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CALIFORNIA REPORTER

145 PACIFIC REPORTER

SECOND SERIES

23 Cal.2d 600

LOPER et al. v. MORRISON et al.

L. A. 18702.

Supreme Court of California.

Jan. 20, 1944.

Rehearing Denied Feb. 17, 1944.

1. Automobiles ⇐244(26)

Evidence that driver for dairy company frequently called upon customers after his regular hours, using his own automobile, supported finding that driver was authorized to do such type of work at time he had automobile accident while calling upon customer to collect an account, so as to render company liable for driver's negligence.

2. Master and servant ⇐332(2)

Whether there has been a deviation so material as to constitute a complete departure by employee from the course of his employment, so as to release employer from liability for employee's negligence, is usually a question of fact.

3. Automobiles ⇐197(7)

In determining whether driver for dairy company was acting in scope of his employment when he became involved in automobile accident while driving his own automobile to collect an account for a customer, relevant factors to be considered were driver's intent, nature, time, and place of his conduct, his actual and implied authority, work he was hired to do, incidental acts that employer should reasonably have expected would be done, and amount of freedom allowed driver in performing his duties.

4. Automobiles ⇐197(7)

Where driver for dairy company was using his own automobile at time of automobile accident to call upon customer for purpose of collecting an account, a deviation from most direct route for driver's own purposes before going to customer's home would not necessarily constitute a complete "abandonment" of his employment, so as to relieve company from liability for injury sustained by third party as result of driver's negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

5. Automobiles ⇐245(31)

Where driver for dairy company, using his own automobile in calling upon customer to collect an account, deviated from his course after failing to find customer at home by going to a tavern for lunch with a fellow employee and thereafter taking other employee home and became involved in an automobile accident on return trip to customer's home, whether such deviation constituted a complete "abandonment" of employer's business, relieving employer from liability for injuries sustained by third party as result of driver's negligence, was for jury.

6. Evidence ⇐351

The purpose of Uniform Business Records as Evidence Act is to enlarge operation of business records exception to the hearsay evidence rule. Code Civ.Proc. §§ 1953e to 1953h.

7. Evidence ⇐351

The common-law business records exception to hearsay evidence rule is based on assumption that records kept in general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded.

8. Evidence ⇐351

The business entry statutes are not limited to entries in commercial enterprises, and hospital records are properly included within their operation. Code Civ.Proc. §§ 1953e to 1953h.

9. Evidence ⇐351

The object of the business record statutes is to eliminate necessity of calling each witness, and to substitute the record

of a transaction or event, and it is not necessary that person making the entry have personal knowledge of the transaction. Code Civ.Proc. §§ 1953e to 1953h.

10. Appeal and error ⇐1056(1)

Even if nurses' record offered by defendant should have been admitted under business entry statutes, its rejection did not constitute prejudicial error, where nurses' record did not refute evidence which it was offered to refute. Code Civ.Proc. §§ 1953e to 1953h; Const. art. 6, § 4½.

11. Appeal and error ⇐1004(1)

An appellate court will not disturb a verdict unless it is so grossly excessive as to immediately suggest passion or prejudice, or corruption on part of jury.

12. Damages ⇐130(1), 133

$2,000 to married woman and $600 to her husband for injuries sustained by woman, which caused her much physical and mental pain, and which required her to spend 26 days in the hospital and incur medical and hospital bills in excess of $400, *held* not excessive.

13. Appeal and error ⇐1046(5)

Trial judge's remarks to defendant's attorney in connection with rulings on admissibility of evidence did not constitute prejudicial misconduct as indicating that judge was partial toward plaintiff especially where jury were specifically instructed that, if judge had said or done anything which indicated that he was inclined to favor either party, it should be disregarded.

14. Trial ⇐260(1)

Refusal of defendant's requested instructions was not error, where subjects of the requested instructions were adequately covered by other instructions.

15. Damages ⇐216(7)

Testimony that at time of trial plaintiff still was suffering from headaches, nervousness, and pain tended to prove future damages and was sufficient to justify instructions thereon.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Elsie Loper and another against Cameron E. Morrison and Arden Farms, Inc., to recover for injuries sustained in an automobile accident. From a judgment for plaintiffs against both defendants, the defendant Arden Farms, Inc., alone appeals.

Affirmed.

Prior opinion 134 P.2d 311.

Russell H. Pray, of Long Beach, Henry F. Walker, of Los Angeles, and S. J. Nordorf and William C. Price, both of Los Angeles, for appellant.

Joseph A. Ball, Albert D. White, and Kenneth Sperry, all of Long Beach, for respondents.

GIBSON, Chief Justice.

Mrs. Elsie Loper (hereafter called plaintiff) and her husband brought this action for damages resulting from an automobile accident in which a car driven by Mrs. Loper was struck by one operated by defendant Morrison, an employee of defendant Arden Farms, Inc. From a judgment against both defendants, Arden Farms, Inc. (hereafter called defendant), alone has appealed.

Morrison was employed by defendant to make deliveries of milk and other dairy products within a designated area, to collect from customers and to solicit new business. Deliveries were made in a truck furnished by defendant, but Morrison used his own car in collecting accounts and soliciting new business after regular hours.

On the afternoon of the accident Morrison left defendant's office in his own car to call on a prospective customer and to collect a delinquent account from a Mrs. Hanson. He was accompanied by Edward Dolan, a fellow employee, to whom he had offered a ride home. After calling on the new customer they went to the Hanson residence about 4:00 p. m. but found no one there. The Hanson account had been delinquent for some time, and Morrison had made numerous unsuccessful attempts to collect it. He had learned from past experience that the Hansons were likely to be at home later in the evening, and he decided to call again about 5:30 p. m. While waiting for Mrs. Hanson to return, Morrison, who had not eaten since breakfast, went with Dolan to a tavern near Dolan's home for a lunch of sandwiches and beer, and then took Dolan home. The

accident happened about 5:30 p. m. while Morrison, returning from Dolan's home, was on his way to collect the Hanson account. Dolan lived about two miles outside the area covered by the milk route, and the collision occurred before Morrison reached the boundaries of his route.

[1] Defendant contends that Morrison was not acting within the scope of his employment at the time of the accident. First, it is argued that the Hanson account was owed to Morrison personally and that in attempting to collect the same he was engaged in his own business. Certain customers whose credit had not been approved by defendant were classified as "unauthorized accounts." Drivers were required to assume liability and furnish bond to protect defendant from losses caused by the failure of such customers to pay for products sold them. Such liability did not attach, however, until after the employment of the driver was terminated, and was limited to a total of $100. Approximately one-third of the customers on Morrison's route, including Mrs. Hanson, were "unauthorized accounts." Mrs. Hanson, who had been a customer of Arden for a long time, owed defendant $25 when Morrison took over the route. Although Morrison continued to deliver dairy products to her, collections made by him were turned over to defendant and credited on the old balance. Morrison worked on a straight salary with no commissions, and all the money he collected was turned over to defendant. He did not buy milk from Arden and sell it to customers. The money due from Mrs. Hanson was owed to defendant and in attempting to collect the account, Morrison was performing a duty imposed by his employer and within the scope of his employment. And there is evidence that Morrison, to his employer's knowledge, frequently called upon customers after his regular hours, using his own car. This is sufficient to support a finding that he was authorized to do this type of work at the time the accident took place.

[2, 3] Defendant contends that we are bound to conclude, as a matter of law, that when Morrison left the Hanson house to take Dolan home, he abandoned the business of his employer and entered upon a mission of his own and had not reentered his employer's business when the accident occurred, and that therefore he was not acting within the scope of his employment at the time of the accident. The general rule in these cases is stated in Kruse v. White Bros., 81 Cal.App. 86, 93, 253 P. 178, recently quoted with approval in Westberg v. Willde, 14 Cal.2d 360, 373, 94 P.2d 590, 597: "Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury." See also Rest., Agency, sec. 228, Comment d. Courts have held as a matter of law that an employee was not in the scope of his employment when the evidence clearly showed a complete abandonment. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311; Gousse v. Lowe, 41 Cal.App. 715, 183 P. 295. But in many other cases it has been held that a jury question was presented. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 P. 966; Cain v. Marquez, 31 Cal.App. 2d 430, 88 P.2d 200; Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178; Dennis v. Miller Automobile Co., 73 Cal.App. 293, 238 P. 739; see 2 Mechem on Agency, 2d Ed., sec. 1916, p. 1491. In deciding the case before us the results reached in other decisions are helpful but not necessarily controlling. See Waack v. Maxwell Hardware Co., 210 Cal. 636, 640, 292 P. 966. In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another. Waack v. Maxwell Hardware Co., 210 Cal. 636, 640, 292 P. 966; Cain v. Marquez, 31 Cal.App.2d 430, 441, 88 P.2d 200; Fiocco v. Carver, 234 N.Y. 219, 137 P. 309; Bryan v. Bunis, 208 App.Div. 389, 203 N.Y.S. 634; 2 Mechem on Agency (2d Ed.), sec. 1880, pp. 1461-1462, and, generally, pp. 1457-1491; Rest., Agency, secs. 228-237. Under these authorities the factors to be considered, insofar as per-

tinent to this case, are the intent of the employee, the nature, time, and place of his conduct, his actual and implied authority, the work he was hired to do, the incidental acts that the employer should reasonably have expected would be done, and the amount of freedom allowed the employee in performing his duties.

[4, 5] Under the circumstances of this case we cannot hold as a matter of law that Morrison's trip to the tavern and to Dolan's home constituted an abandonment of his employer's business. As said heretofore, it was within Morrison's authority to collect accounts at the time the accident occurred.

The employer's liability was not necessarily terminated by reason of the fact that Morrison combined a private purpose of his own with the business of his employer. As stated in Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, 946: "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master." Thus, if the accident had occurred on the trip from the dairy to the Hanson home prior to 4 p.m., the jury clearly could have found that Morrison was acting within his employment although he intended thereafter to get something to eat, and take Dolan home. Further, a deviation from the most direct route for these purposes before going to the Hanson home would not necessarily have constituted an abandonment. See Westberg v. Willde, 14 Cal.2d 360, 372, 94 P.2d 590; Cain v. Marquez, 31 Cal.App. 2d 430, 88 P.2d 200; Gayton v. Pacific Fruit Express Co., 127 Cal.App. 50, 15 P.2d 217; Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178; Dennis v. Miller Automobile Co., 73 Cal.App. 293, 238 P. 739. In the Kruse and Cain cases, supra, detours of several miles were held to present questions of fact. The deviation cases, although not identical with the situation here involved, are quite analogous. Morrison, upon finding no one at home, believed that he would have to wait over an hour before he could see Mrs. Hanson. If he had spent this time in his car in front of the house he would have remained within the scope of his employment. His conduct in going elsewhere for some private purpose while waiting to perform his specific duties presented a question of fact as to whether he had entirely abandoned the business of his employer. See Robertson v. Spitler, 153 Minn. 395, 190 N.W. 992. The employer might reasonably expect that his employee, while so waiting, would engage in some activities for his own purposes. Here, Morrison, who began work at 3 a.m., had not eaten since breakfast, and the fact that he went to a tavern for sandwiches and beer does not require us to hold that he had abandoned his employment, particularly in view of his testimony that he would not have been at the tavern if he had not been waiting to call upon Mrs. Hanson. And, considering the time he had to wait, we cannot hold as a matter of law that it was unreasonable for him to travel somewhat less than two miles for this purpose. Similarly, under these circumstances, we cannot say that his going a short distance farther to take Dolan home was such an unreasonable means of using his time that it must be deemed an abandonment of his employment. Morrison's purpose at the time of the accident was to serve his employer, and it could be reasonably inferred that such purpose continued throughout the period he waited to see Mrs. Hanson. The evidence was sufficient to support a finding that Morrison was acting within the scope of his employment at the time of the accident.

[6, 7] Defendant also contends that the trial court erred in excluding from evidence a portion of a hospital chart called a "nurses' record." The chart contained entries by nurses relative to the condition of the plaintiff during the time she spent in the hospital after the accident, and was offered to refute testimony as to the nature and extent of plaintiff's injuries. Defendant contends that the record should have been admitted under sections 1953e–1953h of the Code of Civil Procedure, known as the "Uniform Business Records as Evidence Act." Section 1953f provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if,

in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Section 1953e provides: "The term 'business' as used in this article shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not." Section 1953g requires that "This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. The common law exception is based on the assumption that records kept in the general course of business usually are accurate, and may be used, in case of necessity, as evidence of the matter recorded. (Hale, Hospital Records as Evidence, 14 So.Cal.L.Rev. 99, 100.) But the exception has been hedged about with so many burdensome restrictions that legislation has been necessary to secure widespread use of such records. Speaking of the desirability of similar legislation, the United States Supreme Court, in the recent case of Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 481, 87 L.Ed. 645, 144 A.L.R. 719, stated: "The several hundred years of history behind the Act (Wigmore, supra, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed."

[8, 9] The business entry statutes are not limited to entries in commercial enterprises, and hospital records are properly included within their operation. Ulm v. Moore-McCormack Lines, 2 Cir., 115 F.2d 492; Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224; Beverley Beach Club, Inc., v. Marron, 172 Md. 471, 192 A. 278; Gile v. Hudnutt, 279 Mich. 358, 272 P. 706; Conlon v. John Hancock Mutual Life Ins. Co., 56 R.I. 88, 183 A. 850; and see VI, Wigmore on Evidence (3d Ed.), sec. 1707, p. 36; 14 So.Cal.L.Rev. 104; 144 A.L.R. 731. There is no reason to believe that a hospital record is not as truthful as a record kept by a commercial firm. It is a record upon which treatment of the patient is based, and experience has shown it to be reliable and trustworthy. See discussion in Globe Indemnity Co. v. Reinhart, 152 Md. 439, 447, 137 A. 43. It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction. Storm & Butts v. Lipscomb, 117 Cal.App. 6, 20, 3 P.2d 567; Patrick v. Tetzlaff, 46 Cal.App. 243, 189 P. 115; Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 2 Cir., 18 F.2d 934, 937. Plaintiff cites several California cases in support of its contention that hospital records are not admissible in evidence. In re Estate of Flint, 100 Cal. 391, 34 P. 863; Pierce v. Paterson, 50 Cal.App.2d 486, 123 P.2d 544; Lusardi v. Prukop, 116 Cal.App. 506, 2 P.2d 870. All of these cases were tried before the Uniform Act became effective in this state, and are not controlling.

[10] The Uniform Act provides that the record is competent evidence if authenticated in the prescribed manner and "* * * if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." Code Civ.Proc. sec. 1953f. Defendant argues that the foundation presented in this case was sufficient to justify the admission of the nurses' record in evidence and that therefore it was error for the court to exclude it. It is unnecessary, however, for us to determine whether the trial court was justified in rejecting the record on these grounds since we are of the opinion no error prejudicial to the defendant has been shown by its exclusion. Before this court can reverse a judgment for improper exclusion of evidence, an examination of the entire cause must show that the error complained of resulted in a miscarriage of justice. Cal.Const. art. VI, sec. 4½. The testimony which the nurses' record was offered to refute was to the effect that while plaintiff was in the hospital she suffered from headaches and many painful bruises and sore spots, that she was nervous and hysterical, and that she was given pills to help her to sleep and to ease her pain. The nurses' record does not refute this evidence. In fact many notations in the chart support plaintiff's testimony. Those notations show that plaintiff had frequent headaches and suffered from pain in various parts of her body, that she was nervous, and that she was given a considerable quantity of sedatives and other drugs. De-

fendant argues that other notations in the chart to the effect that plaintiff did not complain, or that she was comfortable, resting or sleeping, refute evidence of pain and suffering. The entry "no complaints" as it was used here does not indicate that plaintiff did not suffer, nor that she did not complain of her pain and nervousness. A witness called by defendant to authenticate the chart testified that it was the practice of the nurse who kept the chart to make the entry "no complaints" whenever nothing special was reported to her by the nurse in charge of the patient. And notations that plaintiff slept or rested, and that she was comfortable at times, do not contradict the specific evidence as to her pain and suffering. Therefore, while the nurses' chart contained relevant evidence on the issue of the nature and extent of plaintiff's injuries, we cannot say that its exclusion resulted in a miscarriage of justice.

[11, 12] Defendant contends further that even though full credence be given the testimony introduced by plaintiff, the judgment awarding plaintiff $2,000 and her husband $600 was excessive. An appellate court will not disturb a verdict unless it is so grossly excessive as to immediately suggest passion or prejudice, or corruption on the part of the jury. Loeb v. Kimmerle, 215 Cal. 143, 164, 9 P.2d 199; Stanhope v. Los Angeles College of Chiropractic, 54 Cal.App.2d 141, 148, 128 P.2d 705. Plaintiff spent twenty-six days in the hospital. Her injury caused her much pain and suffering, both physical and mental, while she was at the hospital and after she went home. Doctor and hospital bills exceeded $400, and money was expended to repair the Lopers' automobile. For some time plaintiff was unable to carry on her usual duties helping her husband with his business. This evidence is sufficient to justify the amount awarded.

[13] It is contended that the trial court was guilty of prejudicial misconduct. Many remarks of the trial judge are claimed to be erroneous, but only two were assigned as error at the trial. Both of these remarks were made to defendant's attorney in connection with rulings on the admissibility of evidence. They could not be construed as indicating that the judge was in any way partial toward plaintiff or her case, and the jury were specifically instructed that if the judge had said or done anything which indicated that he was inclined to favor either party, it should be disregarded.

[14, 15] Defendant argues that the court erred in giving certain instructions dealing with respondent superior. These instructions properly stated the theory we have already found applicable in this case. Defendant further claims that the court improperly refused to give instructions defining "scope of employment" and stating the rule that abandonment of employment by the employee relieves the employer from liability. But other instructions which were given adequately covered these subjects. Defendant also contends that the court erred in giving instructions dealing with future damage, because, it is claimed, there was no evidence to support such damage. There was testimony, however, that at the time of the trial plaintiff still was suffering from headaches, nervousness and pain. This evidence tended to prove future damages and was sufficient to justify the instruction. See Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 163, 108 P.2d 989; Parsell v. San Diego Consol. G. & E. Co., 46 Cal.App.2d 212, 115 P.2d 539.

The judgment is affirmed.

SHENK, CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. I cannot agree that it is a question of fact whether Morrison was acting within the scope of his employment at the time of the accident. If the facts are undisputed it is a question of law whether liability arises from such facts. San Diego Trust & Savings Bank v. San Diego County, 16 Cal.2d 142, 105 P.2d 94, 133 A.L.R. 416; Leis v. City and County of San Francisco, 213 Cal. 256, 258, 2 P.2d 26; Gaston v. Hisashi Tsuruda, 5 Cal.App.2d 639, 642, 43 P.2d 355; Bell v. McColgan, 68 Cal.App. 478, 482, 229 P. 858; Osgood v. City of San Diego, 17 Cal.App.2d 345, 62 P.2d 195. Ordinarily the court must decide such questions, although occasionally the task may fall to the jury. Thus in the field of negligence if the court does not establish a standard of reasonable conduct the case goes to the jury to determine whether the defendant has acted as a reasonably prudent man would act under the circum-

stances. The jury then has the burden not only of deciding what the facts are but of formulating a standard of reasonable conduct. Clinkscales v. Carver, 22 Cal.2d 72, 75, 136 P.2d 777. As a general rule, however, the court determines the law and the jury the facts, unless it appears that the issue is one that the jury can determine better than the court. See Brown, Law and Fact, 56 Harv.L.Rev. 899. In the present case the court can determine better than the jury the extent of the vicarious liability to which the Arden Milk Company should be subject.

The majority opinion cites section 228, comment d, of the Restatement of Agency which states that it is the function of the court to determine whether an act of a servant is within the scope of his employment "if the answer is clearly indicated," but that otherwise the question is for the jury. If the facts are undisputed, however, it is solely a question of law whether acts are within the scope of the employment. If the question of law is a complicated one there is all the more reason that it should be determined by the court rather than the jury.

There is no dispute as to the facts in the present case. After reaching the place where he was to collect a bill, Morrison left to obtain a meal, transport Dolan home, and await the time for another effort to collect the bill. The undisputed evidence shows that it was no part of Morrison's duty to take Dolan home, and that he did so merely as a personal favor. The accident occurred on the way back from Dolan's home, some twenty blocks from the nearest point of Morrison's assigned territory. It is my opinion that Morrison was returning from a personal mission and had not resumed his employment at the time of the accident and was therefore not then acting within the scope of his employment. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651; Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27; Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311; Adams v. Tuxedo Land Co., 92 Cal.App. 266, 267 P. 926; Helm v. Bagley, 113 Cal. App. 602, 298 P. 826.

EDMONDS, J., concurred.

Rehearing denied; TRAYNOR, J., dissenting.

23 Cal.2d 550

PEOPLE v. ALBERTSON.

Cr. 4457.

Supreme Court of California.

Jan. 19, 1944.

Rehearing Denied Feb. 17, 1944.

1. Criminal law ⇐308

The absence of motive tends to support the presumption of innocence.

2. Homicide ⇐338(1)

In prosecution for first degree murder, where defendant's connection with an assault upon victim 43 days prior to victim's death by cyanide inserted in a vitamin capsule, and connection of assault with murder of victim were only shown by a theory of prosecution based upon circumstantial evidence, and evidence relating to murder was purely circumstantial, admission of evidence pertaining to assault was prejudicial error.

EDMONDS, J., GIBSON, C. J., and CURTIS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Oscar L. Albertson was convicted of murder, and from a judgment imposing the death penalty an appeal was automatically taken under Penal Code, § 1239.

Reversed and remanded for a new trial.

John W. Preston, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and W. E. Simpson, Deputy Dist. Atty., both of Los Angeles, for respondent.

CARTER, Justice.

Upon evidence entirely circumstantial a jury found defendant Oscar L. Albertson guilty of the crime of killng John Kmetz by means of poisoned vitamin capsules, and returned a verdict of murder in the first degree without recommendation. Motion for new trial was denied and a judgment imposing the death penalty is automatically before this court for review (Pen.Code, sec. 1239).

Ten assignments of error are argued in appellant's opening brief, relating in the main to the sufficiency of the evidence, rul-

ings on admission of evidence, misconduct of the district attorney, and error in charging the jury. From the nature of the evidence and its doubtful sufficiency, it is obvious that if error was committed by the trial court which materially affected the substantial rights of the defendant, and which may have resulted in a miscarriage of justice, such error must be considered prejudicial and ground for reversal. People v. Dail, 22 Cal.2d 642, 650, 140 P.2d 828; People v. Silver, 16 Cal.2d 714, 723, 108 P.2d 4. For that reason it is necessary to detail the facts with particularity.

Albertson was a blacksmith by trade. He and Mrs. Albertson, to whom he had been married for twenty years, were active and apparently devout members of the Seventh Day Adventist Church. In the spring of 1935 they made the acquaintance of Miss Esther Dockham, who for about five years had been teaching in the denominational schools of the church. At first they saw her only very occasionally, but as the acquaintance gradually ripened into an intimate friendship they visited with her about once a month, corresponded with her when she was away, and after a year or so started calling at her home sometimes as often as once a week. She called Albertson "Unc" and the wife "Eva," and spent much of the visiting time studying and writing with Albertson on religious topics.

In September, 1938, Miss Dockham accepted a contract to teach at the Exposition Park School in Los Angeles, and started to room with the Albertsons in San Pedro, sharing their living expenses. The Albertsons occupied a tent-house and she slept in their trailer. During the next year she continued to teach at the same school but lived in Los Angeles. However, she visited the Albertsons from time to time. In September, 1940, she commenced to teach at the East Los Angeles School, and met John Kmetz, the murder victim, soon afterward. He was a deacon of the Seventh Day Adventist Church and was also a member of the board having charge of the school where she taught. She saw him from time to time at meetings of the school board and was also a visitor at his home. Twenty years her senior, he was fifty-two years of age and was a widower, having two children, a boy and girl in their teens, with whom he resided in a small house at 4549 East Third Street, near the East Los Angeles School. He had regular and permanent employment as a landscape gardener.

In January, 1941, Miss Dockham and Kmetz started "keeping company". For several months she saw him frequently, and almost weekly went with him and the children on an automobile trip, usually to visit her mother in North Hollywood. She told Mr. and Mrs. Albertson that Kmetz had proposed to her, and on one occasion when she and the Albertsons attended the East Los Angeles Church and Kmetz took up the collection she pointed him out to them as the man who wanted to marry her. But in March or April she composed a proposed letter to him stating:

"Dear Bro. Kmetz. I intended to write you the first of the week but have been busy cleaning house and getting material ready for the 8th gr review. I have been thinking it over, & have decided not to go on the trip during your vacation. You said you wouldn't go unless I did. I know the children will be disappointed but I've made up my mind & I'm not changing it, so don't come & talk with me about it. If you really love your youngsters you will take them on a trip and all of you have a good time. If you would go somewhere and give them a good time, you would be happier yourself. Personally I care nothing for you. I never have, and I never can. It isn't your fault anymore than it is mine. You know everything was to be on a friendship basis. I've tried to act as if I enjoyed what you did for me and I've felt like a hypocrite for accepting things from you. I appreciate what you have done, but please, I don't want to continue our friendship as we have. I'd rather it would be as it was when school first started. You say that there is probably some reason for all this. Yes, there is, and I'm telling you straight to your face instead of behind your back. As I said before, I appreciate all you've done for me but I don't care anything about you and I do not find pleasure anymore in being with you, in fact I don't enjoy being with you. It's been almost like a punishment for me the last few times I've been with you and the family. It all started with the Sunday we went to the mts. I didn't want to go, but forced myself to, because I said I would go, but I just don't want to put myself through it anymore. Guess I'm selfish. When you don't like a person, or I should say, when you don't care for a person, and it is anything but a pleasure to be with them, then why go with them? I just can't make myself go on a trip with you when I feel that I don't care about you. I can't explain

the feeling I have when I'm with you, but it makes me dislike you instead of liking you. You have done nothing to make me feel this way so don't blame yourself. I'd rather you didn't send me anymore candy or ask me to go anywhere with you and the youngsters. I'd rather you wouldn't come and talk to me about it, either; and I'd rather you wouldn't tell the children. I don't want to discuss it with you or Lola, or anyone. * * * Now don't sulk and get blue & discouraged. Just go on as you did before you knew me. Take the children & have a good time. You have gotten along without a woman for 5 yrs. & I guess you'll have to get along for a while longer unless you can find someone else. Please don't think I'm angry and trying to hurt your feelings. I'm not. I'm trying to tell you in as nice a way as I can, that I don't want to go on the trip or anywhere else with you. You've been kind, almost too kind, but I haven't appreciated it the way a single woman should, I guess. I told you from the 1st that I was affectionate, but somehow or other I never felt that way toward the men, and I don't feel the least bit affectionate toward you. I wish when you see me * * * that you would ignore me. Several have said from time to time that no matter where I sit in church, a meeting, or a party, that you spent most of your time looking & smiling at me. To a certain extent that is true & I don't like it. I don't know why it should bother me, but it does. Please understand this note, & forget me. I'm just another woman who doesn't appreciate a man's attentions. Respectfully yours, Esther D."

After writing this intended letter Miss Dockham felt it was too harsh and composed a second one, stating substantially the same thing in softer language, and mailed it to Kmetz. While searching the Albertson trailer the police found the quoted letter in a drawer. The Albertsons had previously encouraged Miss Dockham to marry, and she stated that if she had showed them the letter Albertson would have scolded her.

School closed the latter part of May, and during the first week of June, Albertson called for Miss Dockham at her home in Los Angeles and drove her to the Albertsons' home in San Pedro. This was in response to an invitation which had previously been extended by both Mr. and Mrs. Albertson. Albertson was out of work and was attending a welding school at Redondo Beach. In August, just about the time she was ending her visit with the Albertsons and returning to her home in Los Angeles, she saw Kmetz to talk to him for the first time since writing him the letter rejecting his advances. The conversation took place while she and the Albertsons were attending a church camp meeting at Lynwood. A few days later, when back in Los Angeles staying with her brother, she saw Kmetz at his home, and later, while driving with him, discussed marriage. She explained that her harsh attitude arose out of her belief that he did not really love her but wanted to marry her so he would have a good housekeeper, and that she wrote the letter as a test of his feeling. He renewed his proposal and she promised to marry him. She immediately advised the Albertsons by a postal card dated August 14th, reading as follows:

"Dear Maw and Paw—Prepare for a shock—Mr. Kmetz and I are to be married Monday night! I expect to be down Sun. so I can get most of my things. Eva, would you enjoy fixing my hair for the occasion? Of course I want you both & Charlene to come to the wedding. Only a choice few are invited. I will tell you more about it Sunday. He doesn't want me to teach, but if the board can't get a teacher on such short notice then of course I feel it my duty to teach until they can get some one. Love until Sun. morn. Esther. Just he and I will come. Will have dinner with you. Will bring ice cream."

On Sunday the two went to the Albertsons as planned, and Kmetz and Albertson were introduced. So far as known they had never before met formally. The arrangements for the marriage ceremony were discussed and Albertson accepted an invitation to give the bride away. He reminded Miss Dockham that Kmetz was twenty years her senior and had two children, but advised her, if she loved him, to go ahead and marry. The wedding took place according to plan between 8 and 8:30 of the evening of August 18th at the home of Dr. and Mrs. Groton, of Norwalk, who were related by marriage to Kmetz. Miss Dockham's mother, who had agreed to come if she could, was unable to attend, but her brother was there, also the Albertsons, the minister and his wife, and a girl hired to serve refreshments. Mr. Albertson gave the bride away.

Subsequent to the marriage the Albertsons and the Kmetzes continued their friendship and visited with each other on an average of about once a week. Mr. Kmetz and Mr. Albertson seemed to be friendly. Mrs. Kmetz testified that at the time of the marriage she was in love with Kmetz, and was not then and had never before, nor had she since, been in love with any other man. With reference to the statement in the letter which she wrote Kmetz prior to the marriage, "Now don't sulk and get blue & discouraged," she testified that Mr. Kmetz was in the habit of indulging these moods and quite frequently both before and after their marriage he had spells of melancholia and depression, probably more than a dozen times after the marriage. He told her that they were caused by the way his son acted toward him, that "he acted so disrespectful and so ugly and hateful, and swore at him and treated him in such a way that he felt the boy had no love in his heart for him at all." After the marriage Mrs. Kmetz witnessed occasions when the boy, Raymond, then seventeen, abused and swore at his father.

In early October, about six weeks after the marriage, Mrs. Albertson wrote Mrs. Kmetz, inviting her to visit them over the week end of October 10th. As a reason for the invitation she stated that they expected to move away soon, and it might be the last chance Mrs. Kmetz would have to be with them and to pack up and take back the belongings which she had left in their home. On October 8th Mrs. Kmetz mailed a postal card of acceptance, which read: "Dear Folks—I can come for the week end. I will be ready when Unc comes Friday. I suppose some of your news includes Dorothy and her baby. I hope she is satisfied now that she has a child of her own. 'Well I wanna know!' See you Friday. Love, Esther."

Although Mr. Kmetz was blue and depressed on Friday morning, October 10th, after Mrs. Kmetz told him she was going to the Albertsons for the week end, she made the trip with his full and complete consent. He and the children were home when Mr. Albertson called for her about 5:30 in the afternoon, and she left with Albertson immediately. On Saturday, October 11th, she and the Albertsons attended church at Inglewood. On Sunday, October 12th, she packed her things and in the evening the Albertsons drove her home. They arrived about seven o'clock and Mr. Kmetz was not there, but he came in about five minutes later. He was no longer blue and depressed but had an appearance of satisfaction, pleasure, and happiness. Mr. and Mrs. Albertson stayed for twenty or twenty-five minutes and then left.

During the absence of Mrs. Kmetz, on Saturday the 11th, Mr. Kmetz and the two children had attended church in the morning, returning home about one in the afternoon. When they got up to the door the boy picked up a small package and some letters which the mailman had delivered during their absence, and handed them to his sister, who in turn handed them to Mr. Kmetz. The package purported to come from the "Herb Specialty Co., 1436 N. Wilcox Ave., Hollywood," and bore a Hollywood post office cancellation stamp dated October 10th, 3:30 p. m. Later investigation showed that the company named was unknown at the given address, which was a building unoccupied between October 1st and 15th. One of the letters likewise purported to come from the same nonexistent company, but with an address given as "P. O. Box 231 Hollywood, Cal.," and it was postmarked at Los Angeles, October 10, 5:00 p. m. The subscriber to this box number was Bireley's, Incorporated, a beverage concern.

Upon taking the letter and package from his daughter, Mr. Kmetz set them on the chest of drawers in the front bedroom leading to the kitchen, which was the bedroom occupied by him and Mrs. Kmetz. Later on, while the father and daughter were having their midday dinner, the son having gone out of the house, Mr. Kmetz opened the package and found that it contained twelve capsules, although there were compartments for fifteen. Two of the capsules were dark and the other ten light. The box was about three inches long and two inches wide, with a white top and bottom and orange sides. The capsules were held in place by holes or compartments punched in two cardboard trays, and a layer of cotton on top. In addition to the capsules the box contained a letterhead bearing the name of "The Herb Specialty Co.—Nature's Vitamins extracted from plant life," and the typewritten statement: "Follow Directions Closely 2 Dark Capsules at bedtime. 1 Light Capsule before breakfast Daily."

The letter was also written on the same printed letterhead of "The Herb Specialty Co. P. O. Box 231 Hollywood, Calif.," was dated September 24, 1941, and was signed "The Herb Specialty Company. Dr. W. W. Mackelroy, Mgr." The signature "Dr. W. W. Mackelroy" was written in ink but looked as though it might have been traced, and the penmanship was no better than that of a child. The letter itself was well worded and contained two pages, single spaced, of advertising data. After the salutation "Dear Friend" it stated: "We are selecting a limited number of men in various localities in and about Los Angeles who have reached the age of forty or more whom we believe, without any hesitancy, need healthful help. This help is coming to you absolutely free of charge through the use of 'vitalizing vitamin vigor.' Please read this entire letter and then let these vitalizing vitamins put spring in your step." Seven paragraphs followed, extolling the virtues of vitamins and promising that "The story of how this marvelous discovery was obtained from one of the oldest Indian tribes in South America by one of the world's most famous doctors" would be mailed about October 15th. "Here is our plan," the letter concluded, "We are sending you, under separate cover, a ten days supply of our 'vitalizing vitamin vigor' at no cost to you. Follow the simple directions carefully and when this supply is exhausted, if you are satisfied with the amazing results, send us ten names of men that you believe would be benefited by the use of 'vitalizing vitamin vigor' and for your trouble and benefit we will send you free of charge a 30 days supply. We believe this way is the best and cheapest advertising and a splendid method of helping each other including the other fellow. * * * P. S. We will also have a fine product of blended herbs for women entering or going through the change of life, when our new laboratory opens on or about October 20th."

After looking at the letter and the box of capsules, while sitting at the dinner table, Mr. Kmetz again set them on the chest of drawers in the bedroom. His daughter noticed, as she passed through the house, that they remained there all day. She testified to a conversation which she had with her brother about his having examined them during the day. That evening the brother went out to a party and she went to the boulevard with her father. Her brother came in at two o'clock in the morning. She fixed the time because his quarreling with the father woke her up. She said her father "socked" her brother, and that: "It was over Mother.

"Q. And by Mother you mean Mrs. Esther Kmetz? A. Yes.

"Q. And what was said? A. Oh, about, on the order that he hadn't been acting right, and that he didn't do what she said, and he should be more obedient. It was on that order.

"Q. And what did Ray say just before your father slapped him or socked him as you recall it? A. I don't remember.

"Q. Have you told us all you know about that quarrel now, Lola? A. Yes."

The capsules also remained on the chest of drawers all of the following day, October 12th, and were there when the Albertsons brought Mrs. Kmetz home about seven o'clock in the evening. The arrival of the package and letter was not discussed with them; but the daughter testified that she picked them up from the chest of drawers and "showed them to Mother and Mrs. Albertson," and she testified, "Maybe I said See what Daddy has got for his birthday. I don't remember." The birthday was to occur on October 18th. At the time of the conversation just referred to, Mr. Albertson was engaged in bringing in Mrs. Kmetz' things from the automobile.

Mrs. Kmetz took the package and letter and looked at them, and set them back on the chest of drawers. In about five minutes Mr. Kmetz arrived and the subject was not mentioned again until after the Albertsons left. Mrs. Kmetz testified: "Well, after the Albertsons left my husband put his car up, and I was out there with him while he did it. We went back into the house; Raymond was working with something at—in the room that he occupied; Lola had finished her ironing and said she did not feel very good and wanted to know if I minded if she went to bed instead of sitting up for the evening worship with us, and I told her perhaps she had better go to bed. Before she went my husband asked if I had seen the letter that came through the mail with the medicine, and I told him I did not know if he had received any mail with it."

Mr. Kmetz then told his wife about the letter. She sat on the edge of the bed and read it aloud to him, and then laid it back on the chest of drawers. The letter,

she testified, did not at that time bear the Mackelroy signature looking as it later appeared, nor the word "Dr." preceding the name. At the time of trial the signature looked to her as though it had been traced over one which was originally written by a better penman.

After the letter was read, both spouses continued with their preparations for bed, meanwhile discussing the events of the week end. After Mr. Kmetz had put on his pajamas and emerged from the bathroom, the two had evening worship. Then they sat on the bed and talked for a while. He stepped in the bathroom again and then asked Mrs. Kmetz if she thought he should take the medicine. She said: "Oh, I told him from what we had read in the letter, that it assured us that it could not do any possible harm, so I guessed if he took them it certainly could not harm him in any way." Again, she said: "Well, I thought it was some kind of spring tonic, and I guess he did too, because we discussed it from that standpoint. He was unusually well and strong for his age, and we wondered why anybody would think he needed a tonic. * * * Well, I told him from what we read in the letter—I said 'It certainly couldn't do a person any harm,' so I guess it wouldn't hurt him maybe if he took them." She had previously read the directions "2 Dark Capsules at bedtime," and had noted that two of the capsules were darker in color and larger than the others.

Mr. Kmetz thereupon picked up the box of capsules and went into the kitchen. He called back asking how to take capsules. Mrs. Kmetz told him to swallow them and take a drink of water afterwards, and she heard a sound such as would be made by drawing water and placing a glass on the sink. Mr. Kmetz immediately said that "it made him dizzy." He came into the bedroom, put the window up, fell back on the bed, let out a "horrible groan" and started breathing very heavily and noisily and frothing at the mouth, with his eyes seeming to bulge. Mrs. Kmetz wiped his face with a wet rag and tried to administer other aid. In about fifteen minutes, shortly after 9:15 o'clock, she called Dr. Vernon Ingle, who pumped out the contents of the stomach. An inhalator squad then arrived, but artificial respiration failed and at 10:35 p. m., Mr. Kmetz was pronounced dead.

A radio patrol officer, Edward M. Crum, took the radio call for the inhalator squad and arrived at the house about the same time as the squad. Two neighbors, Mr. and Mrs. McGill, were in the living room. Mr. Crum testified that as long as he was in the house "Mrs. Kmetz was very calm and very collected. She was even more or less joking with Mr. and Mrs. McGill. She treated the whole matter very lightly. She showed no emotion at all. I paid particular attention to it, because I thought that it was rather strange." Mr. Crum was there until after midnight, when the coroner's representative arrived. Mrs. Kmetz showed him the letter, box of capsules and directions, and also the wrapper on the box which she extracted from the trash can. Dr. Ingle also testified that Mrs. Kmetz was "very calm and cool" while he was administering to her husband and inquired, as artificial respiration was being tried, "Do you think he is dead yet?"

After Dr. Ingle had pronounced Mr. Kmetz dead Mr. Crum started to make an investigation and to gather what evidence he could. He talked with Mrs. Kmetz and during the course of the conversation got the Mackelroy letter from her. He folded the letter and laid it under his uniform cap on top of the piano. A short time later he found the letter in Mrs. Kmetz' possession again, at which time she returned it to him at his request, and he then put it in his pocket. The envelope in which the letter arrived was retrieved from the McGills, who for some reason had carried it home.

The autopsy report was that Mr. Kmetz died from cyanide poisoning, and the lack of corrosion in the oral cavity of his throat indicated that it had been swallowed rapidly in some vehicle with a protective covering like a capsule. This poison gives off an odor of bitter almonds, which was noticed by both Dr. Ingle and Mrs. Kmetz while they were administering aid. "Cyanogas" is used in agricultural work, mining, and pest control, and is procurable at any drug store, feed and seed, or hardware store in the United States. No prescription or signing of the poison register is required in making the purchase. In color the poison is dark gray, and it is composed of small particles—a material of about the same color and form as the contents of the two dark capsules. About half the amount contained in one of the capsules would be sufficient to kill an average 150-pound man in about thirty minutes.

On Monday, October 13th, the day after the death, Mrs. Kmetz went to school in

the morning but returned home in the afternoon, and then went to the Albertsons in the evening. They were not home when she arrived, but came in after she had retired. She told them about the death of Mr. Kmetz, and they appeared to be sorry and upset, as any friends would be on hearing bad news. Mr. Albertson seemed to be as much upset as Mrs. Albertson, and promised that they would both "stick by" and help out until everything was taken care of. The following day the Albertsons returned home with Mrs. Kmetz and lived there with her until Mr. Albertson was arrested and charged with the murder. Mrs. Albertson continued on, and was still living there with Mrs. Kmetz several months later when the cause was first called for trial.

On the first trial Mrs. Kmetz testified as a witness for the People, and Mr. Albertson took the witness stand in his own behalf. The jury disagreed, and six weeks later the cause came on for retrial. Mrs. Kmetz could not then be found, although diligent search was made. However, the testimony which she had given on the first trial was read to the jury. Mr. Albertson did not take the witness stand but stood on his plea of not guilty, and his counsel offered no evidence at all in his behalf.

The evidence purporting to connect Mr. Albertson with the crime, as already stated, was purely circumstantial, and consisted mainly of the following:

A printer in Santa Monica testified that on September 22, 1941, a man called at his shop and placed an order for 1000 letterheads for "The Herb Specialty Company," and pursuant to the order the letterheads were printed, one of which the printer identified as the letterhead received by Mr. Kmetz. The work was paid for in cash, and the customer called for it on September 24th. He inquired about multigraphing and the printer referred him to The Letter Shop in Santa Monica. In refusing to identify the customer as Albertson the printer testified as follows:

"Q. But at this time you can not identify Mr. Albertson, the defendant here, as the man who made that order, can you? A. No, I can not. He resembles a person I have seen somewhere, but I would not say where.

"Q. Mr. Albertson is a much larger man than the man you have described, is he not? A. Well, I would say that he is a little lighter in weight."

A stenographer at The Letter Shop testified that on September 24th between three and four o'clock she typed the two-page letter received by Mr. Kmetz (Ex. 15). She did the typing for a man, and when questioned as to whether she saw that man in court, or one who resembled him, she stated, "A. One who resembles him very closely.

"Q. And where is the man that resembles him very closely, the man for whom you did that typing? A. The defendant, Mr. Albertson."

About a week after she typed the letter, the man returned and ordered, on the same letterhead, 500 mimeographed copies of a one-page letter, dated October 3, 1941, advertising "vitalizing vitamin vigor," and offering to send a generous supply absolutely free for ten days' trial. When she was called to the funeral of Mr. Kmetz and asked if there was anyone there she could identify as the possible person that came to the office, she "thought" she identified him there, but testified "I wasn't positive. * * * The impression I had was one rather of having seen the man somewhere before, but not necessarily in the Letter Shop." At the time the two-page letter was typed, the customer inquired about mimeographing and when the stenographer asked him if he wished to place an order "he said not at the time, that he wanted to show this letter I was typing to some one, and that he would take it out of the office, and would bring back a copy to be mimeographed. And there was not much other conversation." After the death of Mr. Kmetz, and on the Monday before the inquest, the stenographer saw a man walk through the Arcade who looked "vaguely familiar." She walked to the door to look at him again, and he turned back into the street. She had a "strange premonition" that he was going to return, and look in again. He did so, and had part of his face covered with his hand over his eye; "He peered in and walked on." Although she had thus had more than one occasion to consider the identity of the customer, she could not identify him positively at the inquest as Albertson, but stated: "Not positively, but they resemble each other."

Mrs. Harris, the proprietor of The Letter Shop, also talked with the customer con-

cerning the order for mimeographing the 500 letters. He left the order on October 2nd, wanted the work rushed, and called for it on October 3rd. In the courtroom Mrs. Harris identified the customer as Albertson. She was asked:

"Q. I will ask you if you will look around the courtroom and see whether or not you can identify here any person that is the person you saw in your shop on October 2nd and October 3rd, who placed the order for the mimeographed sheets? A. Yes, Mr. Albertson.

"Q. Do you recognize him as the man who placed the order? A. Yes.

"Q. And the man who received delivery? A. Yes."

On cross-examination it was brought out that Mrs. Harris had attended the funeral of Mr. Kmetz, but was not then so sure of her identification. She was asked:

"Q. And at the funeral did you see any person whom you recognized as the same person who had been in your office and transacted the business and received the mimeograph from you on October 2nd and October the 3rd? A. Yes, I saw this person, but I wanted to be more sure and wanted to see him again without his glasses and to hear him talk.

"Q. In other words, when you saw him at the funeral he was wearing glasses? A. Yes.

"Q. And when you saw him at the inquest he was not? A. Yes.

"Q. And was he wearing glasses when he was in your office on October 2nd and October the 3rd? A. No."

It also appeared on cross-examination that Mr. Albertson's appearance did not tally in all respects with the description Mrs. Harris had originally given of her customer.

Mrs. Souther, a public stenographer in Hollywood, testified that on the morning of October 9, 1941, a man whom she identified in the courtroom as Albertson appeared at her office and gave her a penciled list of names and an order to address twenty-one envelopes. He waited for them and paid her 45 cents. During the fifteen minutes he was in her office he was observed by another customer. This customer testified that the man in the office resembled Albertson. His identification was not positive. He stated: "I can't tell you I am absolutely sure, because truly I am not absolutely sure. I have a strong impression, and I had the impression that I saw him there." Mrs. Souther remembered the name "Kmetz" on the list of names given her because of its peculiarity and also because there was but one "K" on the list. Typewriter tests indicated that the envelope received by Kmetz was the one addressed by her.

No trace of any "W. W. Mackelroy," the signer of the letter, could be found. A handwriting expert testified that "the characteristics and features of this disputed signature compare with the admitted handwritings of Albertson to a degree that would indicate to me the reasonable certainty that the Albertson handwritings and the questioned signature were both written by the same person," and another expert gave similar testimony.

On one occasion while Mrs. Kmetz was staying with the Albertsons in the summer of 1941, prior to her marriage, she asked Mr. Albertson to buy her some Vitamin A capsules at the drug store. He purchased and delivered to her a box of Pro-Vite capsules, which she took, and when her visit was over she left the box in the Albertson trailer or about the premises. This box, she testified, was similar, if not identical, with a Pro-Vite capsule box (Peo. Ex. 11) which was procured by prosecuting officers from the Sontag drug store, and contained two pasteboard trays containing perforations or holes for forty round, black capsules and forty round, orange capsules.

The box containing the poison capsules bore no resemblance whatsoever to the box purchased at the drug store, either in size, shape, or appearance, except that the drug store box was entirely covered with orange-colored paper, whereas the other box had a strip of orange paper around the sides. The latter seemed obviously to be a homemade affair. The drug store box had trays accommodating eighty capsules, the homemade box a tray accommodating fifteen. One of the handwriting experts, however, testified that the holes in the trays of both boxes were of the same size and were the same unequal distances apart, and he undertook to demonstrate to the jury that the tray from the homemade box matched one area of the tray from the drug store box. An analysis of tiny particles of paste taken from the homemade box were also said to show the same chemical content as that of a bottle of mucilage, of

five and ten-cent store variety, found by officers in the Albertson trailer on October 22nd. Traces of orange color were also said to have been found on the rubber squeegee of the mucilage bottle.

The capsules themselves were entirely different. Those in the drug store box were in the form of a round manufactured translucent pill, resembling a small glass marble. Those in the homemade box were made of the familiar purchasable, colorless, oblong, telescopic capsules. The capsules had been filled with small greenish gray and black particles resembling grass seed, or dry grass or herbs chopped up finely. Mrs. Kmetz testified that her husband had various kinds of medicine around the house and she had seen capsules for colds.

In considering the sufficiency of this evidence to prove the guilt of Albertson, it is pertinent to note the startling fact that no motive whatsoever is shown. Pure speculation that there may have been a romantic attachment between Albertson and Mrs. Kmetz is met by the fact that the evidence without contradiction contains every indication to the contrary. The long marriage of the Albertsons, the fact that they both welcomed Mrs. Kmetz to their home, and the close and intimate friendship existing between the two women show a relationship which in reasonable probability would not have endured over a period of years before, and continued after the Kmetz marriage and murder, had there been a meretricious attachment between Albertson and Mrs. Kmetz. Neither is there any evidence from which it could be intimated or inferred that Mrs. Kmetz was unhappy in her marriage to a degree which would lead Albertson, out of loyal friendship, to attempt to put the husband out of the way. So far as is shown or can be inferred, the family life of the two couples was harmonious and their continuing friendship was sincere. Betterment of living conditions could scarcely have been the motive of Albertson, for the Kmetz house was apparently about on a par with the Albertson trailer-tent home.

[1] The absence of motive, it may be conceded, furnishes but one element for consideration by the jury in connection with the other circumstances in the case, and if proof of guilt is otherwise sufficient to overcome the presumption of innocence the defendant must stand convicted notwithstanding no motive has been shown. But, nevertheless, "absence of motive tends to support the presumption of innocence" (People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389, 394), or as stated in People v. Kelley, 208 Cal. 387, 390, 391, 281 P. 609, 610, a case relied upon by the prosecution, "The absence of proof of motive is a fact to be reckoned on the side of innocence."

Another striking fact is, even if it be admitted as a premise that Albertson did in fact mail the capsules to Kmetz there is a complete lack of any evidence whatsoever that he purchased or otherwise procured the poison, or placed poison in two of the pills. The box of capsules was delivered at the Kmetz home and opened at midday on Saturday, October 11th. It was placed on the chest of drawers in the bedroom, a room used in passing through the house, and there it stayed throughout the remainder of Saturday, all day Sunday and Sunday evening until at least seven o'clock, when Mrs. Kmetz returned with the Albertsons. The capsules were of the telescopic type which can be emptied and refilled by anyone. Had the capsules been of the sealed ampoule variety they could not have been thus subject to tampering, but they were of the home-prepared variety, and the poison used was one which is easily procurable at any number of stores. No testimony whatsoever was adduced to show that the contents of the capsules were not changed or tampered with during the period the box stood open in the Kmetz home or that the poison was inserted prior to the mailing of the package.

If Albertson had poisoned the capsules with intent to murder Kmetz, it seems improbable that he would have left so wide and open a trail with respect to his activities in procuring the advertising material. After completing the preparation of the two-page letter which was mailed to Kmetz, initiating an advertising campaign designed to bring forth the names of prospective capsule purchasers, there was no reason for him to return and arrange for the mimeographing of 500 copies of a shorter advertisement, or to go to still another public place of business to have envelopes typed, thus opening the way for his multiple identification in case of detection. On the other hand, if these activities were carried out by someone "resembling" Albertson, with deliberate intent to kill Kmetz and cast suspicion on Albertson, the transactions could not have been more cunningly arranged to accomplish the foul purpose. If

Albertson did in fact prepare and mail the capsules, but unknown to him two of them were poisoned by another, this would logically explain the openness with which he conducted his early activities and a later attempt to conceal and deny them. The evidence indicates convincingly that Albertson himself did not have the educational qualifications which would make him capable of composing the advertising material.

On motion for new trial, Albertson in protesting his innocence, informed the trial court that he had wished to take the stand in his own behalf, as at the first trial, and that he felt he could have put on a defense which was beyond question.

To strengthen its case, and over vigorous protests of Albertson's counsel, the prosecution offered and was permitted to introduce hundreds of pages of testimony relating to strange happenings on the night of August 30, 1941. If the admission of this evidence was erroneous, the error was clearly prejudicial because of the overwhelming volume of such testimony, comprising a major portion of the transcript on appeal, and also because of the doubtful and circumstantial nature of the evidence as a whole. People v. Dail, supra; People v. Silver, supra. This evidence was admitted for consideration by the jury, as limited by the court's instruction as follows: "You are further instructed that the defendant is not on trial in this case for any crime connected with an assault upon John Kmetz on or about the 30th of August, 1941. The evidence with regard to the transactions of August 30th, 1941 are to be considered by you only as the same may relate to the matter of the relationship of the defendant to John Kmetz, the matter of premeditation, the matter of malice or the matter of motive. Such evidence may not be considered by you for any other purpose." On appeal, however, the prosecution took the position that: "It is our contention that the evidence relating to the assault of August 30, 1941, was admissible here under the rule of common scheme or plan, which in turn tended to connect appellant with the commission of the crime charged in the indictment. * * * The jury was entitled from the evidence to conclude that each plan was conceived by a mind disposed toward deception and secrecy." Resp.Br. 114.

This voluminous evidence of the strange occurrences of August 30th shows the following: On Saturday, August 30, 1941, twelve days after the Kmetz marriage, Mr. and Mrs. Kmetz and the daughter went to visit the mother of Mrs. Kmetz in North Hollywood. They arrived home at 10:20 in the evening. The time is fixed definitely because they found on their return that the son had left a note in the door saying he had gone down on the boulevard with a boy friend and would be home by 11 o'clock. This note caused Mrs. Kmetz to look at her watch, which read 10:20. On approaching the house they had seen parked around the corner an old model automobile, which Mrs. Kmetz, in trying to report to the police, later described as a car which "looked like the car my uncle drove." She refused absolutely to identify it as Albertson's car. After the Kmetz car pulled up in front of their garage, which was located near the sidewalk, with the house in the rear of the lot, Mr. Kmetz carried the groceries into the house and Mrs. Kmetz and the daughter entered with him. In a few minutes Mr. Kmetz went out to put the car away. Mrs. Kmetz and the daughter heard a noise or muffled cry. They rushed out to the front porch and the daughter heard her father cry, "Stop thief," or some words like that. They saw Mr. Kmetz in the vacant lot just east of the house. He was very excited, and upon reentering the house they found that his hat was cut in two places, his head was bruised and cut, but not deeply, and his ear had been pulled away from his head. Although there was light at the intersection and Mr. Kmetz was not knocked out by the first blow but was able to grapple with his assailant and ward off subsequent blows, he could not identify the assailant. If the assailant was the familiar family friend, Albertson, it seems he should have been recognized. Within a few minutes after the assault, the lights went on and off on the car parked around the corner and it moved away. The following morning Mr. Kmetz showed Mrs. Kmetz a bent pickax handle which he said he had picked up in the lot.

Shortly before, or at approximately the time of the assault, that is, at approximately 10:15 p. m., radio policeman Kellogg saw an automobile driven by a man run at forty-five miles an hour through a traffic stop sign at an intersection located about four blocks from the Kmetz home. He gave chase and after proceeding for more than a mile he found the car abandoned and empty except that it contained clothing and

other personal effects. This was at 10:22 p. m. Investigation showed that the car was registered in the name of Mrs. Albertson, and that the personal effects, clothing neatly laid out on the back seat, wallet containing about $2, spectacles and a postal card (Ex. 30, later herein described), etc., belonged to Albertson. There was no proof that the car chased by the officer was the car used by the assailant of Kmetz. There is also a time discrepancy, for if the assault was committed between 10:20 and 10:25 p. m., as testified by the Kmetz family, the assailant could not during the same period have been driving his car at some distance from the Kmetz home, and the car could not have been picked up by the officer at 10:22.

Between midnight of the same evening, August 30th, and 1 o'clock of the morning of August 31st, police officers Allum and Cox, in response to a telephone call, proceeded to Garnet and Soto Streets, a distance of about three and one-tenth miles from the place where officer Kellogg found the abandoned car. There they saw Albertson lying in a half reclining position on the parkway with his head on his hands. He was clad only in his undershirt, shorts and socks, and was suffering from the cold. They took him back to the police station and gave him some clothing and a glass or two of hot water. After a short rest he was able to tell them his story, which was that he, too, had undergone an ordeal which appears to have been worse than that of Kmetz. His tale seemed incredible to the officers, and they refused to believe it, but had him dictate a full typewritten report (Ex. 102).

Albertson's story was as follows: On August 29th he received in the mail a postal card (Ex. 30) reading as follows: "Dear Al—How would you like to be a villiage smithy. a friend of mine about 200 miles north of Los Angeles needs a smith and asked me to try and finde one this week end. He will be here Sat. night or Sun. morn. If interested meet me Sat. night 8 p. m. at cor. Vermont Jefferson Owl drug cigar counter. I have spare room come stay all night to be sure and see him. Friendly yours, George Crocker." This was written in pencil, all but the signature being in printing.

Albertson discussed the invitation with his wife and they decided that he should keep the appointment because he needed a job and had followed the trade of blacksmith. Albertson asked his wife to accompany him but she declined because she was not feeling well and did not want to keep up Charlene (a young girl who was living with them), and because he told her that more than likely he would be back that evening. He drove to Jefferson and Vermont Streets, and at about twenty minutes to 8 o'clock he parked his car on the south side of Jefferson Street. He waited there but no one showed up, so he entered the drug store and inquired of a rather large lady if a Mr. Crocker had been at the store inquiring for him. Receiving a negative reply he stated that he had an appointment there with Mr. Crocker, and the lady suggested that he contact the girl who was coming on duty at 8 o'clock and leave word with her for this Mr. Crocker. He then returned to his car and wrote the license number of the car and his name on a piece of cardboard. He went back to the drug store, inquired of a different young lady, and left the card. He again returned to the automobile and in a few minutes a man approached and asked if he was Mr. Albertson, introducing himself as Mr. O'Connor. He told Albertson that Crocker was unable to keep the appointment because he had to work at Sears-Roebuck until around 9 o'clock, and had sent O'Connor in his place. The two men sat in the car and conversed on various subjects, O'Connor stating that he was temporarily out of work, was a gardener by trade and was anxious to get placed in that sort of employment. Albertson said he had a friend of the family who was a gardener for the Board of Education, referring to Kmetz, and that if O'Connor would contact Kmetz he might secure work. He gave O'Connor a card with the name and address of Kmetz on it. This part of the conversation concerning the giving of the name of Kmetz was not related to the police at first, but was told by Albertson at a later date.

After some further conversation, and at O'Connor's suggestion, Albertson drove to the vicinity of the Sears-Roebuck store where O'Connor said they would meet Crocker as he came off duty. When they reached that location O'Connor told Albertson to pull up, that he saw Crocker waiting. Albertson stopped the car, O'Connor got out, and there was another man standing at the curb. This man, whom Albertson had never seen before, said "Hello, Al" and put out his hand. Albertson shook hands with him and the

man then got into the front seat while O'Connor got into the back seat. The man in the front seat then pulled out a bottle and told Albertson to have a drink. Albertson said he was not a drinking man, to which the other replied, "This is one time you are going to take a drink." O'Connor, from the back seat, then pushed something into Albertson's back which Albertson thought was a gun, the man in the front seat held the bottle to Albertson's mouth, held his shoulders, and Albertson drank. After a short time he became unconscious from the effects of the drink. When he came to, he was in his underwear, lying in a vacant lot. He wandered about in the general vicinity until he observed a party in progress and a couple of Mexican boys on the sidewalk. He called one of them over to him and asked the lad to call the police department. It was pursuant to this call that the police picked Albertson up. At the police station he stuck to his story notwithstanding the officers' disbelief. His abandoned car had already been picked up by the police in the manner hereinbefore described.

So far as appears, neither Kmetz nor Albertson knew on the night of August 30th, or on Sunday, August 31st, that the other had been assaulted. On Monday following, Labor Day, Mr. and Mrs. Kmetz drove in about noontime to visit the Albertsons. They noticed that the Albertson car was gone. This immediately led to a conversation about the occurrences of August 30th and the two men exchanged stories. As Kmetz related his assault, Albertson did not appear to Mrs. Kmetz to be nervous, but, according to her testimony, "he just appeared to be somebody who had been sick and who had gotten up but was not able to be up." Mrs. Kmetz, after hearing that Albertson had given his assailant the Kmetz name and address, advanced the theory that undoubtedly the man took Albertson's car and proceeded to assault Kmetz. This theory harmonized with the time element so far as Albertson's testimony that he was assaulted about 9 o'clock and the Kmetz testimony that he was assaulted about 10:20 are concerned, but would not explain how the officer could have been chasing the Albertson automobile at the same time, unless Mrs. Kmetz misread the time on her watch, or the watch was a little fast. If Albertson and Kmetz, through their church work, had made a common enemy, who tried to murder Kmetz and throw suspicion on Albertson, this theory would fully explain the double assaults and the later poisoning plan.

After the Albertsons and Kmetzes had exchanged stories of the assaults, they all drove to revisit the scene and to call at the sheriff's substation. From the latter place they proceeded to the Kmetz home, where both men were interviewed officially in the presence of each other. Kmetz fixed the time of his assault at 10:15 p. m., instead of 10:20, and Albertson became excited and advanced the opinion that it must have been his car that the assailant escaped in. Kmetz seemed to agree.

Albertson was told that the police officers had his car and the personal effects found in it, including the Crocker postal card, and he stated that he did not know the man who wrote the card. The following day he and Mrs. Albertson again called at the sheriff's office and Albertson was interviewed alone. He again repeated his story and reiterated that it was the truth. The officers again refused to credit it, and one testified: "I told him that it appeared very much to me that this robbery was the result of some act of perversion, and I wanted to know if that was the truth, and he said that it was not." At the completion of the interview Mrs. Albertson was brought in and Albertson said to her: "This man believes I am lying; he says I am lying about this whole thing." The officer then so stated to Mrs. Albertson. Another officer then checked over what Albertson had said and explained why they did not believe it, and Mrs. Albertson replied: "Well, he is my husband, he has always been good to me, I know it sounds awfully funny, but I still must believe him." The police then refused to have anything more to do with the case and returned to Albertson his property, including the Crocker postal card (Ex. 30). Thereafter the friendship of the Kmetzes and the Albertsons was uninterrupted and they continued to exchange visits on an average of once a week until the time of the murder.

The murder caused the reopening of the police investigation. They advanced the theory that Albertson deliberately planned to kill Kmetz; that he wrote the Crocker postal to himself to furnish an excuse for leaving his home on the evening of August 30th; that he left the message at the drug store for the purpose of establishing an

alibi for himself; that there were no such persons as Crocker and O'Connor; that he was not drugged or robbed, but in fact proceeded to the Kmetz home and there concealed himself until the return of the family; that he assaulted Kmetz with intent to kill him, and then faked the assault on himself for his further protection. But this does not gibe with the fact that if Albertson, clad only in his underwear, had assaulted Kmetz, Kmetz would have been cognizant of the peculiarity of his assailant's attire while grappling with him and would have reported it; and if Albertson had not then been so clad it would have been impossible for him to remove his clothing and effects and pile them neatly on the seat of the car. This seems obvious because the man who was driving the Albertson car while the police pursued it only had time, in abandoning the car, to jump out into the shrubbery and escape. The police car was within sight all the time. On the other hand, the theory of a common assailant is plausible under the facts.

When, subsequent to the murder, the officers wished to search the Albertson tent-house and trailer, Albertson offered no objection but turned over the keys to the premises and permitted them to take the several letters and postals which were later placed in evidence, including the Crocker postal (Ex. 30). In an endeavor to show that Albertson wrote the Crocker postal to himself, the officers had him prepare two exemplars (Ex. 31a and Ex. 31b). The exemplars are in some respects similar and in others dissimilar to the original. One exemplar (Ex. 31b) reads line for line with the original (Ex. 30), the first and last words on each line being identical. Albertson testified that this occurred because the officers told him to make his copy as near like the original as he could. The officers deny this and state that they dictated the postal card message. But it scarcely seems believable that a dictated note would come out line for line with the original, even if both postals were written by the same hand. The other postal card (Ex. 31a) on casual examination bears little resemblance to the original (Ex. 30).

Evidence was given by handwriting experts in support of the theory that Albertson wrote the original postal (Ex. 30) and the two exemplars (Ex. 31a and Ex. 31b), and also the Mackelroy signature on the advertising letter. In explaining the basis of this conclusion, one expert testified: "Now, I spoke a moment ago about dissimilarities and similarities. I perhaps could take hours or days or weeks, perhaps months, in pointing out the differences between the handwriting of Mr. Albertson on Exhibit 31-A and Exhibit 31-B, and in the other exemplars of his writing; but I do not [think] that merely pointing out differences would avail me anything in coming to a conclusion. It is really a matter, in my judgment, of evaluating differences. I think the differences should be noted very carefully, because in any handwriting, and any identification problem, the differences should be noted, and sometimes they are really more important than the similarities. But in any event, handwriting identification is a combination of two things, accurate observation and correct reasoning applied to what is seen. Without the reasoning process applied to those differences of course I don't think anything could be identified. * * *" Thereafter, the expert classified "the differences in Exhibit 30" as "explainable differences to those found in Exhibits 31-A and 31-B", and stated: "I think that Exhibit 30 was without question written by the same person who wrote Exhibits 31-A and 31-B."

Counsel for Albertson suggests that if it would take the handwriting expert "hours or days or weeks, perhaps months" to point out differences in the handwriting of Albertson on the several exhibits, "then it is permissible to inquire of what possible value such testimony could be to a layman on the jury. The statement seems utterly absurd and we are unable to follow the processes of reasoning leading up to his conclusion."

Another handwriting expert testified: "Well, it is my opinion, without any reservation, that the same person wrote all three of these exhibits. There is an overwhelming individuality in this questioned writing, when you study all these characters and see how they are made, the size of them, the spacing of them, the slant of the letters, the pen strokes, all the factors that enter into the consideration of this handwriting." But this witness was also troubled by "differences" for he said: "I might state that it has been my observation, from examining this writing that there are more differences between the two specimens of admitted

writing [Ex. 31a and Ex. 31b] than there are between the questioned writing [Ex. 30] and the specimens of admitted handwriting. * * * There are probably more differences between the genuine writing on these two cards [Ex. 31a and Ex. 31b] than there is between the questioned writing [Ex. 30], and the writing on Exhibit 31-B. That doesn't apply to 31-A."

Is it not obvious that the differences prove, if anything, that when Albertson prepared similar exemplar 31b he was, as he testified, trying to obey the admonition of the police officer to make it as near like the original postal as he could, whereas when he wrote dissimilar exemplar 31a he was printing in his own form. He testified:

"Q. What did Van Meter say to you when he asked you to copy Exhibit 31-B from Exhibit 30? A. He told me to copy that as near as I could.

"Q. And is that what you did? A. Yes, sir.

"Q. As far as you were able to you made an exact copy of the card Mr. Van Meter gave you at that time? A. That is correct."

And again:

"Q. Now, when you were asked by Van Meter to copy Exhibit 30, when you made this Exhibit 31-B, did he tell you how to copy it? A. As near like the original as I could.

"Q. Did he tell you to copy the letters and make them the same shape, if possible? A. He said to copy it as near as I could."

This state of proof directs attention at once to one of the main questions argued on appeal, to wit: Was the voluminous evidence relating to the prior occurrence, and not part of the res gestae but remote by forty-three days, admissible when the connection of the occurrence with the defendant and with the crime charged is shown only by a theory of the prosecution based upon circumstantial evidence, and the evidence relating to the crime charged is also purely circumstantial?

[2] It is evident that the admission of this volume of evidence relating to the suspicious circumstances which occurred on the night of August 30th was prejudicially erroneous. The general rule, universally recognized, is that in a criminal prosecution the defendant can be tried for no other offense than that which he is charged in the indictment or information; evidence of collateral independent crimes is not admissible. Wharton's Criminal Evidence, secs. 343, 344, p. 483 et seq.; 20 Am.Jur., sec. 309, p. 287; 22 C.J.S., Criminal Law, § 682, p. 1084 et seq.; 8 Cal.Jur., sec. 167, p. 58 et seq.; 13 Cal. Jur., sec. 84, p. 703 et seq. The equally well-recognized exceptions to this rule are clearly defined. Evidence of other crimes may be admitted when it tends directly to establish the crime charged by proving a material fact, where it is part of the res gestae, or where it helps to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme. 20 Am.Jur., sec. 310 et seq., p. 289 et seq.; 22 C.J.S., Criminal Law, § 683 et seq., p. 1089 et seq.; Wigmore on Evidence, vol. II, ch. XIII, p. 191 et seq.; Wharton Criminal Evidence, sec. 345 et seq., p. 487 et seq.; 8 Cal.Jur., sec. 168 et seq., p. 60 et seq.; 13 Cal.Jur., sec. 84 et seq., p. 703 et seq.

The trial court, however, should be guided by the rule that such proof is to be received with "extreme caution," and if its connection with the crime charged is not clearly perceived, the doubt is to be resolved in favor of the accused, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt. People v. Lane, 1893, 100 Cal. 379, 387–390, 34 P. 856; 13 Cal. Jur., sec. 84, p. 707; 8 Cal.Jur., sec. 168, p. 61. The textwriter explains the limited application of the exceptions to the general rule in these words (Wharton's Criminal Evidence, sec. 360, p. 567): "Certain conditions must always exist as a predicate to the admission of evidence of other crimes. Such evidence, being a departure from the general rule of exclusion, is only admitted to render more certain the ascertainment of the exact truth as to the charge under trial. In any loose relaxation of the rule, the danger to the accused is that evidence may be adduced of offenses that he has not yet been called upon to defend, of which, if fairly tried, he might be able to acquit himself.

"In the first place, the collateral offense for which an accused has not been tried tends to prove his inclination towards crime, that is, to render more probable his guilt of the charge under trial, which is an absolute violation of the rule. It does not reflect in any degree upon the

intelligence, integrity, or the honesty of purpose of the juror that matters of a prejudicial character find a permanent lodgment in his mind, which will, inadvertently and unconsciously, enter into and affect his verdict. The juror does not possess that trained and disciplined mind which enables him either closely or judicially to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge. * * *

"A man may fully recover from the effects of judicial tribulation where it affects only his property or material interests. But recovery from the effects of a charge that involves his reputation and character, and that threatens his liberty or his life, is a recovery only in name. Absolute acquittal cannot completely restore him to the place he once held. The stain of prosecution cannot be eradicated. These momentous consequences demand a rigorous enforcement of the rule, in criminal charges, that evidence of the collateral offense must never be admitted, unless it can be applied to more certainly demonstrate the truth. Hence: (a) Ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has been, in the opinion of the trial judge, first adduced, all evidence of other offenses must be excluded; (b) the collateral offense cannot be put in evidence without proof that the accused was concerned in its commission; (c) there must be identity of person or crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, that clearly connects the accused, showing that the person who committed the one crime must have committed the other. In other words, some connection between the other crime and the crime charged must be shown, and it must be shown with reasonable certainty that the accused committed the other crime."

In the present case the evidence of the events of August 30th obviously failed to satisfy the requirements set forth as (b) and (c) in the above quotation. At most it showed that defendant's account of his whereabouts on that night was considered incredible by the police, and that defendant, or his car, might or might not have been by the Kmetz home. It was insufficient to create more than a mere suspicion that defendant might have been the assailant of Kmetz. Moreover, it was placed before the jury under an instruction which was clearly erroneous, and failed to bring it within any of the recognized exceptions to the general rule of inadmissibility. This instruction, already quoted herein, told the jury that "the defendant is not on trial in this case for any crime connected with an assault upon John Kmetz on or about the 30th of August, 1941. The evidence with regard to the transactions of August 30th, 1941, are to be considered by you only as the same may relate to the matter of the relationship of the defendant to John Kmetz, the matter of premeditation, the matter of malice or the matter of motive. Such evidence may not be considered by you for any other purpose."

This instruction was erroneous and misleading, and it invaded the province of the jury in that it was unqualified by any statement that before the jurors could consider the testimony for the specified purposes, they must conclude, first, that Kmetz was in fact assaulted on the night of August 30th and, second, that defendant was in fact the assailant of John Kmetz on that night.

Separately considering the elements referred to in the instruction, it will be seen that the evidence as to the assault tended to prove nothing at all with respect "to the matter of the relationship of the defendant to John Kmetz," for no relationship between them other than a friendly one was shown and there was no evidence whatsoever identifying defendant as the assailant. As to "motive" there was no proof whatsoever. That the victim may have been assaulted by someone some six weeks before he was poisoned adds nothing to the bare fact that no motive was revealed for either act. Without identification of defendant as the assailant, the assault evidence did not tend to show either "premeditation" or "malice." Furthermore, these two elements were established by the receipt of the poisoned capsules, and no strength was given to that conclusive showing by proof of merely suspicious occurrences, not part of the res gestae, which proof would in any event at most be cumulative. Other elements, not mentioned in the instruction but referred to in the briefs, are likewise not involved. The evi-

dence did not tend to prove any "common plan or scheme" on the part of defendant; it showed no "guilty knowledge" and no "material fact" concerning the poisoning. The occurrence was remote in time, and not part of the res gestae. As to "identity" or "intent" it was insufficient to do more than arouse cumulative suspicions.

It is true that where evidence of a prior offense is properly admissible under the exceptions to the general rule, it is not necessary to prove all of the elements of that offense beyond a reasonable doubt, as would be the case were the defendant standing trial for it as well as for the crime charged. People v. Lisenba, 1939, 14 Cal.2d 403, 429–432, 94 P.2d 569, and cases there reviewed. But the proof must nevertheless be sufficient to arouse more than mere suspicion; it must afford "substantial evidence" that the prior offense was in fact committed by the defendant. People v. Lisenba, supra; Scott v. State, 1923, 107 Ohio St. 475, 141 N.E. 19, 26, overruling Baxter v. State, 91 Ohio St. 167, 110 N.E. 456; State v. Hyde, 234 Mo. 200, 136 S.W. 316, Ann.Cas.1912D, 191; Wharton's Criminal Evidence, sec. 366, p. 584; 20 Am.Jur., sec. 318, p. 299; Haley v. State, 84 Tex.Cr.R. 629, 209 S.W. 675, 3 A.L.R. 784–786; 22 C.J.S., Criminal Law, sec. 690, p. 1112; Commonwealth v. Petrillo, 338 Pa. 65, 12 A.2d 317, 325; State v. Ebel, 92 Mont. 413, 15 P.2d 233.

To thus emphasize the degree of proof required, varying terms have been used for guidance of the trial court. "The evidence which can be so used of other crimes presupposes that the other crime is prima facie established by competent proof" (Commonwealth v. Petrillo, supra, 12 A.2d at page 325), "To render such evidence admissible, it must be shown that it substantially establishes the defendant's guilt as to such other crime * * * or, in other words, it must be shown with reasonable certainty that the accused committed the other crime. * * *" State v. Ebel, supra, 15 P.2d at page 237. "* * * The degree of proof required in this class of testimony is held on excellent authority to be positive or substantial, but not 'beyond a reasonable doubt.'" Scott v. State, supra, 141 N.E. at page 26; see State v. Hyde, supra, 234 Mo. at page 250, 136 N.W. at page 331. "Before evidence of the commission of other crimes by accused is admitted, the trial court should satisfy itself that the evidence substantially establishes the other crimes, clear and convincing proof, and the making out of at least a prima facie case, being required; evidence of a vague and uncertain character, offered for the purpose of showing that the accused has been guilty of similar offenses, should not be admitted under any pretense whatever, nor is mere suspicion, or proof of a suspicious circumstance, sufficient. So, before guilty intent may be inferred from other similar crimes, they must be established by evidence which is legal and competent and plain, clear, and conclusive. * * *" 22 C.J.S., Criminal Law, § 690, p. 1112.

Here, the fact that the circumstantial evidence of the prior merely suspicious occurrences was adduced in great quantity so that it comprises a large part of the voluminous record, cannot serve as a substitute for "substantiality" where none exists. This erroneously admitted proof shows, if anything, that it must by very reason of its voluminousness have tended to confuse the jurors and warp their judgment. Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle. Here the evidence of suspicious prior occurrences affords no substantial proof whatsoever connecting defendant in any way with the charge on which he was tried.

The judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.

SHENK and SCHAUER, JJ., concur.

TRAYNOR, Justice (concurring).

[2] I agree with the conclusion in the majority opinion that it was prejudicial error to admit the evidence with regard to the assault of August 30, 1941. This evidence, in my opinion, was insufficient to enable a reasonable jury to conclude that it was more probable that defendant committed the assault than that he did not.

There were other prejudicial errors that constitute additional reasons for reversing the judgment. There was, first, the reading from the transcript of defendant's testimony at the former trial and the subsequent contradiction of that testimony by witnesses called by the prosecution. If the testimony of a witness at the first trial of a case does not contain assertions concerning material facts, it is irrelevant at a second trial and therefore inadmissible. Even if the witness testified to material facts, his declarations at the first trial are hearsay at the second trial and not admissible under section 1870(8) of the Code of Civil Procedure unless "a witness [is] deceased, or out of the jurisdiction, or unable to testify." None of these reasons exists in the present case. The admission of this testimony, therefore, was not proper unless permitted under other exceptions to the hearsay rule.

False statements by a defendant to those investigating the commission of the crime are admissible if they indicate consciousness of guilt. Although hearsay, they are receivable as admissions and are provable because they are regarded as assertions by the accused tending to show guilt. Thus, such statements have been held admissible because they involved an attempt by the accused to establish a false alibi (People v. Miller, 19 Cal.App.2d 708, 66 P.2d 448), the giving of false explanations for the possession of goods allegedly stolen (People v. Cox, 29 Cal.App. 419, 155 P. 1010; People v. Martin, 16 Cal.App.2d 515, 60 P. 2d 1014), the denial by a defendant that he knew his codefendant, immediately subsequent to the wrecking by that codefendant of a stolen car in which the defendant was a passenger (People v. Zabriski, 135 Cal.App. 169, 26 P.2d 511), and the denial by defendant that he had delivered carpets to a thief when the question was whether the carpets had been delivered innocently or as part of a scheme to defraud. People v. Cole, 141 Cal. 88, 74 P. 547. Similarly, in People v. Arnold, 43 Mich. 303, 5 N.W. 385, 38 Am.Rep. 182, the falsehood consisted of a fictitious reason for being present at the scene of the crime.

It has never been suggested, however, that every falsehood voiced by the defendant between the time of the crime and the trial can be admitted on this basis, for it is well known that all persons are liable to make errors in the description of past events. Consciousness of guilt is proved, not by evidence of such slips, but by fabrications which, like devious alibis, are apparently motivated by fear of detection, or which, like devious explanations of the possession of stolen goods, suggest that there is no honest explanation for incriminating circumstances and thus are admissions of guilt. Before evidence of false statements by a defendant may be received, the court must determine whether the falsehood is one that may be reasonably construed as implying such an admission; otherwise evidence might be received that is in no way relevant to the issues and therefore seriously prejudicial to the defendant because it indicates to the jury that he is a dishonest person.

The errors proved by the prosecution in the present case have none of the characteristics of such admissions. From the transcript of defendant's testimony at the former trial, it appeared that defendant answered "No" when asked whether he had said to one of the officers in the course of the investigation, "I did not pass any opinion on the man (Kmetz) outside of that he was twenty years older and that he had two children, and that if she wanted to consider these things, if she actually loved the man there was no objection." Defendant answered "Yes" when asked whether he had told any of the officers investigating the case of a conversation he had described with O'Connor, the person who he alleged had robbed him of his car and clothes at the time of the assault on Kmetz, to the effect that O'Connor had worked as a railwayman. He expressed considerable doubt, however, as to which officer he had spoken of the conversation but indicated that it might have been Officer Bowers. After the transcript was read, Officer Bowers took the stand and testified that defendant had not described this conversation to him but had made the statement set forth concerning Kmetz. Parts of the transcript were also read containing an admission by defendant that he had filled out an application for a job stating falsely the extent of his education as well as a statement by defendant that he knew no one named Crocker, which was followed by testimony, induced by the exhibit of one of defendant's notebooks, that he knew a woman named Hedwig Crocker, aged ninety.

These errors were not indicative of consciousness of guilt. It is irrevelant that defendant made out a false employment ap-

plication and could not remember a Mrs. Crocker. A guilty person would have no reason to withhold the statement concerning the age of Kmetz, for such a statement is one that any friend of the girl might make. The statement that "if she actually loved the man there was no objection" does not indicate any hostility to the deceased. Defendant's assertion that he had told Officer Bowers of his conversation with O'Connor cannot reasonably be regarded as an admission of guilt, particularly in view of his doubt as to whether he had or had not mentioned the matter to Officer Bowers. There was, therefore, no legitimate ground for the admission of this evidence. Its admission permitted the prosecution to do indirectly what it could not do directly, namely, attack the character of the accused for veracity, a trait that, unless he takes the stand, is not involved in a trial for murder and is therefore not a proper subject of inquiry. People v. Burke, 18 Cal.App. 72, 122 P. 435; People v. McMillan, 59 Cal.App. 785, 212 P. 38; People v. Derrick, 85 Cal.App. 406, 259 P. 481; People v. Peterson, 120 Cal.App. 197, 7 P.2d 366; see 1 Wigmore on Evidence, 3d Ed., p. 438.

In addition, evidence was introduced that several of the police officers told defendant they did not believe his story when he described how O'Connor took his car and clothes. These declarations were hearsay (People v. Yeager, 194 Cal. 452, 486, 229 P. 40) and expressions of opinion on the part of the officers. Had defendant remained silent when the officers expressed these opinions, they might have been admitted on the theory that defendant conceded their truth by his silence. He protested, however, that his story was true, and there was therefore no ground for admitting the officers' declarations. People v. Teshara, 134 Cal. 542, 66 P. 798; People v. Lapara, 181 Cal. 66, 183 P. 545; People v. Yeager, supra; People v. Ayhens, 16 Cal.App. 618, 117 P. 789; People v. Wilson, 61 Cal.App. 611, 215 P. 565.

The trial court erred again when, of its own volition, it instructed the jury as follows: "You are further instructed that a defendant in a criminal case cannot be compelled to be a witness against himself, and that the defendant in this case has the privilege of declining to take the witness stand and testify. The Constitution of the State of California provides as follows: 'In any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.' Constitution of California, Article I, section 13."

This instruction was prejudicially erroneous for it imposed no limitations on the jury as to what consideration it could give defendant's failure to testify and left the jury free to infer guilt from that fact alone. The jury is not free under the constitutional provision to give defendant's failure to testify any consideration it sees fit, any more than court or counsel are free to make any comment thereon they see fit. See People v. Ottey, 5 Cal.2d 714, 724, 56 P.2d 193. Before the constitutional amendment it was error to comment on the defendant's failure to take the stand or to advise the jury that it could draw inferences unfavorable to him on that account. People v. Tyler, 36 Cal. 522. The constitutional amendment changes the rule of the Tyler case and permits such comment but does not do more. It does not relieve the prosecution of the burden of establishing guilt beyond a reasonable doubt by competent evidence. People v. Sawaya, 46 Cal. App.2d 466, 471, 115 P.2d 1001. If the prosecution fails to meet this burden, the jury cannot infer guilt from the failure of the defendant to take the stand. If, however, the prosecution has introduced competent evidence on every element of the crime, the jury, in weighing the evidence and drawing inferences therefrom, may consider the defendant's failure to explain evidence against him that he could reasonably be expected to explain. Under such circumstances, the jury may weigh the evidence most heavily against the accused and draw reasonable inferences that may be unfavorable to him.

Even where the prosecution has introduced evidence on every essential element of the crime, however, it is not fair to the accused to leave the jury free, under a general instruction like that in question, to give the defendant's failure to testify whatever consideration it sees fit. There is then no protection to the accused against the jury's weighing the evidence most heavily against him and drawing unfavorable inferences from his failure to explain matters of which he could not reasonably be expected to have cognizance. The failure of the accused to testify derives significance

from the presence of evidence that he might "explain or deny by his testimony," for it may be inferred that if he had an explanation he would have given it, or that if the evidence were false he would have denied it. See Code Civ.Proc., sec. 1963, subds. 5 and 6. No such inferences, however, can reasonably be drawn from the silence of the accused concerning matters outside his knowledge. The New Jersey Supreme Court, which has always allowed comment on the failure of the accused to testify, has recognized that "His failure to offer himself as a witness when his testimony could not meet or disprove any particular fact or circumstance * * * probably ought not to affect him, and, if so, his silence should not be commented on or considered." Parker v. State, 61 N.J.L. 308, 39 A. 651, 654. See, also, State v. Wines, 65 N.J.L. 31, 46 A. 702; State v. Howard, 83 N.J.L. 636, 87 A. 436; State v. Rubenstein, 136 A. 597, 5 N.J.Misc. 387.

If the defendant had taken the stand he would not have been obliged to explain matters for which he could not reasonably be regarded as having an explanation. Thus, in Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann.Cas.1917B, 1168, holding that when the defendant took the stand the trial court could properly call the attention of the jury to his failure to explain matters that he could explain, the court was careful to note that the trial court "did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to those matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his own behalf." If a defendant who takes the stand is not obliged to explain matters that he cannot reasonably be expected to explain, a fortiori a defendant who does not take the stand is not obliged to explain such matters.

When a jury is instructed in general terms that it may consider the failure of the accused to take the stand, it is likely to regard his silence as indicating the truth of testimony other than that relating to matters within his knowledge. It may even assume that innocent people take the stand and that defendant is guilty because he did not. Since a conviction must be supported by something more substantial than silence, it is essential that the jury be instructed as to the limitations upon the consideration that it may give a defendant's failure to testify.

The court also erred in instructing the jury substantially in the language of Penal Code section 1105 that, "Upon a trial for murder, the burden of proving circumstances of mitigation or that justify it devolves upon the defendant."

The burden of proof is usually twofold. The party bearing it faces a burden of persuasion, sometimes called "the risk of nonpersuasion." This means that the issue must be determined against him if the evidence does not convince the trier of fact that it is more probable than not that the facts are as he represents them. See 9 Wigmore on Evidence, 3d ed., sec. 2486. He also usually has the burden of going forward with the evidence, for if no evidence is introduced a verdict must be directed against him. See 9 Wigmore on Evidence 3d Ed., sec. 2487. In several early cases this court held that the burden placed on defendant by section 1105 included both these burdens and required the defendant to prove circumstances of mitigation by a preponderance of the evidence. People v. Arnold, 15 Cal. 476; People v. Hong Ah Duck, 61 Cal. 387; People v. Raten, 63 Cal. 421, 422; but see People v. West, 49 Cal. 610. Subsequently, however, these decisions were overruled (People v. Bushton, 80 Cal. 160, 22 P. 127, 549) and it has since been uniformly held that an instruction requiring proof of circumstances of mitigation by a preponderance of the evidence is erroneous. It has been said that defendant is required only to produce enough evidence of such circumstances to raise a reasonable doubt of his guilt. People v. Bushton, supra; People v. Elliott, 80 Cal. 296, 22 P. 207; People v. Post, 208 Cal. 433, 281 P. 618; People v. Madison, 3 Cal.2d 668, 676, 46 P.2d 159; People v. Marshall, 112 Cal. 422, 44 P. 718; see People v. Wells, 10 Cal.2d 610, 622, 76 P.2d 493.

However illogical it is to impose on a defendant the burden of raising a reasonable doubt as to his guilt when the prosecution already has the burden of proving his guilt beyond a reasonable doubt, these decisions unquestionably have the effect of relieving the defendant of the burden of persuasion.

The duty imposed by section 1105, therefore, is solely that of going forward with the evidence, of introducing evidence of circumstances of mitigation. See 9 So.Cal. L.Rev. 405. The Code section thus has the effect merely of freeing the prosecution of the risk of a directed verdict in favor of the defendant. People v. Milner, 122 Cal. 171, 178, et seq., 54 P. 833; see 9 Wigmore on Evidence, 3rd Ed., secs. 2487, 2512. If, however, the jury is instructed in the language of section 1105, it is likely to amplify the effect of the Code section by concluding that it must decide that mitigating circumstances do not exist unless the defendant convinces it that the existence of such circumstances is more probable than not. An instruction in such language is therefore erroneous. People v. Carson, 43 Cal.App.2d 40, 110 P.2d 98.

An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court. See Formosa v. Yellow Cab Co., 31 Cal.App. 2d 77, 87 P.2d 716; New York & P. R. S. S. Co. v. McGowin Lumber & E. Co., 1 Cir., 284 F. 513. It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court. Kansas City, etc., Ry. v. Becker, 63 Ark. 477, 39 S.W. 358; see People v. Ghysels, 81 Cal.App. 122, 252 P. 1067; People v. Pagni, 69 Cal.App. 94, 230 P. 1001; 1 Reid's Branson, Instruction to Juries (1936) p. 217. The history of section 1105 in this court makes it clear that a jury would not understand the section without guidance. Judicial interpretation has attributed to it a meaning not apparent from its language, and an instruction that fails to convey that interpretation is misleading and therefore erroneous. See 14 R.C.L. 772.

It has sometimes been held that if the jury is also instructed that the prosecution must prove its case beyond a reasonable doubt, an instruction in the language of section 1105 is not prejudicial. See People v. Hawes, 98 Cal. 648, 33 P. 791; People v. Richards, 1 Cal.App. 566, 82 P. 691. If the instruction as to reasonable doubt is made expressly applicable to the evidence of mitigating circumstances (see People v. Richards, supra) this conclusion is correct. If the instruction is phrased in general terms, however (see People v. Hopper, 42 Cal.App. 499, 183 P. 836; People v. Leddy, 95 Cal.App. 659, 273 P. 110), a reasonable jury might easily conclude that section 1105 creates an exception to the rule that if a reasonable doubt of the defendant's guilt appears he must be acquitted, believing that mitigating circumstances have not been proved when it has merely been shown that it is not certain beyond a reasonable doubt whether they exist. See People v. Marshall, 112 Cal. 422, 44 P. 718. Cases such as People v. Grill, 151 Cal. 592, 91 P. 515; People v. Wilt, 173 Cal. 477, 160 P. 561; People v. McClure, 148 Cal. 418, 83 P. 437; and People v. Attema, 75 Cal.App. 642, 243 P. 461, concerned with other criticisms of the use of the literal language of section 1105, do not establish the validity of such an instruction against the objection now urged. The case of People v. Burdg, 95 Cal.App. 259, 272 P. 816, making a contrary assumption, should be disapproved.

[1] It may be contended that in the present case this instruction was not prejudicial because there was no evidence of mitigating circumstances. It has been recognized, however, that if there is no evidence of such circumstances an instruction under section 1105 is apt to confuse the jury and may therefore be ground for reversal. People v. Tapia, 131 Cal. 647, 63 P. 1001, 1004. The jury can hardly be aware that this instruction, formally declared by the court as the law applicable to the case, is irrelevant. In dutifully attempting to apply it to the evidence, it may have found significant the words "the commission of the homicide by the defendant being proved," and taken them to indicate the court's belief that this much has been proved. People v. Tapia, supra. It is also likely that the jury failed to observe that proof of "the commission of the homicide by the defendant" must precede the application of the instruction, and concluded that the instruction placed the burden of proving some facts on the defendant and some on the prosecution, thus depriving defendant of his right to have the prosecution prove all material facts beyond a reasonable doubt. Such an error is made the more serious by use of the statutory language, giving the jury the impression that defendant was bound to prove such facts by a preponderance of the evidence. There was no justification for this instruc-

tion in the absence of evidence of mitigating circumstances, for the question of defendant's guilt depended solely on whether or not he committed the homicide, and the jury should therefore have been given no instructions that did not relate to the determination of that question. In some cases it may be reasonable to suppose that the jury ignored an instruction of this kind. See People v. Wilt, supra. The verdict in the present case, however, in view of the uncertainty of the circumstantial evidence presented by the prosecution and its failure to prove any motive for the killing, suggests that the jury may well have been influenced by the court's error.

EDMONDS, Justice (dissenting).

Considering the great mass of substantial evidence pointing unerringly to appellant as the perpetrator of the cunningly conceived but awkwardly executed murder of John Kmetz, I cannot justify on any logical or rational basis the labored effort of the majority opinion to belittle the testimony which connects Albertson with the commission of the crime.

The fact that evidence is circumstantial does not detract from its probative value. The law makes no distinction between circumstantial and direct evidence. Whether the evidence is of the one kind or the other, the same degree of proof is required and the final test of its sufficiency is the same: does the whole evidence together satisfy the minds of the jurors beyond a reasonable doubt of the truth of the charge? People v. Parchen, 37 Cal.App. 2d 215, 222, 98 P.2d 1045; People v. Murray, 41 Cal. 66, 67. Circumstantial evidence may be as conclusive in its convincing force as the testimony of witnesses to the overt act (People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631; People v. Nagy, 199 Cal. 235, 236, 248 P. 906); indeed, it often leads to a conclusion more satisfactory than direct evidence can produce (People v. Morrow, 60 Cal. 142); consequently where the circumstances proved reasonably justify the conclusion of the jury expressed in its verdict, a reviewing court may not interfere with the determination. People v. Latona, 2 Cal. 2d 714, 43 P.2d 260.

From the evidence presented by the prosecution the jury and the trial judge concluded that Albertson is guilty of the crime charged against him. In an attempt to minimize the damning effect of this evidence, my associates state that it is "entirely circumstantial"; that "no motive whatsoever is shown"; that there is no proof that appellant ever "purchased or otherwise procured the poison," or that the poison was inserted in two of the capsules prior to mailing, or that the contents of the capsules "were not changed or tampered with" after they were received at the Kmetz home. They also state that if appellant had poisoned the capsules "it seems improbable that he would have left so wide and open a trail"; also, if appellant did prepare and mail the capsules "but unknown to him two of them were poisoned by another, this would logically explain the openness with which he conducted his early activities and a later attempt to conceal and deny them." These are all matters of argument more properly presentable to a jury and entirely outside of the province of an appellate court which, under elementary rules, must affirm a judgment based upon substantial evidence. Concerning the several matters referred to in the majority opinion as not being covered by the evidence, it was for the jury to decide "what circumstances were essential to satisfy their minds beyond all reasonable doubt of [appellant's] guilt, and thus constitute necessary links of such chain." People v. Wilt, 173 Cal. 477, 485, 160 P. 561, 565; People v. Ah Jake, 91 Cal. 98, 27 P. 595.

An appellate court is not concerned with the weight of the evidence, but will only consider whether it includes facts justifying an inference of guilt by the jury. If the evidence reasonably supports that inference, the judgment must stand, although the facts presented to the jury might also reasonably be reconciled with the innocence of the defendant. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. The court must assume in favor of the verdict the existence of every fact which the jury reasonably could have inferred or deduced from the evidence. People v. Newland, supra, 15 Cal. 2d page 681, 104 P.2d 778; People v. Perkins, supra; People v. Parchen, supra.

Kmetz received the box of poison capsules less than two months after he married the woman who for six years had been an intimate acquaintance and frequent companion of Albertson. The as-

sociation of Esther Dockham and Albertson commenced when they spent much time together preparing questions and answers on religious topics, and continued after her marriage to Kmetz to almost the very hour when the capsules were sent to the bridegroom. For on the late afternoon of the same day the poison package was mailed, Albertson called for the bride in his automobile and took her away for the week end.

Tending to show that Albertson sent the capsules in a box which he made for that purpose, and also procured and mailed the inducing letter which was delivered with it, is substantial evidence from which his guilt reasonably may be inferred. Read as a whole it convincingly points to him as the person who carried out the poison plan. Briefly summarized, it shows:

1. The two-page letter which accompanied the capsules was typewritten on letterheads printed upon an order placed twenty days prior to the death of Kmetz, by a man who paid cash for them. Although the printer was unable to identify Albertson as the man who had ordered the letterheads, any doubt that he was that man would seem to be dissipated by other evidence which positively connects him with the literature of "The Herb Specialty Co.," an imaginary company with the address of a vacant building.

2. When the printer delivered the letterheads, he referred the purchaser to the Letter Shop in Santa Monica for multigraphing. On the same day a man appeared at the Letter Shop with letterheads of "The Herb Specialty Co." and ordered a two-page letter written from copy which he submitted. The employee who took this order testified that Albertson very closely resembled the man for whom she did the work and the letter written by her was identified as the one that accompanied the poisoned capsules mailed to Kmetz. This employee informed the customer that if many copies of the letter were desired she would recommend that it be reduced in length and then mimeographed.

3. Eight days later a man came to the same Letter Shop and ordered 500 one-page letters to be mimeographed on the letterheads of "The Herb Specialty Co." He called for them on the following morning. The proprietress positively identified appellant as the man who placed this order and called for the mimeographed letters. The employee of the Letter Shop, who eight days earlier had typed the two-page letter which accompanied the capsules to Kmetz, also testified that she later cut the mimeograph stencil from the copy of the one-page letter that had been left with the proprietress for mimeographing, and that she then saw the one-page letter being run from the stencil cut by her on to stationery of "The Herb Specialty Co." The one-page letter is a condensation of the subject matter of the longer one.

4. Three days prior to the death of Kmetz, a man appeared at the office of a public stenographer and notary public in Hollywood and requested her to address 21 envelopes to the persons whose names appeared on a sheet of paper furnished by him. When called as a witness she identified an envelope addressed to John Kmetz, bearing a return address of "The Herb Specialty Co.," as one of the envelopes she had written for the man. The envelope contained the two-page letter which accompanied the poison box to Kmetz. This witness positively identified Albertson as the man for whom she did the work.

5. A client of the public stenographer, who was in her office when the envelopes were written, testified he was "80 per cent" sure that Albertson was the man he saw there at that time.

6. Two handwriting experts testified that, in their opinions, the signature of the "doctor" appearing on the two-page letter accompanying the poison box to Kmetz was in the handwriting of the appellant. They reached this conclusion after comparison with and study of exemplars of Albertson's handwriting.

In addition to this uncontradicted testimony definitely connecting Albertson with the nonexistent "Herb Specialty Co.," whose name appeared on the poison box, there is other evidence equally substantial and persuasive which points to Albertson as the sender of the capsules received by Kmetz. He is a blacksmith by trade, and cyanide is used in tempering steel. It also appears that cyanogas is the trade name for calcium cyanide. It may be purchased in any drug, feed, or hardware store without

a prescription or the signing of a poison register, and is composed of small particles of about the same color (dark gray) and form as the content of the two capsules taken by Kmetz.

During the first week of June, 1941, Albertson came to Miss Dockham's home in Los Angeles and took her to his trailer-tent home in San Pedro. He had been out of work for some time and was attending a W. P. A. welding school in San Pedro. Miss Dockham was not feeling well and she asked Albertson to get her some vitamin capsules. Those he procured were marketed under the name of Pro-Vite and came in a bright orange box which she said was "similar, if not identical both as to appearance, make, exterior and interior" with one which was received in evidence. By August she had taken most of the tablets and left the box in the trailer when she returned to Los Angeles for the opening of school.

One of the handwriting experts examined the construction of the small box which went through the mail and expressed the opinion that "the paper pasted on the top and bottom was not as it came from the factory. It looked to me like a home made job of pasting * * * the interior of the box was not factory made or factory assembled but was assembled in a somewhat amateurish manner." More specifically, he pointed out that the pasteboard trays in the Pro-Vite box identified by Mrs. Kmetz are of the same thickness as the ones in the box mailed under the name of "The Herb Specialty Co." and that the holes in each showed the same workmanship. Also, the holes in the trays of each box are of the same size and the same distance apart. He found that the holes in the trays of the Pro-Vite box are not exactly spaced, and demonstrated to the jury that an area, and only one area, on the tray taken from it very accurately matches an area of the one in the box received by Kmetz.

The forensic chemist of the police department corroborated this testimony and also gave the results of his microscopic examination of the two boxes. He found that the cardboard stock in each is the same and that the small one carries some indication of the bright color of the one which came from the drug store. Of even more significance is his testimony that an analysis of tiny particles of paste taken from the upper tray of the small box showed the same chemical content as the mucilage which was found by officers in the Albertson trailer on October 22nd. And he also told the jury that on the rubber squeegee of this mucilage bottle he found traces of the color of the drug store box.

Certainly this evidence does not justify the implications of the majority opinion that the jury reasonably could not have deduced from the voluminous testimony any or all of the circumstances mentioned as not being covered by it. To illustrate: The statement that there is no evidence to show that the capsules were not tampered with after being received at the Kmetz home entirely ignores facts shown in connection with them. The package in which they were received bore the name of a fictitious company, with directions on part of a letterhead of this mythical organization, and there came with it a descriptive and inducing letter signed by an imaginary "doctor." This letter was traced to the appellant and handwriting experts testified that the "doctor's" signature was made by him. The majority opinion also ignores the testimony of the daughter of Kmetz, who saw the package opened by her father on October 11, 1941, and described it as then containing two dark and ten light-colored capsules. At the time Kmetz took the capsules, his widow testified, the box still contained two dark and ten light-colored capsules. Compliance with the enclosed directions suggesting the taking of "2 Dark Capsules at bedtime" resulted in the death of Kmetz. Certainly this evidence reasonably supports the jury's implied finding that the capsules were not tampered with at the Kmetz home or elsewhere after leaving the hands of the sender.

My associates have also usurped the functions of the jury in asserting that "no motive whatsoever is shown" for appellant's commission of the homicide. Preliminarily, it should be stated that while proof of motive is always material, and the absence of motive may be considered by the jury on the side of innocence, it is not an essential factor in the proof of a crime. If from the evidence tending to connect appellant with the capsules and the literature which came with them the jurors believed he sent the poison to Kmetz, it was not necessary in order for them to render a verdict of guilty, to find a motive which led him to do so.

People v. Kelley, 208 Cal. 387, 390, 391, 281 P. 609; People v. Tom Woo, 181 Cal. 315, 328, 184 P. 389.

But there is an answer of fact, as well as of law, to the argument of the majority opinion. Motive is the thought that impels one to act; it is the product of human relationships and environment, follows no general pattern and very often cannot be accounted for upon any analysis of logical human behavior. Conditions which induce one person to act in a particular way have no effect whatever upon another. Often there is no understandable basis for certain conduct. The present case, however, is not one of that class in which there is no evidence to show motive. Certainly in the relations of Esther Dockham and the Albertsons for six years, and the part John Kmetz played in them for a few brief months, there is much that might have led to criminal conduct. Indeed, that evidence provides substantial support for concluding that any one of several motives was the procuring cause of the murder.

From 1935 when Esther Dockham took a teaching position at San Pedro to the death of Kmetz in 1941, Albertson and his wife lived in a trailer and a tent house which adjoined it. For some time Miss Dockham lived with them; after she left San Pedro she frequently returned there for over night or longer visits. On an unspecified number of occasions Mr. Albertson alone came to Los Angeles in his automobile to take her to San Pedro.

Miss Dockham met Kmetz in September, 1940, and started "keeping company" with him in January, 1941. For several months she saw him frequently. In either March or April Miss Dockham wrote a letter to Kmetz in which she stated she would not go out with him any longer. But evidently Kmetz disregarded her letter and was a persistent suitor, for afterward he came to see her several times. And during these and later months of 1941 Miss Dockham was frequently with Albertson. The first occasion shown by the evidence was in February or March, 1941, when the treasurer of the school board was at Miss Dockham's home. Albertson came to see her and she introduced him as her uncle. The witness testified that, at the time he left, Albertson's unoccupied car was standing in front of the house.

Another witness was a student at the school where Miss Dockham was teaching in the fall of 1941. He testified that when she called at his home to deliver his grade card he saw Albertson alone in his car in front of the house. On another occasion, the witness said, he saw Albertson and Miss Dockham together at church. Mrs. Albertson was not present and they drove away together. On several occasions, the boy told the jury, he noticed Albertson sitting alone in his car near the school.

Even after Miss Dockham's marriage to Kmetz she continued her association with Albertson. On at least one occasion he came to the Kmetz house when her husband was not present. And Kmetz received the poison capsules the morning after his wife left with Albertson to spend the week end at San Pedro. She was ready with her bag packed when Albertson called for her at 5 o'clock in the afternoon. He was alone. They made one stop at Gardena on the way to San Pedro. The next day she and the Albertsons went to church, at Inglewood, returning to the trailer for dinner. On Sunday morning she accompanied Albertson to Gardena on a business errand. They came back to San Pedro, and that evening the Albertsons drove her to Los Angeles. Two hours later Kmetz took the two dark capsules. He died shortly afterward.

The following morning Mrs. Kmetz spent a short time at the East Los Angeles School, and then returned to her home until late afternoon when she went to the Albertsons in San Pedro. Lola, Kmetz' daughter, accompanied her. When Mrs. Kmetz and Lola returned to Los Angeles the next day, the Albertsons went with them and took up their residence at the East Third Street home. Mrs. Albertson was living there at the time of the trial. Although the People were not required to prove a particular, or any, motive for killing Kmetz, it was for the jury to determine whether one might be inferred from this and other evidence.

Any discussion of the existence of a possible motive for the homicide necessarily must also include a consideration of the evidence concerning the assault made upon Kmetz on the night of August 30, 1941, twelve days after he had married Esther Dockham and approximately six weeks prior to his death. At the outset, it may be conceded that this evidence would be incompetent and inadmissible in the prosecution for murder unless it tended to prove some element of or motive for the homicide

and likewise tended to connect appellant with the assault. The general rule is that evidence of other crimes is admissible when it tends to establish motive, intent, absence of accident or mistake, identity, guilty knowledge, or a common scheme or plan (1 Wharton's Criminal Evidence 490–491, sec. 345), and the trial judge accordingly instructed the jury "that the defendant is not on trial in this case for any crime connected with an assault upon John Kmetz. * * * The evidence with regard to * * * [such an attack is] to be considered by you only as the same may relate to the matter of the relationship of the defendant to John Kmetz, the matter of premeditation, the matter of malice or the matter of motive. Such evidence may not be considered by you for any other purpose."

The appellant contends that the instruction should have been qualified by the further statement that before this testimony could be considered the jurors must believe, beyond any reasonable doubt, that Albertson committed the assault. But the law, as recently declared by this court in People v. Lisenba, 14 Cal.2d 403, 429–432, 94 P.2d 569, 583, is to the contrary, for it was there held "that evidence which merely tends to show * * * the commission of other offenses is admissible * * * even though it falls short of proving the corpus delicti of such other offenses." In the Lisenba case it was decided that as the prosecution had "made a substantial showing tending to prove" the prior offense, the trial court properly admitted what were described as "simply evidentiary facts introduced for the purpose of being considered [by the jury], together with all of the other evidence in the case * * * doubtful and otherwise," in its determination of the ultimate fact. People v. Lisenba, supra. The majority opinion, in concluding that the testimony challenged by the appellant does not amount to "substantial evidence" that he committed the assault, ignores the settled rules of criminal procedure and adopts a theory different from that urged by Albertson.

It is undisputed that shortly after 10 o'clock on the night of August 30, 1941, Kmetz was set upon in front of his home and struck over the head with a pickax handle. The assailant then ran across a vacant lot east of the Kmetz home, entered a car parked on McDonnell Avenue, which then moved south, made a "U" turn to the north, and drove away "as fast as it could go" without any lights. Before the grand jury Mrs. Kmetz testified that just prior to the assault she noticed the parked car and that it looked like the automobile her "uncle" (appellant) drove. This testimony was read to her upon the trial to refresh her recollection which in the interim had become hazy and uncertain. She then testified that the car parked close to the Kmetz home immediately preceding the assault resembled the automobile owned by Albertson.

There is other evidence tending to connect Albertson with this attack. About 10:15 on the same evening, a car with one person in it failed to make a boulevard stop in the immediate neighborhood and was pursued by a police officer. After a chase of two miles, the driver of the rapidly fleeing car abandoned it. This automobile, registered in the name of Mrs. Albertson, was customarily driven by the appellant. In it was found, among other things, certain articles of wearing apparel belonging to Albertson.

Some time after 12 o'clock that night, the appellant, clad only in his underwear, was found by the police about three miles from the place where the abandoned automobile had been found. He then told the fantastic story narrated in detail in the majority opinion. It was the province of the jury to determine from all of the evidence concerning the attack upon Kmetz, including the testimony of the handwriting experts, that Albertson had written the "Crocker" postcard, whether appellant was the assailant. Had Kmetz named Albertson as the person who struck him with a club on the night of August 30th, there would be no question concerning the admissibility of testimony to that effect. As the record shows that Kmetz was unable to identify his assailant, the testimony from which it may very reasonably be inferred that Albertson was the attacker and, to divert suspicion from himself, fabricated his account of the meeting with "O'Connor" and "Crocker" and the other events of that night, was equally relevant. The fact that the attack was six weeks before the death of Kmetz affected the weight, but not the admissibility, of the evidence, and its purpose was not to prove Albertson guilty of the assault but to show a motive for the homicide. Certainly the evidence upon this

issue affords a substantial basis for an inference of motive.

As stated in 1 Wharton's Criminal Evidence 289, section 246, it is "always proper for the prosecution to offer evidence of motive, regardless of any collateral effect it may have in showing, or tending to show, the commission of another offense by the accused. An inquiry in this regard is often of great importance, particularly in cases of circumstantial evidence." And in People v. Argentos, 156 Cal. 720, 726, 106 P. 65, 67, this court declared: "In a case where the identity of a person who commits a crime is attempted to be proven by circumstantial evidence, such as in the case at bar, evidence of a motive on the part of a defendant charged is always a subject of proof, and the fact of motive particularly material. In proof of motive, the prosecution has a right to offer any testimony which reasonably and fairly has a tendency to establish it, and we are satisfied that the evidence which was admitted by the court, and of which appellant complains, was relevant to, and had a logical bearing upon the subject. What weight that evidence might have was a question for the jury, but that it was admissible, notwithstanding it showed the defendant was charged with some other offense than the one for which he was being tried, and though its tendency might have been to prejudice him in the minds of the jury, is not, under the authorities, open to question. People v. Sanders, 114 Cal. 216, 46 P. 153." See, also, People v. Soeder, 150 Cal. 12, 15, 87 P. 1016; People v. Wilson, 117 Cal. 688, 691, 49 P. 1054; 1 Wharton's Criminal Evidence 569, sec. 360, and authorities supra.

Taken as a whole the evidence points unerringly to Albertson as the person who, actuated by any one of several motives, conceived and carried out a thoroughly premeditated plan to kill the husband of Esther Dockham. The hand of Albertson is clearly seen in the preparation and mailing of the letter in the name of "The Herb Specialty Co." There can be no reasonable doubt whatever that the discarded box in which the vitamin pills he bought for Esther Dockham were marketed furnished the design as well as the material for the vehicle used to carry the poison to Kmetz.

The record shows that the appellant had a fair trial with full protection of his rights. Certainly no error is shown which, after an examination of the entire cause including the evidence, reasonably suggests that there has been a miscarriage of justice. Const. art. VI, sec. 4½.

For these reasons, in my opinion, the judgment and also the order denying a new trial should each be affirmed.

GIBSON, C. J., and CURTIS, J., concurred.

Rehearing denied; GIBSON, C. J., and CURTIS, J., dissenting.



62 Cal.App.2d 680

AMBROSE et al. v. ALIOTO.

Civ. No. 3142.

District Court of Appeal, Fourth District, California.

Jan. 31, 1944.

1. Appeal and error ⇐460(2)

An injunction which merely has effect of preserving the subject of the litigation in status quo is purely "prohibitory," and if it has the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative positions or rights of the parties at the time injunction was granted, it is "mandatory" as respects right to supersedeas on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction" and "Prohibitory Injunction".

2. Appeal and error ⇐460(2)

An injunction which compels a party affirmatively to surrender a position which he holds, and which upon the facts alleged by him he is entitled to hold, is "mandatory", as respects right to supersedeas on appeal.

3. Appeal and error ⇐460(2)

An order enjoining defendant from delivering fish to a packing company with which defendant had a contract, or to anyone other than another company, was "mandatory", and the perfection of an appeal from the order operated automatically to stay proceedings in lower court which was without jurisdiction to compel obedience to the decree pending appeal.

Application from Superior Court, San Diego County; Edward J. Kelly, Judge.

Application in supersedeas by Mary Alioto against Annie L. Ambrose and Joe Alioto to stay proceedings in the Superior Court of San Diego County in which petitioner was adjudged guilty of contempt in violating an injunction.

Writ granted.

Sloane & Steiner, of San Diego, for petitioner.

Gray, Cary, Ames & Driscoll, of San Diego, for respondents.

GRIFFIN, Justice.

Plaintiffs brought suit in the Superior Court of San Diego County for specific performance of a certain agreement entered into between them and defendant Mary Alioto with respect to a fishing vessel named Dependable, which was enrolled under the name of Mary Alioto, as owner. On September 24, 1943, judgment was entered in favor of plaintiffs. By the terms of the judgment defendant was required to execute a bill of sale conveying to plaintiff Annie L. Ambrose a one-half interest in the vessel, and to plaintiff Joe Alioto a one-tenth interest. The judgment further contained the following provision: "Now, Therefore, It Is Ordered, Adjudged And Decreed, that the defendant Mary Alioto and all persons under her control, at her direction or on her behalf, be and the said defendant and all such persons are hereby enjoined and restrained from delivering to Sun Harbor Packing Company, or to anyone other than Westgate Sea Products Co., any fish caught on any fishing voyage made by the vessel Dependable."

Neither Sun Harbor Packing Company nor Westgate Sea Products Co. was named as party plaintiff or defendant in the action. Notice of appeal from that judgment was filed October 1, 1943. At that time defendant executed the bills of sale above mentioned and deposited them with the clerk under the provisions of section 944 of the Code of Civil Procedure to abide the judgment of the appellate court. Due notice was given respecting the reporter's and clerk's transcripts.

It is alleged in the petition that the purpose of defendant in defending the action in the lower court and in prosecuting her appeal was to have her title in the Dependable quieted against the respondents; that the Sun Harbor Packing Company and Westgate Sea Products Co. are both canners of fish in the port of San Diego; that there are at least two other canners in that port and many others in the Los Angeles port; that the supply of raw fish is limited and there is competition among the canners to obtain catches from fishing vessels; that the prices paid for such fish by canners are governed by federal ceiling regulations and fish brings the same price from one as from another; that shortly prior to the commencement of this action defendant was in actual and exclusive control of the vessel and the only person appearing on the records of the United States Customs Office as entitled to management of it; that until May 6, 1943, Westgate Sea Products Co. held a contract for delivery of all catches of fish to such cannery, but such contract expired on that date and thereupon defendant, as such owner, contracted to deliver the catch of such vessel thereafter to Sun Harbor Packing Company, and during the pendency of such action she continued to make delivery to Sun Harbor Packing Company and desires that such delivery shall continue; that the master of the vessel at the time of the commencement of this action and ever since has been under standing orders to operate it in the fishing industry and to deliver all catches of fish to Sun Harbor Packing Company; that at the time of the filing of this action the vessel arrived in the port of San Diego with a load of fish and proceeded to deliver it to Sun Harbor Packing Company in fulfillment of such contract, but plaintiffs obtained a restraining order from the Superior Court enjoining her from delivering to Sun Harbor Packing Company or to anyone except Westgate Sea Products Co. more than 40 per cent of the fish caught on such voyage; that accordingly, 60 per cent was delivered to Westgate Sea Products Co. and 40 per cent to Sun Harbor Packing Company; that thereafter and prior to the trial of the cause the vessel returned to the port of San Diego with another load of fish and plaintiffs applied for a similar restraining order affecting such load of fish, but the court declined to issue the same, whereupon defendant delivered the full load of fish to Sun Harbor Packing Company, and ever since has continued to make such delivery in accordance with her agreement with said company; that at the time of rendition and entry of the judgment above mentioned the vessel De-

pendable was on the high seas engaged in its customary business of fishing for tuna and albacore pursuant to the orders of defendant and pursuant to agreement for delivery of its catch to Sun Harbor Packing Company; that at no time since the rendition and entry of said judgment has she made any change in those orders or in her agreement; that on the 12th of October, 1943, the vessel returned to its home port of San Diego with a load of fish, and, with the approval of the defendant, but without any affirmative action or direction on her part, delivered said fish to Sun Harbor Packing Company; that thereafter plaintiffs caused an order to be issued out of the Superior Court requiring defendant to appear on October 25th to show cause why she should not be punished for contempt by reason of such delivery; that she, through her attorneys, thereupon moved to quash such order on the ground that the court had no jurisdiction to hear the same or to punish her for contempt; that such motion was on October 25, 1943, heard by the trial judge who tried the original action and rendered the original judgment; that the judge thereupon denied the motion to quash and directed the defendant to appear before him on November 15, 1943, for the hearing of the contempt proceeding upon its merits. It is then alleged in paragraph IV that unless restrained by this court, the trial judge will proceed to try such issue of contempt and undertake to punish defendant for the alleged violation. It is then alleged that the defendant has complied with all provisions of the judgment which were not stayed by the appeal. It is claimed that plaintiffs and the court are seeking to invoke contempt proceedings to enforce a mandatory injunction on the judgment requiring her to deliver the fish caught by the vessel Dependable to Westgate Sea Products Co., and to none other, and that the trial court is without jurisdiction to compel obedience to that portion of such judgment.

Plaintiffs admit generally the above allegations, and allege that from May 6, 1938, up to and including July 27, 1943, all tuna caught by the vessel Dependable was delivered to Westgate Sea Products Co., and that no tuna caught by that vessel was delivered to Sun Harbor Packing Company, or to any other packing company; that on July 27, 1943, the vessel arrived in port with a load of fish and proceeded to take the same to the dock of the Sun Harbor Packing Company, but that before said fish could be delivered to that company plaintiffs obtained a restraining order enjoining defendant from delivering to Sun Harbor Packing Company or to anyone except Westgate Sea Products Company, more than 40 per cent of the fish caught on the voyage; and that therefore 60 per cent of the load of fish was delivered to Westgate Sea Products Co.

Plaintiffs admit the allegations of paragraph IV of the petition and allege that on November 15, 1943, the parties to this proceeding stipulated in open court that a hearing on the contempt proceeding might be continued until this court should have an opportunity to pass upon this petition. Plaintiffs admit that they and the Superior Court are seeking to invoke contempt proceedings to enforce the provisions of the judgment.

It is contended by petitioners herein that the judgment was mandatory in character and that it was therefore stayed by the appeal. Pomin v. Superior Court, 44 Cal. App.2d 206, 112 P.2d 17, and cases there cited. Whether an injunction or decree is prohibitory or mandatory in character is not always easy of determination and what may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory. Byington v. Superior Court, 14 Cal.2d 68, 70, 92 P.2d 896.

We therefore must analyze the effect of the quoted provision of the judgment to determine whether or not its provisions were or were not stayed pending the appeal.

We do not have before us the record on appeal in the original action and therefore do not endeavor to pass upon the propriety or correctness of the trial court's action in rendering the quoted portion of the judgment respecting the catch of fish and the subsequent delivery of it by means of the vessel Dependable. That question, no doubt, will be presented and considered on its merits at the proper time. The only question here to be decided is whether the judgment, as rendered, is mandatory or prohibitory in character.

[1, 2] An injunction or decree is purely prohibitory which merely has the effect of preserving the subject of the litigation in status quo, while, in general, an injunction or decree is mandatory if it has

the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted or the decree entered. Hence, if the injunction compels a party affirmatively to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory. Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am.St. Rep. 54; Mark v. Superior Court, 129 Cal. 1, 61 P. 436; Foster v. Superior Court, 115 Cal. 279, 47 P. 58; 14 Cal.Jur. p. 179, sec. 6. Plaintiffs cite many cases to this effect. Defendant concedes this to be the general rule. In the light of this rule we will therefore analyze the allegations admitted in the petition. It is stated that until May 6, 1943, Westgate Sea Products Co. held a contract with defendant to deliver all catches of fish to it and that such contract expired on that date. The record before us does not disclose that defendant was obligated to deliver fish to the Westgate Sea Products Co. thereafter under any contract. She was free to contract for the sale and delivery of fish from the vessel Dependable with any other packing company. The petition recites that as soon as the contract with Westgate Sea Products Co. expired defendant thereupon "contracted to deliver the catch of such vessel thereafter to Sun Harbor Packing Company", and that on July 27, 1943, she was in the process of making a delivery of fish under the contract when she was restrained, in part only, from so doing. A 40 per cent delivery was made to Sun Harbor Packing Company under permission of the court and plaintiffs apparently made no objection to such an order. The petition recites further that "during the pendency of such action she continued to make delivery to Sun Harbor Packing Company and desires that such delivery shall continue"; that prior to the trial she delivered a full load of fish to that same company after a restraining order had been refused; that when the judgment was entered the vessel was on the high seas engaged in its customary business of fishing pursuant to defendant's agreement to deliver more of its catch to Sun Harbor Packing Company; that no voluntary deliveries were being made or had been made to Westgate Sea Products Co. since defendant's contract was entered into between her and the Sun Harbor Packing Company.

[3] From these allegations it clearly appears that at the time the decree was entered or injunction granted, a contract had been made for delivery of the fish to the Sun Harbor Packing Company and that delivery had been and was being made in compliance therewith; that the judgment reciting that defendant be restrained from delivering to Sun Harbor Packing Company or to anyone other than Westgate Sea Products Co. is but another means of stating that defendant must cease delivering to Sun Harbor Packing Company and must deliver fish to Westgate Sea Products Co. The result and effect of the decree is not only mandatory in character but compels the performance of a substantive act and also contemplates a change in the relative position or rights of the parties which existed at the time the decree was entered. The terms of the decree under consideration being mandatory in effect, the perfection of the appeal operated to automatically stay proceedings in the lower court in reference thereto and the trial court was and is without jurisdiction to compel obedience to that portion of the decree. Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640; Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 114 P.2d 579; Smith v. Smith, 18 Cal.2d 462, 116 P.2d 3; Pomin v. Superior Court, supra; Clute v. Superior Court, supra; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Schwarz v. Superior Court, 111 Cal. 106, 113, 43 P. 580; Byington v. Superior Court, supra.

Writ granted as prayed for in the petition.

BARNARD, P. J., and MARKS, J., concur.

62 Cal.App.2d 450

BRADFORD et al. v. SOUTHERN CALIFORNIA PETROLEUM CORPORATION et al.

Civ. 3110.

District Court of Appeal, Fourth District, California.

Jan. 25, 1944.

Hearing Denied March 23, 1944.

1. Appeal and error ⇐1012(1)

A judgment based upon substantial evidence must be upheld, and it is insufficient upon appeal to demonstrate that judgment is against preponderance of evidence or that upon same evidence other persons would come to a different conclusion.

2. Contracts ⇐245(2)

Generally, all prior negotiations and stipulations concerning subject matter of contract are merged in contract when executed. Code Civ.Proc. § 1856.

3. Reformation of Instruments ⇐43

In broker's action to reform contract regarding acquisition of oil leases, broker had burden of proving that parties had intended that contract should provide for equal division of proceeds so as to constitute a joint venture, or that provisions of contract were otherwise inconsistent with parties' intentions. Civ.Code § 3399.

4. Reformation of Instruments ⇐45(2)

Evidence warranted judgment refusing reformation of contract between oil lease broker and oil company regarding acquisition of leases on ground that contract contained parties' agreement.

5. Reformation of Instruments ⇐46

The only finding necessary to support judgment denying reformation of contract was that its terms coincided with parties' agreement. Code Civ.Proc. § 1856.

6. Trial ⇐393(1)

The statute providing that copy of proposed findings shall be served on all parties at least five days before findings are signed by court is directory and not mandatory. Code Civ.Proc. § 634.

7. Trial ⇐393(1)

The signing of findings on fifth day after service did not impair validity of judgment subsequently entered, especially where motion for new trial presenting the question was denied. Code Civ.Proc. § 1856.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by W. G. Bradford and others against Southern California Petroleum Corporation and another to reform a contract relating to oil and gas leases. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, and Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for appellants.

Thos. Reynolds and Howard Painter, both of Los Angeles, and Roger R. Walch, of Hanford, for respondent Southern California Petroleum Corporation.

A. L. Weil, Martin J. Weil, by J. M. Jessen, all of Los Angeles, and John G. Covert, of Hanford, for respondent General Petroleum Corporation of California.

GRIFFIN, Justice.

This is an action for reformation of a contract. The contract sought to be reformed was entered into by and between the plaintiff W. G. Bradford and the defendant Southern California Petroleum Corporation, hereinafter referred to as "Southern". The plaintiff Johanna Bradford is the wife of W. G. Bradford. The plaintiff Republic Petroleum Company, hereinafter referred to as "Republic," is the successor in interest of the plaintiffs W. G. Bradford and Johanna Bradford. The defendant General Petroleum Corporation of California (hereinafter referred to as "General") is the assignee, with respect to certain oil leases, of the defendant Southern.

About 1932, Bradford entered into the business of independent oil lease broker. About 1939, he became interested in the Helm-Amerada area (the field which is involved in this action). He and one Goodrich obtained signatures of various landowners in the area on what purported to be options to lease the lands of such owners for oil. These instruments were designated "Contract and Agreement to Lease for Oil and Gas". These so-called options provided, among other things, that Bradford would assign them to a responsible oil company with sufficient finances to

carry out the terms of the oil leases. Practically all of the so-called options had been signed by the landowners prior to May 1, 1939. From May, 1939, to the latter part of June, 1940, Bradford unsuccessfully approached many persons and firms in an endeavor to sell his rights in the so-called options. In June, 1940, Bradford approached Southern with a view of selling these options to it. The matter was orally discussed between Bradford and the officers of Southern, and the latter advised Bradford of the conditions under which they would enter into the deal. Their oral understanding or agreement was evidenced by a letter memorandum dated June 28, 1940, directed to Bradford, which in substance recited that:

"The purpose of this letter is to set down in writing and to confirm our verbal agreement made this day regarding certain lands now under contract to be leased to you in Fresno and Kings counties (described by townships) * * *

"It is hereby understood and agreed that all acreage now under contract to you to be leased or additional lands which may be contracted for in the above-mentioned townships are to be leased to us as your nominee under said contract, subject to the following conditions of agreement between yourself and the Southern * * *

"We are to furnish the necessary expenses to you for traveling and incidental expenses necessary to you for these leases drawn and placed in escrow * * * We also agree to pay for all title charges involved and to make the payments necessary for lease rentals on all leases taken.

"It is understood and agreed that we are to be in full charge of the handling and disposal of all leases taken, at all times; that in consideration of your entering into this agreement, we are to pay you the sum of four thousand dollars ($4,000.00) * * *

"It is further understood and agreed that we are to divide on a fifty-fifty (50-50) basis all cash bonuses and overriding royalties received by us, when, as and if any of the leases involved are sold and assigned to other operators or operating companies, with this proviso, however, that we are first to receive the sum of four thousand dollars ($4,000.00) after it has been paid to you as consideration or whatever amount has been paid plus whatever expenses we have paid to you for your work in getting the leases executed before any 50-50 division of profits shall operate.

"It is further understood and agreed that on all leases involved in this agreement there must be at least a minimum of one-half of one per cent (1/2 of 1%) gross overriding royalty retained for the benefit of W. G. Bradford or his nominee. This one-half per cent (1/2%) gross overriding royalty shall be deducted from the total gross overriding royalty before a 50-50 division of overriding royalty shall take effect.

"It is further understood and agreed that at any time Southern * * * may select parcels of acreage to be held by them for their own account, and to be taken out of and away from the pooled acreage, provided, that they shall deliver to W. G. Bradford one-half of one per cent (1/2 of 1%) gross overriding royalty on such acreage withdrawn; and shall also allow him to select a like amount of acreage from the pooled acreage for his own account; it being understood and agreed that 1/2 of 1% gross overriding royalty is to be paid to Southern * * * on any leases so selected by him.

"It is further understood and agreed that in connection with the above paragraph, Southern * * * shall have an option, good for ninety (90) days, to buy any leases selected by W. G. Bradford, under the above-mentioned paragraph, paying him a consideration of five dollars ($5.00) per acre, plus two per cent (2%) gross overriding royalties * * *

"It is further agreed that this is a temporary memorandum letter of agreement, setting forth a rough outline of the terms and conditions of our understanding, and that in due course a proper form of contract shall be drawn and entered into by the parties concerned.

"If this letter sets forth the terms and conditions of the agreement as understood by you, kindly affix your signature on the carbon copy of this letter in the place provided. * * *

"(Signed) Southern California Petroleum Corporation,
"By Robert Shlaudeman,
"President.

"I hereby approve and accept the above letter of agreement, and also acknowledge receipt of the sum of five hundred dollars ($500.00) paid to me" on account.

"(Signed) W. G. Bradford."

The "formal contract" executed as of June 28, 1940, then provided in more elaborate terms, that:

"* * * Bradford did heretofore execute and enter into certain contracts with various owners of real property * * *

"Now, therefore, it is agreed as follows:

"1. Bradford does hereby assign * * * unto Southern * * * all of the contracts above described * * *

"2. Bradford further agrees that if he shall at any time within six (6) months from the date hereof execute any other contracts * * * Bradford will * * * assign * * * unto Southern * * * any and all such contracts * * *

"3. All leases executed * * * shall be executed by and between the respective landowners as lessors and Southern * * * as lessee * * *

"4. Bradford shall devote his time and attention exclusively to the work of securing and the execution of leases in favor of Southern * * *

"5. Southern * * * shall pay all reasonable traveling and other expenses of Bradford * * * and shall make payment of rentals under all leases * * *

"6. In consideration of the assignment of said contracts by Bradford to Southern * * * and of the services performed by Bradford hereunder, Southern * * * agrees to pay to Bradford the total sum of four thousand dollars * * *

"7. It is understood and agreed that all of said leases shall belong solely to Southern * * * and Southern * * * shall have the right to * * * develop, dispose of, or otherwise * * * surrender or abandon all or any of said leases in such manner and at such time or times and upon such terms and conditions as it shall in its sole discretion determine; provided that in any disposition of said leases there will be reserved and retained with respect to each lease a gross overriding royalty for the benefit of Bradford, or his nominee, of at least one half of one per cent (1/2 of 1%) of all oil, gas and other hydro-carbon substances produced, saved and sold from the premises covered thereby.

"8. If and when Southern * * * shall dispose of said leases, or any thereof, or any interest therein, and shall receive cash bonuses, and/or shall reserve overriding royalties in any such transactions, then Southern * * * shall be entitled out of such bonuses and/or royalties, to reimburse itself, first, in the amount of $4,000.00 representing the monies paid to Bradford * * * and second, in an amount equal to all of the escrow, title, traveling and other expenses paid out by Southern * * * in connection with obtaining said leases except rental monies; and after Southern * * * shall have been fully reimbursed as aforesaid, and after deducting the one half of one per cent (1/2 of 1%) gross overriding royalty interest of Bradford hereinabove provided for in paragraph 7 hereof, then all remaining cash bonuses and/or overriding royalties shall be divided equally between Bradford and Southern * * *

"9.(a) Anything herein notwithstanding, Southern * * * shall at any time or from time to time be entitled to select and designate for its own account and use any parcel or parcels of land covered by said leases, or any thereof, up to but not exceeding in area one-half (1/2) of the lands held under said leases. In such event the leases covering the lands so selected shall thenceforth be owned by and held, retained, used and/or disposed of for the account of Southern * * * and Bradford shall have no right to share in or receive any part of the cash bonuses, overriding royalties or other returns or avails received by Southern * * * with respect to the lands so selected and designated or the leases covering the same, excepting only that Bradford shall nevertheless receive with respect to any such lands said one-half of one per cent (1/2 of 1%) gross overriding royalty * * *" herein provided.

"(b) In the event that Southern * * * shall at any time make such selection and designation of lands for its own account, then Bradford shall forthwith in each case be entitled to select and designate for his own account and use lands covered by said leases of an area equivalent to those so selected by Southern * * *. In such event the lease or leases covering the lands so selected shall be assigned to and shall thenceforth be owned by and held * * * for the account of Bradford, and Bradford shall assume and be solely responsible for and shall protect and save Southern * * * harmless from all payments and obligations of the lessee thereunder, and Southern * * * shall have no right to share in or receive any part of the cash bonuses, overriding royalties or other returns or avails received by Bradford with respect to such lands so selected by him, and shall not be liable for any payments or obligations of the lessee therein, excepting only and provided that Southern * * * shall in each case receive and be

paid a gross overriding royalty of one-half of one per cent (1/2 of 1%) of all oil, gas and other hydrocarbon substances produced, saved and sold from such lands.

"(c) If Bradford shall select any lands for his own account as hereinabove provided in subparagraph (b), then it is understood and agreed that Southern * * * shall have, and Bradford does hereby grant to Southern * * * the exclusive right and option for a period of ninety (90) days after such selection and designation by Bradford, to purchase the lease or leases covering any and all lands so selected by Bradford at a price of five dollars ($5.00) for each acre of land, plus a gross overriding royalty to Bradford of two per cent (2%) of all of the oil, gas and other hydrocarbon substances produced, saved and sold from such lands. Such option shall be exercised by notice in writing to Bradford within said ninety (90) day period. * * *

"(d) Any selection and designation of lands by the respective parties hereto as provided for in this paragraph 9 shall be made by notice in writing * * *

"11. Nothing herein shall be construed to give Bradford any right, title or interest in or to any of said leases, or the leasehold estates thereby created, or the lands covered thereby, excepting only the leases which may be selected by Bradford for his own account as provided in paragraph 9 hereof, and excepting the royalties herein provided to go to Bradford; it being understood and agreed that Southern * * * is the sole owner of said leases, and Bradford's only right is to receive the payments and/or royalties herein provided for and to compel performance of this agreement. * * *

"14. This agreement is executed for the purpose of superseding, and it does supersede a temporary memorandum agreement heretofore executed by the parties hereto of even date herewith and this instrument constitutes and contains the entire agreement between said parties."

Pursuant to this understanding, Bradford did procure leases for Southern, and subsequently Southern, acting under the provisions of the contract, selected certain acreage for its own. Such selection was made in accordance with the provisions of the formal contract by a "Notice of Selection of Lands", dated 11/18/41. Thereafter, Southern sold some of this acreage to the defendant General. On October 31, 1941, a well was brought in on land in the immediate vicinity of the pooled acreage. About this time, Bradford sold and assigned his interest in the contract to Republic, after which the present action was instituted to reform the formal contract in accordance with the claimed first oral agreement and the letter memorandum agreement. After Southern had selected certain lands as above set forth Bradford failed to make any selection. On December 18, 1941, Southern served written notice on Bradford and Republic, calling their attention to the fact that Bradford was entitled, under the formal contract, forthwith to make selection for his own account, and advised him that unless he made his selection within a reasonable time after Southern's selection, Bradford's right of selection would expire. Under the terms of this notice Bradford was further advised that Southern intended to exercise its option to purchase lands which Bradford might select, as provided in the formal contract. This is a general picture of the facts of the case. Additional details will be brought out later in discussing the points raised on this appeal.

Section 3399 of the Civil Code provides three grounds for the reformation of contracts: (1) Fraud; (2) mutual mistake of the parties; and (3) a mistake of one party which the other at the time knew or suspected. The original complaint filed in this action on January 3, 1942, set forth only the third ground above mentioned. It was there alleged that Southern told Bradford, who it is alleged was inexperienced in business transactions and legal matters, that the formal contract contained a true statement of their oral agreement; that in fact it did not conform to the true agreement, and that Bradford signed the same under the mistaken belief that it did conform thereto, which mistake was known to Southern.

On May 25, 1942, more than five months later, plaintiffs, with leave of court, filed an amendment to the complaint which sets up a second cause of action. This cause of action likewise seeks reformation of the formal contract, but such reformation is sought not on the ground of unilateral mistake, but on the ground of fraud. Substantially the same facts are alleged in the amendment to the complaint as in the original complaint, but they are alleged in a different manner. At or about the conclusion of the trial, the plaintiffs chose to add one paragraph to the second cause

of action and they did so by an amendment which, for the first time, set forth the existence of a joint venture between Bradford and Southern with respect to all of the leases involved. The plaintiffs ask that the formal contract be reformed and then enforced as reformed, and that the plaintiffs be adjudged to be the owners of an undivided one-half interest in all the leases obtained through the efforts of Bradford, and that the assignments of the leases to defendant General Petroleum Corporation be set aside.

The main issue in the case is whether or not the plaintiffs, under the undisputed evidence, are entitled to a reformation of the formal contract as a matter of law.

The court found that it was not true that Bradford was inexperienced in business transactions or legal matters, but that on the contrary he had, since 1932, actively and solely engaged in, and was experienced in the business of dealing in oil and gas leases and was experienced in the legal aspects thereof; that all the transactions and dealings between the parties were not of such a nature as to establish a confidential or fiduciary relationship; that the letter memorandum was jointly prepared by Bradford and Southern and expressed their understanding in the negotiations which had preceded the preparation and execution of such memorandum; that pursuant to the terms of that letter memorandum and the oral understanding and agreement of the parties, the letter memorandum was delivered to Southern for the purpose of preparing the formal contract; that thereafter the formal contract was prepared and was read and discussed between the parties; that corrections, deletions and additions thereto were made at the request of both Bradford and Southern, and subsequent thereto a final draft was prepared and executed by them; that all the negotiations between the parties were fairly and honestly conducted and that the formal contract incorporated therein all of the terms and conditions of the letter memorandum; that the formal contract expressed the true intent, meaning and understanding of the parties thereto as to the terms, covenants and conditions of their said agreements; that at all times both parties to the agreements understood them; that the terms of the agreements embodied all of the preliminary negotiations had between the parties thereto, and no terms or covenants were omitted therefrom; that no misrepresentations as to the meaning of any of the terms or conditions in the agreements or the legal import thereof were made by defendant Southern; that no fraud was perpetrated on Bradford by defendant Southern; that after the execution of the agreements, and with full knowledge of the terms and conditions thereof and the legal import and true meaning thereof, and under the terms of the formal contract, Bradford negotiated for and procured the execution of certain oil and gas leases from landowners in the name of Southern as lessee; that at all times said leases stood in the name of defendant Southern except those certain leases purchased by defendant General; that at all times Bradford knew that Southern was holding itself out to be the sole and exclusive owner of the leases with full power to deal with them in such manner as defendant Southern should in its discretion determine, except as to the terms and conditions set forth in the formal contract; that during all of that period of time between the date of the execution of the written agreements and the date of filing the complaint, Bradford voiced no objection to the fact that the leases were in the name of Southern, and by his acts and conduct led others, and particularly defendant General, to believe that Southern was the sole and exclusive holder and owner of the leases; that by their acquiescence therein and by their failure to object thereto, they ratified and confirmed the conduct on the part of Southern; that General purchased from Southern certain of the leases for a consideration of $85,821, and other valuable consideration in good faith, without notice of any claims or purported claims on the part of plaintiffs; that notice of selection of land was duly and regularly given pursuant to the terms of the formal agreement, and that Southern was and now is the sole and exclusive owner of the leases set forth in the notice of selection of lands, free and clear of any claim of plaintiffs, save and except the overriding royalties reserved under the formal contract; that General was a bona fide purchaser for value of the leases and leasehold estates; that plaintiffs, by their acts and conduct, are estopped from asserting any claim or claims to any of the leases except the overriding royalties reserved; that plaintiffs have been guilty of laches by reason of their failure to assert their alleged claims within a reasonable period of time; that most of the allega-

tions of plaintiffs' complaint were found to be untrue; and that plaintiffs are not entitled to any judgment against the defendants or either of them. Judgment was entered accordingly.

Appellants now argue (1) that the formal contract does not conform to the true agreement of the parties as evidenced by their conversations and the letter memorandum, and that under such circumstances the court should have reformed the contract; (2) that General having acquired the leases from Southern with full knowledge of appellants' rights, holds title subject thereto; (3) that the agreement was one of common enterprise for the benefit of both parties in the nature of a joint venture and that defendants are required to account thereunder; and (4) that the evidence does not support the findings.

[1] We will first discuss the main question here involved as to whether the findings are supported by the evidence. We have examined the reporter's transcript of the testimony containing 2,158 pages in respect to the claimed oral conversation between Bradford and the officers of Southern. Bradford claimed that he did not intend to allow Southern to take one-half of the acreage in one selection and leave him to select only from the remainder; that it was his understanding that he was to have a one-half interest in the entire transaction, i. e., he told Southern "All I want is a 50-50 deal out of this and you draw up any kind of a paper you want to that effect and I will sign it". Defendants' agents' testimony contradicted that evidence, and one testified that "I did not hear anything about a 50-50 deal at all." The testimony in respect to the oral conversation was conflicting in many respects. Even plaintiffs, in their brief, agreed with this conclusion. It is there said: "The evidence introduced was conflicting as to conversations during the negotiations between Bradford and the officers of the Southern California Petroleum Corporation". In this respect we are bound by the time-honored rule governing our duty on appeal. It is not sufficient upon appeal to point out, or even demonstrate to this court, that the judgment is against the preponderance of the evidence, or that upon the same evidence other persons would come to a different conclusion. If there is any substantial evidence upon which the court could have found its judgment it must be upheld. Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 P. 82; City of San Diego v. Cuyamaca Water Co., 209 Cal. 152, 287 P. 496.

[2] The written letter memorandum specifically provided that Bradford accepted the terms of the agreement as therein set forth; that the letter was for the purpose of setting down in writing "and to confirm" the oral agreement. As a general rule, all prior negotiations and stipulations concerning the subject matter of a contract are considered merged therein when the contract is executed. Sec. 1856, Code Civ.Proc.; 6 Cal.Jur. p. 380, sec. 229.

[3, 4] The main question then is whether the formal contract contained the agreement of the parties on the subject matter. Most of the provisions of the letter memorandum were, in effect, contained in the formal agreement. It was agreed that the formal agreement might contain other provisions and might elaborate upon the general terms expressed in the letter memorandum. From a reading of the formal agreement it appears that the method of selection of the leases as adopted by Southern was permissible under its terms. The trial court was justified in holding that this was the method agreed upon although Bradford argued that it was his intention that the agreement would provide that the acreage was to be divided into 80-acre parcels and that Southern might make the first selection of 80 acres, Bradford the next, and so alternating in a "checker board" fashion until the entire selection was completed. The formal agreement, when considered as a whole, clearly disproves any contention that the venture was a joint venture in which Bradford was to participate on a 50-50 basis, even though the letter memorandum does refer to some 50-50 basis of division of cash bonuses and overriding royalties if and when the leases involved might be sold to other operators. The formal agreement itself provided that it was "executed for the purpose of superseding" the temporary letter memorandum and "contains the entire agreement between said parties". Bradford had ample opportunity to examine its provisions. As a matter of fact he suggested and made certain changes in it before it was signed. If Bradford had intended that it should have contained provisions for a 50-50 division of the proceeds realized under its operation so as to constitute a joint venture or that the provisions thereof were inconsistent with his intentions in other respects,

the burden was upon him to convince the trial court of those facts. We must presume that the trial court fully weighed and considered the evidence on this subject. We are unable to disturb the trial court's finding that the formal contract should not be reformed in accordance with plaintiffs' suggestions even though plaintiffs' suggested plan of selection and division of profits may now appear to be more equitable. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945. This was a question for the determination of the trier of facts. When the trial court finds on such a question, when there is substantial evidence to support it, this court, on appeal, may not weigh the evidence and substitute a different finding. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

[5] The only finding necessary to support the judgment denying the prayer for reformation of the contract was that its terms were identical with those that had been agreed upon by the parties, and other findings not necessary to the judgment or on immaterial issues need not be made. Burke v. Meyerstein, 94 Cal.App. 349, 271 P. 343; and the same case in 193 Cal. 105, 222 P. 810. The findings of the trial court are supported by the evidence.

This determination automatically disposes of the question whether the General acquired its leases from Southern in good faith, for a valuable consideration and without notice of plaintiffs' claim.

[6, 7] Finally, objection is made to the fact that the trial court signed defendants' proposed findings before the lapse of five full days after service, as provided in section 634 of the Code of Civil Procedure. The findings were served on December 18, 1942, and signed on December 23, 1942. In support of this objection plaintiffs cite In re Estate of Pala, 55 Cal.App.2d 647, 131 P.2d 593, 595, where it was said: "The court may not adopt or sign findings 'prior to the expiration of five days after such service' * * *." Construing that section before its amendment in 1933, its provisions have been held to be directory and not mandatory. Hammond Lumber Co. v. Henry, 87 Cal.App. 231, 261 P. 1027 [hearing denied by the Supreme Court]. See, also, Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147, in which case, construing that section subsequent to the 1933 amendment, the Supreme Court held that the provision directing a party to prepare findings and that a copy of the proposed findings should be served upon the parties at least five days before they are signed, is merely directory and not mandatory, and that the failure of a party to serve the opposite party with a copy of the proposed findings of fact and conclusions of law is not a statutory ground for setting aside or vacating a judgment. This question was presented to the trial court on a motion for new trial, which motion was denied. We therefore conclude that the signing of the findings on the fifth day did not prejudice plaintiffs nor impair the validity of the judgment subsequently entered.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



62 Cal.App.2d 590

PEOPLE v. BARROW.

Cr. 2269.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1944.

1. Larceny ⊂=65

Evidence sustained conviction of grand theft committed by taking a wallet from person of complaining witness during a scuffle.

2. Larceny ⊂=55

Testimony of complaining witness that he entered alley to investigate a groan, that defendant, who was in alley, put her arms around complaining witness, who pushed defendant away, and that thereafter complaining witness missed his wallet and immediately accused defendant of taking it, gave rise to inference that wallet was on person of complaining witness at the time and was taken by defendant without consent of complaining witness.

3. Criminal law ⊂=1119(1)

Record did not sustain claim, made for first time on appeal, that defendant was not represented by counsel at all stages of the proceeding.

4. Criminal law ⇐1171(1)

Where it appeared from entire record that result of trial would not have been different in event that particular question asked of police officer by district attorney which elicited an objectionable answer had not been asked, alleged misconduct of district attorney was not prejudicial.

5. Criminal law ⇐655(5)

Trial court's admonition to defense counsel to be fair to complaining witness in manner of asking questions because complaining witness was hard of hearing, and admonition to both counsel to proceed with proper decorum, did not constitute misconduct.

6. Criminal law ⇐699

It is duty of trial judge to maintain decorum during trial and to see that questions propounded to a witness are so asked that witness can hear and understand them.

7. Witnesses ⇐404

Where defendant testified that she had not subsequently seen man who was with her at time of her arrest and an officer established identity of such man, testimony of another officer that man identified was in court during defendant's preliminary hearing and was with defendant at civic center at a later date was properly admitted.

8. Witnesses ⇐404

Where defendant testified that she had not subsequently seen man who was with her at time of her arrest and officer testified that such man was in court during defendant's preliminary hearing, question of whether defendant would have seen man in courtroom went to weight rather than competency of impeaching testimony.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Arterio Barrow was convicted of grand theft, and, from judgment and from order denying motion for new trial, she appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant, a colored woman, was convicted upon a trial by jury of the crime of grand theft and was sentenced to imprisonment in the California Institution for Women at Tehachapi. She appeals from the judgment and from the order denying her motion for a new trial.

On this appeal, defendant makes several contentions, among which is the claim that the evidence was insufficient to support the judgment. It will therefore be necessary to set forth the evidence upon which the prosecution relied to show that defendant had stolen the wallet of the complaining witness.

The complaining witness, a garage man, had attended the Fox Theatre in San Francisco on the evening in question. After leaving the theatre around 10 o'clock he walked up McAllister Street to a point near Gough Street. As he passed Latham's Storage House he heard a noise or groan coming from the entrance way. He went into the entrance way, which was dark, and there found the defendant. He testified: "She put her arms around me, and her arms came down back of me, around my back. I thought it was sort of funny so I pushed her away. * * * Then I thought it was rather funny that she would do that. * * * I was standing over there, and I started to walk out. I felt for my wallet. Right away I saw my wallet was gone and I grabbed her by the shoulders and I yelled, 'You have got my wallet'. And I pulled her out on the sidewalk. * * * she said she never had it, when I pulled her out on the sidewalk. And so I yelled, and there was a colored gentleman on the corner that came running down. And I did not know what it was. He yelled out; he said, 'What is going on here?' * * * I let her go and she went behind him." He further testified that he was carrying his wallet in his right hip pocket. The colored man did not speak to defendant and after defendant had left, the colored man told the complaining witness that he did not know the defendant. The complaining witness followed defendant down McAllister Street and then stopped at a store to telephone the police. He abandoned this idea as he feared he would lose sight of defendant. He again located defendant on Turk Street, where he found her in company of the same colored man. He then ran to a police station on Ellis Street and returned to the vicinity

with the police in a police car. Defendant and the same colored man were then found at the corner of Ellis and Gough Streets and were taken from there to the police station. A search of these parties did not result in the finding of the wallet. The police therefore searched the entrance way of Latham's Storage House but failed to find the wallet. On the following morning at about 4 a. m., the wallet was found by a fifteen year old boy while delivering papers. As the boy raised a hanging "No Parking" sign, attached to the doors in the entrance way of Latham's Storage House, for the purpose of inserting the morning paper in the mail slot, the wallet dropped to the floor of the entrance way. The wallet contained identifying papers as well as money and the boy returned the wallet and contents to the complaining witness on the same day.

Defendant's testimony concerning the events of the evening was quite different. She testified: "Well, I stopped in a doorway for private reasons, and just as I went to get up this white man walked in on me. And I jumped up because he frightened me, it happened so sudden. So he says 'Don't be afraid, I just want to spend some money with you'. I said, 'You don't want to spend any money with me'. Then he offered me five dollars to be with him. I said, 'No, I don't want any of your five dollars or you either'. And he grabbed me and I wrassled with him. He got me by the arms as though he was going to force me to restrain. And I grappled with him. I got away from him and I screamed, and then he fled, and I went on about my business." She denied taking the wallet and denied that the colored man came up while she was there. She testified, however, that the colored man, who was with her at the time of arrest, had met her about half a block from the place of her arrest and that she was talking to him about her arthritis at the time of the arrest. She denied that she had previously known the colored man or his name and denied having seen him after the night of her arrest. Other evidence showed, however, that the same colored man had been in court on both days of her preliminary hearing and that he and defendant had been seen together at the Civic Center on a later occasion.

[1, 2] It was the theory of the prosecution that defendant and the colored man had cooperated in planning the commission of the offense; that defendant had attracted the complaining witness by her groans into the dark entrance way for the pose of consummating the plan; that defendant had taken the wallet from the hip pocket of the complaining witness when she had her arms around his back; and that she had concealed the wallet under the hanging sign on the door during the confusion which followed the taking. While there was a conflict in the testimony, the jury was entitled to disbelieve the unconvincing story told by defendant and to believe the testimony of the complaining witness. There can be no doubt concerning the sufficiency of the evidence given by the complaining witness to sustain the judgment. Defendant claims that there was no evidence to show that the complaining witness had his wallet on his person at the time he entered the entrance way and further claims that there was no evidence to show that the wallet was taken without the consent of the complaining witness. Assuming without deciding that there was no direct evidence on the subjects to which these claims relate, the only reasonable inference to be drawn from the complaining witness' testimony was that the wallet was on his person at the time and was taken by defendant without his consent.

[3] It is also contended that "defendant was not represented by counsel at all stages of the proceedings". The record discloses that defendant's attorney of record was Mr. Hennessy. At the opening of the trial, Mr. Coghlan appeared and stated, "Mr. Hennessy asked me to appear for him and select the jury". After the selection of the jury, Mr. Coghlan stated: "I will have to remain in this case until Mr. Hennessy comes. I don't want to delay it." The record does not definitely disclose the time of Mr. Hennessy's arrival, but it shows that objections were made by both Mr. Hennessy and Mr. Coghlan on the direct examination of the complaining witness, who was the first witness called to the stand. The cross-examination of the complaining witness, which started at the opening of the afternoon session, was admittedly conducted by Mr. Hennessy who represented defendant throughout all subsequent proceedings. No claim was made in the trial court that defendant had not been represented by counsel at all times and the record does not sustain the claim now made on this appeal.

Defendant further contends that there was prejudicial misconduct on the part of

defendant's counsel, on the part of the district attorney and on the part of the trial court. A reading of the record discloses the possibility that there were some side remarks of counsel on both sides which were not heard by the court reporter and therefore do not appear in the record. Without any apparent provocation, Mr. Hennessy, counsel for defendant, said at one point: "I will slap you in the nose if you call me any names, God damn you." There is nothing to show to whom this remark was addressed, but at another point counsel for defendant stated that the district attorney was "calling me names in the courtroom". While the above statement on the part of defendant's counsel is to be condemned, there is no showing that it was prejudicial and no citation of any authority to show that defendant may complain on appeal of such a remark by her own counsel. We therefore pass the point concerning the alleged prejudicial misconduct of counsel for defendant.

[4] The only claim of prejudicial misconduct on the part of the district attorney is based upon the asking of a question of a police officer concerning a conversation with defendant. The district attorney merely asked the police officer to state a conversation had with defendant on the morning following her arrest. The officer started his answer by saying: "I asked her what her name was and I asked her about the different arrests that she had down in Texas." The trial court promptly sustained an objection and admonished the jury to disregard the statement. The district attorney reframed his question so as to limit the answer to the conversation "about this case in question" and the conversation, as thus limited, was given without objection. It may well be, as contended by defendant, that the district attorney is chargeable with the answer of a witness, containing objectionable matter, even if the question which brought forth such answer was asked in good faith. From a reading of the entire record, including the prompt admonition given to the jury by the trial court, it does not appear probable that the result of the trial would have been different in the event that the question had not been asked or the objectionable portion of the answer had not been given. We are therefore of the opinion that any alleged misconduct on the part of the district attorney was not prejudicial.

[5, 6] The alleged misconduct on the part of the trial court arose out of statements made to counsel by the trial court. It appears that the complaining witness was hard of hearing. At one point in the cross-examination of the complaining witness, the trial court said to counsel for defendant: "Now, the way you dropped your voice there, he doesn't know what you asked him, I don't think. Be fair. He is hard of hearing." At another point, the district attorney sought to clear up the testimony of the complaining witness and asked the witness if his testimony was as indicated by the district attorney in the question. The witness said: "That is right". Counsel for defendant said: "That is not his testimony." The trial court then said: "I am sure he doesn't understand because it is contrary to his testimony." During certain acrimonious discussions engaged in by counsel, the trial court referred to their actions as "stage play", cautioned counsel to desist and told them they would have to proceed with the trial with proper decorum and could settle their differences outside the courtroom. We find nothing in any of the challenged statements indicating misconduct on the part of the trial court. It was the duty of the trial court to maintain decorum during the trial and it was the duty of the trial court to see that questions propounded to the complaining witness were asked in such manner that the witness might hear and understand them. We do not believe that the trial court overstepped the bounds of propriety in performing these duties. It is interesting to note that on the only occasion when counsel were in apparent disagreement concerning the testimony of the complaining witness, the trial court's statement was in accord with the version of the testimony as stated by counsel for defendant.

[7, 8] Finally defendant contends that the trial court committed prejudicial error in admitting certain testimony offered for the purpose of impeaching defendant. We find no merit in this contention. Defendant had testified that she had not subsequently seen the colored man who was with her at the time of her arrest. The testimony upon which the claim of error is based is the testimony of Officer Iredale to the effect that a colored man by the name of Darnell was seen by him in the courtroom on both days during the preliminary

hearing of defendant and was seen by him with defendant at the Civic Center at a later date. Defendant apparently makes two points: First, that it did not appear that Darnell was the colored man who was with defendant at the time of the arrest, and second, that the mere presence of Darnell in the courtroom on two occasions did not prove that defendant had seen him on those occasions. The identity of Darnell as the man who was with defendant at the time of her arrest was established by the testimony of another officer and the question of whether defendant would have seen Darnell upon his appearances in the courtroom was a question affecting the weight rather than the competency of the portion of Officer Iredale's testimony relating to such appearances.

The judgment and order denying defendant's motion for new trial are affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.



62 Cal.App.2d 445

FAY et al. v. CRAGS LAND CO. et al.

Civ. No. 14214.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1944.

1. Judgment ⇐572(2)

If in first action a demurrer is sustained to complaint because of omissions of essential allegations, and these allegations are supplied in second action, judgment is not a bar to second action.

2. Judgment ⇐572(2)

If in first action, a demurrer is sustained to the complaint, defects which are merely technical or formal may be supplied in second action without encountering defense of res judicata.

3. Judgment ⇐572(2)

If in first action a demurrer is sustained to the complaint, and essential allegations thereof are substantially the same in second action, judgment bars prosecution of second action, irrespective of whether judgment is correct.

4. Judgment ⇐585(2)

Where objection to introduction of evidence on ground that stockholders' first derivative complaint did not state a cause of action was sustained, and judgment was for defendants, and there was no substantial difference between allegations of stockholders' first and second derivative complaints, judgment was res judicata of stockholders' right to maintain second complaint.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Stockholders' derivative action by Kenyon Tudor Fay and others against the Crags Land Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Lorrin Andrews, of Los Angeles, for appellants.

Murphey & Davis, Walter E. Bennett, Meserve, Mumper & Hughes, E. A. Meserve, and Kenneth E. Grant, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Two actions were commenced by the plaintiffs against the defendants. At the trial of the first action defendants objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the objection and entered judgment in favor of defendants. This judgment was entered on December 4, 1940. Plaintiffs appealed but thereafter dismissed the appeal and commenced the present action on August 25, 1941. At the commencement of the trial of the present action defendants asked the court to first pass upon the special defenses presented, the plea of res judicata, the alleged bar of the statute of limitations, and the claim that, the action being derivative, plaintiffs did not take the steps necessary to enable them to maintain the action. The court granted the request of defendants and in support of the plea of res judicata the judgment roll in the previous action was introduced in evidence. After discussion by counsel the court announced that judgment would be rendered for defendants upon grounds then stated. Thereafter a judgment in writing was signed by the court

and filed in which it is set forth: "After due consideration, the court announced from the bench that he would find, First, that the plaintiffs, as stockholders of the Crags Land Company, had no right to bring, prosecute or maintain this action; Second, that the judgment in the previous action between same parties and numbered 446858, was an adjudication of all the material facts set forth in plaintiffs' complaint in this action, and on which the plaintiffs must recover if at all, and that therefore, the said judgment was and is a complete bar to the further prosecution or maintenance of this action; Third, that the action is barred by the provisions of subdivision 4 of section 338 and the provisions of section 359, both of the Code of Civil Procedure of the State of California; and, Fourth, that the complaint does not state facts sufficient to constitute a cause of action: And that judgment will be against the plaintiffs and in favor of the defendants. Thereupon findings were waived by all parties, plaintiff and defendants." We have concluded that the ruling of the court on the issue of res judicata is correct. Therefore it will be unnecessary to discuss the other grounds mentioned by the trial court.

According to the allegations of the complaint plaintiffs are the owners of one share of the capital stock of defendant Crags Land Company, a corporation, which they obtained by a decree of distribution in a probate proceeding. Of the original 60 shares of stock in the corporation only 29 remain outstanding. It is alleged that the Land Company which was incorporated in 1910, is the owner of 2300 acres of land of the value of more than $200,000 and that for the purpose of enhancing the value and attractiveness of this acreage the Land Company built a community club house and permitted defendant Crags Country Club to use about 40 acres of this land; that the stockholders of the Club corporation failed and neglected to support the Club and that the directors of the Land Company assessed the stockholders of the Land Company for the use and benefit of the Club corporation; that the individual defendants as directors of the Land Company have failed to operate the company for the benefit of the Land Company in compliance with its corporate purposes; that they have assessed the stockholders of the Land Company in a sum greater than $100,000, the assessments being $400 per year per share, for the benefit of the Club corporation and have loaned to the Club corporation the sum of $25,000, although they knew that the Club corporation did not have assets and revenue with which to repay the loan; that the Land Company was caused to execute purported leases of land to three directors of the Land Company for the term of 99 years at the stipulated rental of $1 per year; that the Land Company was organized to deal for profit in real estate but that for many years the affairs of the corporation have been allowed to remain dormant; that the affairs of the Land Company through a conspiracy on the part of the individual defendants have been conducted for the benefit of the Club corporation and for the benefit of the individual defendants and contrary to the interest of the Land Company; that the assessments were not legally made; that in 1937 the individual defendants fraudulently reported to divers stockholders that it was necessary to the proper conduct of the business of the Land Company to amend its articles so that assessments could be legally made but that the consent to the amendment of the by-laws was not signed by two-thirds of the stockholders then actually entitled to vote; that at all times since 1929 the individual defendants in pursuance of their conspiracy controlled the Land Company and caused and permitted its officers to fail to keep proper records or to make any reports or accountings; that plaintiffs did not have access to the records of the company and did not learn until June or July of 1939 of the conditions set forth in the complaint.

Plaintiffs assert that the action is a "derivative suit on behalf of the corporation which is unable to take independent action because the corporation is alleged to be dominated by the individual defendants". They seek an accounting against the individual defendants for operating the Land Company for the benefit of the Country Club and for the benefit of the individual defendants. They also seek an injunction against further assessments of stock and ask that a receiver be appointed for the property of the corporation.

[1-3] The judgment in the first action was entered after an objection to the introduction of any evidence on behalf of plaintiffs was sustained. The defense of res judicata raised upon the filing of the second action presents to the court the same issue that would be presented if a general demurrer had been sustained in the first action and is to be governed by the same

legal principles. If in a first action a demurrer is sustained because of the omissions of essential allegations and these allegations are supplied in a second action the judgment in the first action is not a bar to the second. Likewise, defects which are merely technical or formal may be supplied in the second action without encountering the defense of res judicata. But if the essential allegations are substantially the same in both actions the judgment in the first action effectively bars the prosecution of the second action. See v. Joughin, 18 Cal.2d 603, 606, 116 P.2d 777. And this is true whether the judgment in the first action was correct or erroneous.

An examination of the complaints filed by plaintiffs in the two actions discloses that there is no substantial difference between the allegations in the first complaint and the allegations in the second complaint. Both of the complaints contain allegations concerning matters leading to the specific charges of fraud and misfeasance respecting: the incorporation of the Crags Land Company; the purposes of its incorporation; the incorporation of Crags Country Club; the purchase of the real property by the Land Company; the improvement of a part of the real property with a club house, swimming pool, tennis court, etc.; the lease of the improved part to the Country Club for a long term of years; the failure of the Land Company to pay dividends or earn a profit; the insolvency of the Country Club; the charge that its sole source of income is from membership dues; the futility of a demand upon the board of directors to take action to correct the alleged abuses; the ownership by plaintiffs of a share of stock in the Land Company; the failure of plaintiffs to discover the facts until an investigation of the public and company records was made in 1939; and charges to the effect that each defendant participated in the acts of fraud and misfeasance of which complaint is made. In each complaint it is specifically alleged that defendants expended funds of the Land Company for the benefit of the Country Club; that they failed to collect rentals from the Country Club; improperly levied assessments on stock of the Land Company and expended the proceeds on the Country Club; leased acreage to three individual defendants at a nominal and insufficient rental; improperly permitted the Land Company to become indebted in the sum of $25,000 and depreciated the value of plaintiffs' stock by fraudulent acts. Plaintiffs seek the same relief in both actions.

In the complaint in the first action plaintiffs alleged on information and belief that the individual defendants "have been directors of said Company and have, during their term in office, acquiesced" in the various acts which are set forth as constituting a cause of action; that the "said defendants in their capacity as directors" have failed in the discharge of various duties specifically mentioned; that said "directors" failed to act in good faith and to the best interest of the stockholders. In the second action plaintiffs allege that the individual defendants about the year 1929 conspired to take over and maintain control of the Land Company and to administer its affairs in the interest and benefit of themselves and the Country Club without regard to the corporate purposes of the Land Company; that in pursuance of the conspiracy defendants dominated the board of directors of the Land Company by the election of a majority of the board, consisting of the individual defendants or others who had agreed to act only in the interest of the individual defendants and the Country Club; that the individual defendants, while uniting with other conspirators, took no steps to rectify the conditions mentioned in the complaint but on the contrary ratified and approved the acts of which complaint is made.

[4] We are satisfied that there is no substantial difference between the allegations of the two complaints. The gravamen of both complaints is fraud on the part of defendants. Conspiracy is directly charged in both complaints, and the same acts are specifically set forth as constituting the fraud, and in both complaints the same relief is sought. The allegation in the second complaint that the individual defendants, in addition to their acts as members of the board of directors conspired to and did dominate and control the board of directors and ratified the alleged unlawful acts of the board, does not substantially alter the charges made in the first complaint. If the first complaint failed to state a cause of action the additions inserted in the second complaint did not give vitality to plaintiffs' charges. The court did not err in sustaining the defense of res judicata.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

EMPIRE STAR MINES CO., Limited, v. BUTLER et al.

Civ. 12409.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1944.

Rehearing Denied Feb. 25, 1944.

Hearing Denied March 23, 1944.

1. Appeal and error ⇐901

Appellant has burden of showing that challenged finding of fact is without any substantial support in record, and it is not enough that trial court, on evidence before it, could have decided otherwise.

2. Mines and minerals ⇐123

Where water diverted by defendant by artificial means into plaintiff's workings on mineral vein of disputed ownership ultimately passed into workings which unquestionably were on plaintiff's vein, plaintiff was entitled to damages to compensate for expense of pumping out such water.

3. Mines and minerals ⇐31(1), 32

Under federal mining patents, locator acquires an extralateral right to follow a mineral vein which apexes on his location beyond his own surface sidelines beneath other land, and, in event of an intersection of veins, prior locator has prior rights. 30 U.S.C.A. §§ 26, 41.

4. Mines and minerals ⇐31(1)

The extralateral right of a locator to follow a mineral vein which apexes on his location beyond his own surface sidelines beneath other land does not exist in townsite lots which are held under nonmineral townsite patents even though original location of vein is outside townsite. 30 U.S.C.A. § 26.

5. Mines and minerals ⇐83

Under agreement between two mine owners creating extralateral rights between themselves under townsite property as would exist under federal mining patents outside townsite property, each party was entitled to follow his vein below an intersection, notwithstanding that there might be an intersection in which one vein could not be visibly traced through another. 30 U.S.C.A. §§ 26, 41.

6. Mines and minerals ⇐83

Under agreement between two mine owners creating extralateral rights between themselves under townsite property as would exist under federal mining patents, where there is a junction of veins being mined by each owner, ownership of single vein below junction carries with it ownership in forks into which vein may later divide. 30 U.S.C.A. §§ 26, 41.

7. Mines and minerals ⇐83

The use of phrase "parts of veins", in contract between mine owners by which first mine owner granted to second mine owner all veins and parts of veins having their apexes within certain boundaries under townsite lot, did not disclose intent to alter statutory scheme which parties were attempting to follow ordinarily applicable to property outside townsite lots. 30 U.S.C.A. §§ 26, 41.

See Words and Phrases, Permanent Edition, for all other definitions of "Parts of Veins".

8. Mines and minerals ⇐32

In determining meaning of word "intersection", as used in statute giving first locator the intersecting area in event of an intersection of mineral veins, definition in Glossary of Bureau of Mines is entitled to consideration but is not conclusive. 30 U.S.C.A. § 41.

See Words and Phrases, Permanent Edition, for all other definitions of "Intersection".

9. Mines and minerals ⇐83

The word "intersection", as used in contract between mine owners founded on federal statute giving first locator intersecting area in event of an intersection of mineral veins, did not contemplate that tracing through was essential to show an intersection, notwithstanding that the word is often used to describe a geological process by which one vein cuts across another of earlier formation. 30 U.S.C.A. §§ 26, 41.

10. Mines and minerals ⇐32

Whether an "intersection" of mineral veins or a "junction" exists must be determined by strike and dip and other physical characteristics.

"Dip" is broadly defined as the downward course of a vein, the direction or inclination towards the depth; while "strike", at right angles to the dip, is used

to designate the longitudinal or horizontal course of a vein.

See Words and Phrases, Permanent Edition, for all other definitions of "Dip", "Junction" and "Strike".

11. Mines and minerals ⇐83

Where plaintiff's mineral vein and defendant's vein came together under plaintiff's surface property, but adjudication of ownership went beyond limits of such surface property and plaintiff made no showing of ownership of other lands involved and set out affirmatively to show that a junction as distinguished from an intersection of the veins existed, burden of proof was on plaintiff.

12. Mines and minerals ⇐38(18)

Evidence, including testimony as to physical conditions, winzes, stopes, and different strikes and drifts in general area where plaintiff's and defendants' mineral veins met, sustained finding that there was a junction rather than an intersection of veins and that plaintiff, as prior locator, had ownership of single vein continuing from point of junction. 30 U.S.C.A. § 41.

A "drift" is a horizontal mine passageway driven on or parallel to the course of a vein. A "winze" is a vertical or steeply inclined passageway driven to connect one mine working with another. A "raise" is a passageway driven from a lower level to a higher level. A "stope" is an excavation formed by mining ore.

See Words and Phrases, Permanent Edition, for all other definitions of "Drift", "Raise", "Stope" and "Winze".

13. Evidence ⇐265(13)

Positive, direct, and unequivocal testimony on a particular issue overcame inference that could be drawn from alleged admission contained in equivocal testimony of one of the litigants.

14. Mines and minerals ⇐38(18)

Where plaintiff and defendant disputed ownership of principal mineral vein continuing from point of juncture of their respective veins, correlation of characteristics of productive disputed vein with productive areas of plaintiff's vein over a wide extent and with productive area of plaintiff's vein near place of meeting were properly considered by trial court as well as testimony of plaintiff's witnesses who had participated in mining operations on disputed vein and in vicinity of rake of encounter.

15. Appeal and error ⇐949

In action to determine ownership of a disputed mineral vein from point of juncture of plaintiff's and defendants' respective veins, questions as to extent to which defendant should be permitted to examine plaintiff's workings, and as to whether plaintiff refused to permit inspection to extent directed by court's orders, were matters for trial court, the decision of which could not be disturbed in absence of showing of abuse of discretion.

16. Mines and minerals ⇐38(13)

Where both plaintiff and defendants claimed ownership of disputed mineral vein in their respective pleadings, defendants could not use their admission that they committed a trespass against plaintiff by artificially inducing water into workings which were clearly plaintiff's as well as into disputed vein as a basis for contention that determination of ownership of disputed vein was not necessary.

17. Mines and minerals ⇐38(13)

In action to determine ownership of disputed mineral vein, pleadings *held* to require adjudication of title to portions of disputed vein lying outside surface area owned by plaintiffs.

18. Mines and minerals ⇐38(24)

Finding that defendants' mineral vein formed a junction with plaintiff's vein and that below line of junction only vein existing was plaintiff's vein, when construed with other findings, was not objectionable as determining that whenever any vein owned by defendants may meet plaintiff's vein or its branches plaintiff is owner of all branches below point of meeting.

19. Evidence ⇐265(7)

Where plaintiff admitted that certain of plaintiff's mine workings were on defendants' vein, findings and judgment declaring such workings to be on plaintiff's vein were required to be modified to reflect plaintiff's admission.

20. Appeal and error ⇐1039(2)

A judgment will not be reversed because of uncertainty in complaint, which was ground for special demurrer, where issues were agreed upon when trial commenced and defendant was not prejudiced by uncertainty.

21. Appeal and error ⇐1011(1)

Conflicting evidence, as to whether defendants knew or should have known that opening into which drill holes from defendants' mine penetrated was part of plaintiff's mine and that water discharged artificially into such drill holes would flood plaintiff's workings, was for trial court.

22. Mines and minerals ⇐125

Evidence that, as soon as plaintiff plugged one hole through which defendants discharged water into plaintiff's mine, defendants drilled another and continued to discharge water into plaintiff's mine, authorized injunction against future trespasses.

23. Injunction ⇐48

An injunction may be granted against repeated or continuous trespasses, and property owner will not be relegated to successive suits for damages.

24. Mines and minerals ⇐125

The fact that defendants ceased to deliver water from defendants' mine into plaintiff's mine while a temporary injunction against such conduct continued in effect was not ground for denying an injunction.

25. Injunction ⇐189

Court, in its discretion, may enjoin defeated litigant from continuing to perform acts found to be wrongful so as to give successful litigant reasonable repose from future unnecessary litigation.

26. Mines and minerals ⇐125

Decree enjoining defendant from so conducting his mining operations as to break into plaintiff's workings, which were admittedly on defendants' vein, was improper.

27. Adjoining landowners ⇐3

At common law, generally a landowner was entitled to have his soil remain in its natural position without being caused to fall away by reason of excavations or other improvements on neighboring land.

28. Adjoining landowners ⇐3
Mines and minerals ⇐122

Where one owns surface of land and another the subjacent land or minerals therein, owner of surface is entitled to have it remain in its natural condition without any subsidence by reason of withdrawal of land or minerals thereunder by subjacent owners.

29. Adjoining landowners ⇐3
Injunction ⇐46

At common law, violation of rights of lateral and subjacent support gave rise to an action for damages which ordinarily did not accrue until a subsidence took place, although occasionally a right to injunctive relief against further excavation was recognized after some damage resulted.

30. Mines and minerals ⇐121

A mine owner may follow his vein to limit of his ownership, notwithstanding that in so doing he will break into workings of another mine.

31. Mines and minerals ⇐121

A mine owner, who has first opened up his mine to limits of his boundary, has no right to require adjoining owner to leave a natural barrier by stopping short of common boundary.

32. Mines and minerals ⇐125

In injunction action between mine owners, plaintiff's showing of special injury was insufficient to justify decree requiring defendants to leave a natural barrier between defendants' workings and plaintiff's workings.

33. Mines and minerals ⇐123

A lower mine owner cannot complain of water which flows into lower mine naturally as result of operations in upper mine conducted in a careful manner, and lower mine owner's loss, if any, is "damnum absque injuria".

See Words and Phrases, Permanent Edition, for all other definitions of "Damnum Absque Injuria".

34. Appeal and error ⇐781(4)

Where ownership of disputed vein was a principal issue in trial of injunction suit between mine owners, plaintiff was entitled to a decision on such issue, notwithstanding that facts arising pending appeal from trial court's judgment removed immediate need for injunctive relief.

35. Appeal and error ⇐781(4)

Where injunction suit between mine owners was fully tried and plaintiff was found to be entitled to damages, an adjudication of ownership of a disputed vein and an injunction restraining defendant

from artificially introducing water into plaintiff's mine, fact that, pending appeal, defendants' mine was closed and filled with water and reopening was prohibited under War Production Board Order, did not make injunction issue "moot", and whole case would be disposed of at once.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Issue".

Appeal from Superior Court, Nevada County; Warren Steel, Judge.

Action by Empire Star Mines Company, Limited, against Cooley Butler and others, to restrain defendants from artificially introducing water into that portion of plaintiff's mine located below the workings of defendants' mine, for damages and for other relief. Judgment for plaintiff, and defendants Cooley Butler and Wallace Butler appeal.

Affirmed in part and reversed in part.

Pierce Butler, Jr., of St. Paul, Minn., G. A. Bisbee, of Los Angeles, and H. Ward Sheldon, of Nevada City, for appellants.

Robert M. Searls and William E. Colby, both of San Francisco, and Frank G. Finnegan, of Nevada City, for respondent.

PETERS, Presiding Justice.

Plaintiff and defendant Cooley Butler each operate gold mines in the Grass Valley mining district of Nevada County. Plaintiff instituted this action against Cooley Butler, Wallace Butler and Fred Kalenborn for injunctive relief and damages. The last two named persons were joined as defendants as employees of Cooley Butler. The action was dismissed as to Fred Kalenborn. The theory of the complaint was that defendants had drilled holes from their mine through which water was artificially and wrongfully introduced into that portion of the workings of plaintiff's mine which is located below the workings of defendants. For this water trespass plaintiff sought damages and to enjoin any future trespasses. Plaintiff also sought to enjoin defendants from continuing to sink a designated winze from their mine into the mine of plaintiff. The trial court awarded plaintiff injunctive relief, in terms that will hereafter be set forth in detail, and damages of $2,531.34. From this judgment defendants Cooley Butler and Wallace Butler appeal.

Inasmuch as the major problems involved on this appeal are dependent upon vein ownership, each party claiming title to that portion of the vein into which the drill holes empty, and since defendant Cooley Butler is the only defendant to claim ownership, references hereafter to "defendant" in the singular are to Cooley Butler. The other defendant and appellant, Wallace Butler, joins in Cooley Butler's contentions insofar as they are relative to his liability.

General Facts and Contentions of the Parties.

The vein owned by plaintiff is known as the Pennsylvania vein, while that owned by defendant is designated as the Dromedary vein. Some 1200 feet vertically below the surface of the ground these two veins come together. The line of contact of the two veins is referred to as the rake of encounter. Below the rake of encounter are located certain workings of plaintiff into which the drain holes above mentioned empty. Defendant contends that these workings of plaintiff are located on a continuation of the Dromedary vein owned by him, and that plaintiff's workings thereon are a trespass. The plaintiff contends, and the trial court found (Cl. Tr. p. 2, line 11), that where the veins come together there is a junction of the Dromedary and Pennsylvania veins; that thereafter there is but one vein; and that title to this vein is in plaintiff under the terms of an agreement made in 1915 between plaintiff's predecessor in interest and defendant's predecessors. If this theory is correct, inasmuch as the drill holes penetrate workings upon the vein below the rake of encounter, defendants were guilty of a trespass in drilling into these workings.

In defendant's analysis there is an intersection of the defendant's Dromedary vein and plaintiff's Pennsylvania vein above where the drill holes penetrate, with each vein continuing on beyond the intersection as a separate vein. Under the agreement of 1915, if there is an intersection of veins, each owner is entitled to follow his vein beyond the intersection; if there is a junction, the single vein below the junction is the property of plaintiff. It is defendant's position that the drill holes penetrate workings which, although made by plaintiff, are in fact upon the downward extension of defendant's Dromedary vein beyond its intersection with the plaintiff's

vein. The fourth member of the intersection is claimed to be the Wiggly vein, which, in defendant's analysis, is the downward extension of the plaintiff's vein. It is plaintiff's position, and the trial court found, that the Wiggly vein is a minor, insignificant down dipping branch which departs from the single vein formed by the union of the Pennsylvania and Dromedary veins. The vein into which the drill holes penetrate is referred to by defendant as the disputed vein, and sometimes will be so designated herein. Defendants' briefs refer to the plaintiff's vein above its meeting with defendant's Dromedary vein as the Penn-yellow vein because of the fact that in a diagram included in the briefs the line depicting a cross-section of that vein is colored yellow.

[1] The question as to whether the Dromedary and Pennsylvania veins intersect, each continuing beyond the intersection as separate veins, or whether they join and become one vein, is the major factual question in the case. On that question depends the ownership of the vein where the drill holes penetrate. The court has found that there was a junction, with the result that the vein below the junction was adjudicated to be the property of the plaintiff under the contract of 1915. The defendant's contention is that the evidence as a matter of law shows an intersection rather than a junction. To succeed in this contention defendants have the burden of showing that the court's finding of junction is without any substantial support whatsoever in the record. It is, of course, as defendant is well aware, not enough that the trial court on the evidence before it could have decided for defendant.

Defendants make the further contention that even though there is a junction of the Pennsylvania and Dromedary veins which continue downward as a single vein, such vein has a subsurface apex at the rake of encounter, which apex is so located that the vein below the junction is the property of defendants under the agreement of 1915.

The defendants' mine upon the Dromedary vein is known as the Golden Center Mine. The court found that in 1936 the defendants drilled a hole from the 1100 level of their Golden Center Mine which penetrated workings of plaintiff on the disputed vein below. The defendants then laid pipes along the 1100 level, into which they conducted water from their mine, and by means of a pump artificially forced water into the dammed up area surrounding the top of the drill hole, and thence down the drill hole into plaintiff's workings on the disputed vein. The plaintiff had acquired the Pennsylvania mine property in 1929. These Pennsylvania workings on the disputed vein had been allowed to fill with water by plaintiff's predecessor before plaintiff acquired the property in 1929, with the result, the court found, that plaintiff did not make discovery that water was being introduced through defendants' drill hole until December, 1939, when it was informed of the fact by one of its employees who had formerly worked for defendants. The plaintiff immediately plugged up the hole. In February, 1940, plaintiff unwatered its own workings. The court found that, when the first hole was plugged, defendants commenced artificially to introduce water into plaintiff's workings through a second hole, drilled in 1939, and when plaintiff plugged that hole, defendants sent the water down a third hole, which they had also drilled in 1939.

[2] The court further found that the defendants' agents and employees knew, or reasonably should have known, that the drill holes had penetrated lower levels of plaintiff's mine, and that the water from the Golden Center Mine that was thereafter wrongfully, wilfully and intentionally diverted by artificial means into plaintiff's mine put plaintiff to the expense of pumping out such water, to its damage in the amount of $2,531.34, as computed by representatives of both parties. Defendants do not object to the award of damages, since they concede that, regardless of the ownership of the disputed vein, the water ultimately passed into workings which unquestionably are on plaintiff's vein. (Op. Br. p. 311.)

In addition to the award of damages, the judgment also contained an injunctive provision restraining defendants "from introducing or causing to flow through said drill holes, or any other drill holes similarly driven, or through any artificial conduits, any water from the Golden Center mine so that it will escape through artificial means into the Pennsylvania mine." (Cl. Tr. p. 87.)

By the complaint plaintiff also sought injunctive relief as to a winze which defendant had constructed on its Dromedary vein from its 1650 level to its 1800 level,

and which, if continued, would break into the workings of plaintiff. (It has been stated heretofore that the workings particularly involved in this action are located about 1200 feet vertically below ground. The mine levels referred to in this opinion are reached by workings descending into the earth at an angle, rather than vertically, which accounts for the levels being indicated by larger figures than 1200.) This winze is in close proximity to the drill holes through which the water was introduced into plaintiff's mine. Plaintiff alleged that the sounds of blasting were becoming increasingly audible in plaintiff's mine and that if defendants caused the winze to break into plaintiff's workings there was grave danger that serious injury would be caused plaintiff's workmen; that the roof and supporting timbers in plaintiff's workings would be injured, and that additional floods of water would be permitted to flow into plaintiff's mine through said workings. The findings recite that the court had granted an injunction pendente lite restraining defendants from extending the winze "so as to break into and jeopardize" any of the workings of the Pennsylvania mine. (Cl. Tr. p. 78.) The winze is referred to in the briefs as the "enjoined winze."

By the injunctive provisions of the decree here appealed from it is provided that whenever a close approach of the workings of the two mines is indicated by sounds of blasting or otherwise, maps of the workings in the vicinity shall be exchanged. If after the exchange of maps and further consultation any breaking into or injury to plaintiff's workings seems reasonably imminent, defendants are enjoined from further pursuing their vein in the enjoined winze or at any other point where it may endanger life or property of plaintiff. The decree further provides that "if, in order to avoid breaking into and injuring plaintiff's workings in violation of the court's findings and judgment herein, defendant Cooley Butler shall find it necessary to leave intact any protective pillar of rock containing ore which he deems valuable, he shall notify plaintiff of this fact and request a joint appraisal of said ore by representatives to be designated by him and representatives to be designated by plaintiff." If the representatives fail to agree as to value, the question shall be referred to the court, which retains jurisdiction to enforce the decree. If plaintiff fails to pay the value so ascertained within ten days, or if plaintiff at any time notifies defendant that it does not object, defendant may proceed to mine the protective pillar. (Cl. Tr. pp. 88 and 89.) The decree recites that "equitable considerations and the fact that plaintiff's workings in this vicinity have been constructed and were in existence long prior to the approach thereto of defendants' workings" lead to the decree in this form. (Cl. Tr. p. 88.)

Defendant argues that even though it is held, contrary to his contention, that there is a junction of veins and that, therefore, the plaintiff owns the disputed vein, nevertheless the above injunctive provisions are not called for by the exigencies of the situation. The decree forbids defendant to mine his own Dromedary vein up to its junction with plaintiff's vein by requiring him to leave a protective barrier, and this, in defendant's view, constitutes an exercise of eminent domain in favor of a private corporation for its private purpose.

Interpretation of the phrase "parts of veins" in the 1915 Agreement.

Reference was made above to defendant's contention that even though there is a junction of the Dromedary with the Pennsylvania vein, nevertheless, under the agreement of 1915, made by the predecessors in interest of the parties to the present suit, the defendant is the owner of the vein below such junction.

The shaft of the plaintiff's Pennsylvania mine is located to the south and east of the shaft of defendant's Golden Center mine. The plaintiff's shaft is located outside the boundaries of the townsite of the city of Grass Valley, defendant's shaft within those boundaries. Development of the Pennsylvania mine in the area of the Pennsylvania shaft commenced more than seventy years before the present action. The Golden Center mine is of much later development. Both mines contain extensive workings.

[3] In the case of federal mining patents the locator acquires what is known as an extralateral right to follow a vein which apexes on his location beyond his own surface side lines beneath other lands. Rev. Stats. § 2322, 30 U.S.C.A. § 26. The federal law further provides: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of

intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purpose of convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Rev.Stats., § 2336, 30 U.S.C.A. § 41.

[4] The extralateral right above described does not exist in townsite lots which are held under non-mineral townsite patents. As to such townsite lots, extralateral rights do not apply even though the original location of the vein is outside the townsite. As to townsite lots, title to the surface carries title to fixed mineral deposits beneath. The workings upon the disputed vein, into which the defendant's drill holes penetrate, are within the Grass Valley townsite, being beneath lots 6 and 7, block 18, of the townsite. In 1915, when plaintiff's and defendant's predecessors entered into the agreement upon which their rights depend in the present suit, plaintiff's predecessor owned mineral rights in a number of lots in the Grass Valley townsite, including lots 6 and 7, block 18, and defendant's predecessors owned such rights in other lots under grants from the surface owners. The divided ownership is described in plaintiff's brief as a "checkerboard," which made economical mining operations impractical. It was to try to settle the problems growing out of this "checkerboard" ownership that the 1915 agreement was entered into.

The agreement recites that the parties each own land and mineral rights situated in the townsite within an area bounded on the north by the center line of Main and West Main Streets, on the east by the center line of Auburn Street, and on the south by the south boundary of the townsite as delineated on an official map of 1872; that one of the parties of the second part (one of defendant's predecessors) also owns properties west of the western boundary of the townsite; that it is contemplated that each party may acquire hereafter other property and mineral rights within the above described boundaries of the townsite and also property outside the townsite and west of the west boundary thereof. (Agreement is printed, Supp. to App. Op. Brief, p. 1 et seq.)

It is then provided that the purpose of the agreement is to adjust amicably and finally controversies which have arisen between the parties with regard to the extent of their respective rights within the boundaries described. By paragraph first of the body of the agreement the predecessor of plaintiff grants and conveys to defendant's predecessors "all veins and parts of veins which have their tops or apices within the areas bounded as follows: on the North by the center line of West Main and Main Streets, on the East by the center line of Auburn Street, and on the South by the South line of the Grass Valley Townsite," as shown on the official map, and "all veins which have their tops or apices west of the west boundary of said Townsite, and which lie beyond the center line of West Main Street extended indefinitely in its own direction northwesterly, and the south boundary of said Townsite extended indefinitely westerly, with the right to follow said veins on their downward courses indefinitely westwardly between said North and South boundaries, and said boundaries extended in their own directions westerly and eastwardly to the intersection of said veins with a vertical plane drawn through the center line of Auburn Street, and northerly to a vertical plane drawn through said center line of West Main and Main Streets, and southerly to a vertical plane drawn through the south line of said Grass Valley Townsite, extended in their own directions westerly." (Supp. to App. Op. Brief, p. 3.) It is to be noted that the area within which veins must apex to be the property of the defendant's predecessors is the area described in the preamble of the agreement. The apex of the Dromedary vein, which extends on strike for a considerable distance in a general north-south direction, lies, in part, within the bounded area. With any portion of such apex that may extend outside the bounded area we are not here concerned.

The defendant's predecessors, in turn, conveyed to plaintiff's predecessor by paragraph second "all veins and parts of veins which have their tops or apices outside" the area bounded as described above, "with the right to follow said veins on their downward courses indefinitely." (Supp. to App. Op. Brief, p. 4.) It is to be noted that plaintiff's predecessor is given the right to follow veins apexing *without* the area indefinitely on their downward course beneath the bounded area, but that it is only in a westerly direction that defendant's predecessors were to have the right to

follow indefinitely to full depth veins apexing *within* the area. The apex of the Pennsylvania lies outside the bounded area.

It was also provided that properties and rights which the parties might thereafter acquire within the defined areas should be subject to the agreement.

Paragraph third of the agreement is as follows: "Should any of the veins hereinbefore described and conveyed to said parties of the second part [defendant's predecessors] unite or form a junction on their downward course with any vein or veins hereinbefore described and conveyed to the party of the first part [plaintiff's predecessor], the party of the first part shall be deemed to be the owner of the vein in its further downward extension below the line of union or juncture. If the veins, or any of them, belonging to the party of the first part intersect or cross a vein or veins of the parties of the second part, the ore at the space of intersection shall belong to the party of the first part. Below such intersections each party shall be entitled to pursue and mine its or their own vein." (Supp. to App. Op. Brief, p. 6.)

The court found that in framing the above paragraph the parties had in mind § 2336, Revised Statutes, above quoted. (Cl. Tr., p. 65.) The parties admit that the words "unite," "union," "intersect," "cross" and "space of intersection" were used in the agreement with the same meaning as those terms have in the statute.

The obvious purpose of the agreement was to provide by contract for a form of extralateral right in the townsite lots somewhat similar to what would exist under a federal mining patent. This was done to overcome the difficulties of the "checkerboard" ownership above described.

It will be noted that both the federal statute and paragraph third of the 1915 agreement provide for two situations, first, for an intersection or crossing of veins, and secondly for a union or junction of veins where they form a single vein below the rake of encounter. The contract provides that each party shall be entitled to pursue his vein below an intersection, and this is also the clear meaning of the statute. Defendant's main contention, hereafter considered, is that there is an intersection within the meaning of the contract and the statute, with the result that the disputed vein is the downward continuation of the Dromedary vein beyond the intersection and is the property of defendant, and that the Wiggly vein, the fourth member of the intersection, is the downward continuation of the Pennsylvania vein and the property of plaintiff. But, in addition, and this is the point now under discussion defendant makes an alternative inconsistent contention that the situation is something other than an intersection or junction as those terms are used in paragraph third of the contract; that even though the Pennsylvania and Dromedary veins unite to form a single vein, that vein thereafter divides into the disputed and Wiggly veins, which are "parts" of the single vein formed by the union, and such parts have their apices at the line where the vein divides. Since such line lies within the area bounded on the north by Main Street, on the east by Auburn Street and on the south by the south line of Grass Valley townsite, defendant argues that the Wiggly vein and the disputed vein are both its property under paragraph first of the contract of 1915. By that paragraph plaintiff's predecessor conveys to defendant's predecessors "all veins and parts of veins which have their tops or apices" within the bounded area.

Defendant concedes that, if there is a clear-cut intersection, each party is entitled to pursue his own vein below the intersection under paragraph third. But, says defendant, where the identification as junction or intersection is "obscure" (Op. Br. p. 56), or where the veins meet and follow a common course along "a space of intersection for some distance to another and downward divergence" (Op. Br. p. 39), then paragraph third does not control, but the ownership of the down dipping forks is governed by the provision that "all veins and parts of veins" which have their apices within the bounded area are conveyed to defendant's predecessor. If this construction be correct, it would mean that every vein, in addition to its normal apex, might have one or more subsurface apices at every point where it met another vein.

[5, 6] If, as defendant contends in other portions of his argument (and as we are prepared to hold), there may be an intersection notwithstanding one vein cannot be visibly traced through another, then, under paragraph third, each party is entitled to his vein below the intersection. If, on the other hand, on the facts of the particular case, there is a union or junction, rather than an intersection, then,

in our view, ownership of the single vein below the junction carries with it ownership of the forks into which the vein may later divide.

In the absence of the phrase "parts of veins" in paragraph first, there would be no ground for contending that ownership of the single vein below a union does not, under paragraph third, carry with it ownership of the forks into which the vein may divide. Furthermore, the single vein formed by a union within the bounded area, although without a branch, equally with the forks below a union, would be a part of vein with a subsurface apex, as would both lower members where there is without doubt an intersection. Yet in these situations ownership under the contract is clearly not made to depend on location of a lower subsurface apex.

[7] It is plain that under § 2336, Revised Statutes, ownership of the single vein below a union embraces ownership of down dipping forks into which the vein splits. The court found that the parties had the statute in mind in drafting the contract. It is true that the statute does not use the phrase "parts of veins" as does the contract, but we are of the view that the phrase was not used with an intent to alter the statutory scheme in this particular. Defendant cites no statute nor any decision involving a contract where ownership is made to depend on location of a lower apex rather than the apex nearest the surface. We are of the opinion that, had the parties to the contract of 1915 intended such an unusual result so contrary to the general mining law, they would have so provided expressly in paragraph third, rather than have left the matter to a strained implication from the phrase "parts of veins."

It would seem that the inclusion of this phrase is of little significance. There is no difference in the meaning of the contract whether these words are included or omitted. The phrase is probably referable to the fact that the parties held divided ownership of mineral rights in the bounded area west of Auburn Street, with the result that each might own parts of a vein. Obviously, plaintiff's predecessor intended to convey to defendant's predecessors only such parts as plaintiff's predecessor owned. Or the parties may have had in mind a vein extending longitudinally along its strike beyond the bounded area, in which event only the part lying within such bounds extended vertically beneath the surface was conveyed to defendant. Then again the parties may have included the phrase with the thought that up dipping forks with separate apices under the agreement might be parts of veins in the sense that they were branches of other stronger forks.

The interpretation for which defendant contends would not only be contrary to the general mining law, would not only lead to confusion and endless disputes, but would also lead to uneconomical mining. If defendant be correct, all downward forks with a subsurface apex west of Auburn Street would belong to defendant. In the event there was no nearby upward fork, with apex west of Auburn Street, the defendant would have no direct approach to the downward fork and could reach it only by cross-cut, that is, by cutting across country rock from vein to vein, rather than by following a vein. Occasionally, cross-cuts are used in mining operations. In fact, the Pennsylvania 2400 level near the shaft was originally reached by cross-cut from the plaintiff's Empire vein. But a construction making cross-cutting the rule, rather than the exception, would be uneconomical and opposed to reason.

For these reasons, we think that defendant's construction of the contract based on the phrase "parts of veins" must be rejected. It follows that the ownership of the disputed vein depends on whether there is a junction between the Dromedary and Pennsylvania veins, in which event the vein is the property of plaintiff, or an intersection, in which event it is the downward continuation of defendant's Dromedary vein. The trial court has found that there was a junction, and this finding must be affirmed unless as a matter of law it is without support in the evidence.

Definition of "intersection" and "junction."

The parties disagree as to the definition of the terms "intersection," and "junction," as those terms are used in the 1915 agreement. Defendant contends that the basic finding of the court that there was a "junction," is based upon an erroneous definition given the term "intersection" by plaintiff's witnesses. In his memorandum opinion the trial judge stated that he did not base his judgment on plaintiff's definition, but, in the view of defendants, the findings cannot otherwise be sustained.

Plaintiff squarely takes the position that an intersection results only when a vein of one geologic age cuts across a vein of an earlier geologic age, in which event the later intersecting vein may be visibly traced through the earlier one. In this analysis a difference in age of veins is a sine qua non to the existence of an intersection, and visible traceability of one vein through the other is a manifestation of the process of formation. Also, in this analysis, the only vein that exists in the area of intersection is the vein of the youngest geologic age, it being the vein that intersects, cuts across, and displaces the older vein where the two veins meet.

Defendant rejects plaintiff's test of different ages, and contends that the criterion is principally one of position and appearance. Position is determined by strike and dip. "Dip" is broadly defined as the downward course of a vein, the direction or inclination toward the depth, while "strike," at right angles to dip, is used to designate the longitudinal or horizontal course of a vein. I Lindley on Mines, p. 718, § 317. Defendants concede (Cl. Br. p. 12), as they must, that, if plaintiff's test of intersection be accepted as the correct one, then the finding that there was a junction and not an intersection is supported by substantial evidence. On the other hand, if the test proposed by plaintiff is incorrect, and that proposed by defendants is correct, then the question is presented as to whether, using defendants' standards, the finding is supported. In the memorandum opinion of the trial court reference is made to the opposing definitions, and, it is stated: "* * * the court views the question as one not entirely controlled by legal definition but also a question of fact to be determined from the particular facts and circumstances as shown by the evidence in the case." In the findings the trial court describes the relative positions of the respective veins, and describes in detail the differences in physical appearances between the Dromedary and the Pennsylvania veins. It is upon these findings that the trial court determined that there was a junction and not an intersection. Thus, it was the theory of the trial court that, applying the tests proposed by defendants, there was a junction and not an intersection. Plaintiff urges that the basic finding that there was a junction is supported by either of two theories. It first urges that, independently of the findings relating to the position and appearance of the veins, if its definition of "intersection" be accepted, there can be no doubt, and defendants admit, that there is substantial evidence that the two veins are of the same geologic age, and that one cannot be traced through the other. Therefore, it urges, the finding that there was a junction, is supported. On the other hand, if its definition of "intersection" be found to be incorrect, and, if the tests offered by defendants be applied as the proper criterion, it urges that the findings as to the relative positions and appearances of the veins are supported, and that these findings support the finding of junction. In view of this twofold argument in support of the ultimate finding under attack, logical considerations suggest that we should first determine the proper definition of the term "intersection," because, only if the definition proposed by plaintiff be found to be incorrect, need there be considered the sufficiency of the evidence to support the findings relative to the position and appearance of the veins.

We are convinced that the definition proposed by plaintiff must be rejected, and that the trial court properly applied the tests proposed by defendants.

The parties are agreed that the term "intersection" has the same meaning in the agreement of 1915 as it has in § 2336, Revised Statutes. The contract gives to plaintiff rights which, under the statute, go to the prior locator.

Dr. Buwalda, expert witness for plaintiff and head of the department of geology at the California Institute of Technology, testified that his conception coincided with the definition given in the Glossary of the United States Bureau of Mines. That definition is as follows: "Intersecting Veins. A vein or lode which cuts across one of earlier formation." (Tr. pp. 978, 1586.) In elaborating upon that definition the witness testified that in order that there be an intersection there must be a deposition of the materials in the respective veins at different times; that the fracturing and deposition of vein material in the Pennsylvania vein was simultaneous with the fracturing and deposition of vein material in the Dromedary vein; that intersection, as a term in mining law, involves a time relation—a later vein cutting across an earlier one—differing in that respect from the meaning of the term as used in application to streets.

The witness further testified that it was the "possibility of tracing one vein through another, through an older one," which gave "rise to the relation of intersection." (Tr. pp. 984, 925.) In this analysis the tracing through process is evidence of the difference in age of veins, and that one has cut the other. In illustration of his definition, the witness said that if a quartz vein and a galena vein came together at right angles, and the galena could be observed passing through between the edges of the quartz, there would be no doubt that there was an intersection. After the witness had said that the analogy was an unhappy one in that it would not be likely that a quartz vein and a galena vein would form simultaneously, he was asked by defendants' counsel to draw a diagram depicting a junction of a galena vein and a quartz vein at the angles above specified. The witness then prepared a diagram, in form a right angle cross, introduced as defendants' Exhibit L (Tr. p. 930), showing a quartz vein colored yellow and a galena vein colored brown. The central area is colored mottled brown and yellow to show a commingling of veins, with inability to trace either upper member through the central area to a corresponding lower member. The witness testified that under his definition there would not be an intersection even in such a case of definite correlation in position and kind of vein material between the upper and lower members.

The plaintiff's witness Mann also drew a diagram in the form of a right angle cross, depicting veins meeting, which was introduced as defendants' Exhibit E. (Tr. p. 452). He testified that unless one vein could be traced through from upper to lower member there would not be an intersection. Other witnesses for plaintiff gave similar definitions.

In the analysis of plaintiff's witnesses traceability of the vein is evidence that a later vein has cut or intersected an earlier vein. The fact that both the Dromedary and Pennsylvania veins are quartz with certain similar characteristics would not preclude there being an intersection within the meaning of plaintiff's witnesses. That is, it would not be necessary that a different material be traced through. The witness Buwalda referred to a "structure" as running through where there is an intersection (Tr. p. 923), and one of plaintiff's other witnesses referred to a tracing through of the gouge from an upper member to a lower member. In plaintiff's brief it is said that some "distinguishing feature" of the younger vein must be traceable through the older one. (Resp.Br. p. 146.)

Defendant contends that subsequent geological developments may affect traceability, thus destroying the evidence of intersection as plaintiff defines the term. Defendant refers to a statement as follows in Clark-Montana R. Co. v. Butte & Superior Copper Co., D.C., 233 F. 547, 570: "It is obvious, and also admitted, that if the veins cross at any one point, they must cross at all points, *even though so obscurely as to be undiscoverable.* But this is not so of union. Every appearance of union and merger may exist at many places, but if one point of crossing is proven, all evidence of union avails nothing and the veins are proven to cross throughout. *Healing and cementation may destroy evidence of crossing in many places.*" (Italics added.)

Reference is also made to Clark-Montana Realty Co. v. Anaconda Copper Mining Co., D.C., 20 F.2d 1008, 1014, where the court stated: "Plaintiffs refer to the sometime appearance of union of veins, when in fact one intersects the other, and recementation by mineralizing solutions conceals the evidences, as of reference in the Elm Orlu Case [Clark-Montana R. Co. v. Butte & Superior Copper Co., supra]."

The witness Buwalda testified to the Pennsylvania and Dromedary veins being of contemporaneous creation which, in his analysis, precluded an intersection, but whether for this conclusion he relied solely on the fact, as he found it, that one vein could not be traced through the other, or on additional factors, is not plain.

Defendants' witnesses, on the other hand, testified that in determining whether there was a junction of veins they attached no significance to the relative ages of the two veins. The position of defendants is illustrated by the testimony of the witness Tolman (Rep.Tr. p. 1565):

"Q. We have a particular question here: To your mind what is the distinction as the terms are used by geologists and mining men, between the situation where, on the one hand, the vein crosses another and intersects it, and, on the other hand, where a vein joins or unites with another? A. I think the question is one entirely of geometry and identification.

"Q. Just explain that? A. If one vein crosses another vein, the crossing is proved

if the two portions of the first vein are correlated and the two portions of the second vein are correlated beyond each vein. In other words, the correlation is just as simple as the correlation of a street crossing. We know that one street crosses another when we find each street on either side of the other street, beyond the crossing and it doesn't make any difference at all how the street was developed, whether the grader went down one street and swung around the other. The relative age of the streets makes no difference, nor even whether one street was paved later than the other. The question is a question of crossing, in the minds of miners and in the minds of the common people: Are the two portions of one vein identifiable on each side of the crossing, and likewise are the two portions of the second vein identified as on each side of the crossing?

"Q. And with that definition, is it necessary that one vein be traceable or discernable throughout the point of meeting in its crossing of the other vein? A. I do not think it is necessary that the actual penetration of the two structures should be followed and, moreover, I believe in Grass Valley it might be a very, very difficult problem and work that is entirely unnecessary.

"Q. To that definition, is there necessary any questions of relative times of the fissures in which the veins appear or relative times of the deposits within either vein? A. I do not think that it is necessary to go into the question of relative times and I think that is especially true in regard to the Grass Valley District.

"Q. Why is that particularly true as respects that district? A. Because in the Grass Valley District, as is well known, we have a long series of events that have fashioned these ore deposits. We first had some fracture that controls the ore solution and controls the deposits or intrusion of the ores. The fissures were opened up and solution under pressure came up these fractures. Then, the ore was deposited, but even under the assumption that the ore came out at a general time it must have reached the different veins by different routes and the ore itself could be scarcely thought to be contemporaneous in different veins. Furthermore, the fracturing continued after the deposits of the ore and all of these features are a part of the vein. The deposition of the vein material itself took place in different stages."

The question, as we have said, is the sense in which the words "intersect" and "intersection" are used in § 2336, Revised Statutes, which provision, the court found, the parties had in mind in drafting the contract of 1915. Neither counsel has found decisions which squarely consider whether the time element is necessarily involved in the definition, or if such element is involved, whether tracing through is essential to show different ages.

[8] To what weight is the definition in the Glossary of the Bureau of Mines entitled? Buwalda testified that he would take the definition there given as the one in current use and as representing the understanding of the mining profession. He also testified that such bulletins as the Glossary are usually made up by one of the senior members of the bureau and then passed around to others in the bureau with a view to getting as precise a definition as possible; that the definitions contained therein represent an agreement among the older men in the bureau; that he had no direct evidence as to the Glossary, but every reason to believe it was thus prepared. Defendant brought out, however, that the Glossary does not even attempt to define "junction" or "union," as opposed to "intersection."

The definition of the Glossary is an interpretation by an administrative tribunal charged with development and promotion of the mining resources of the country. It does not appear, however, that the bureau in the performance of its duties has had occasion to apply this definition in determining rights among private owners or rights of such owners in relation to the government. Its definition is entitled to consideration, but it is not conclusive.

Although there seems to be no decision squarely considering the meaning of the terms "intersect" and "intersection" as used in § 2336, Revised Statutes, both parties construe judicial remarks as favoring their contentions. Plaintiff again quotes from Clark-Montana R. Co. v. Butte & Superior Copper Co., D.C., 233 F. 547, page 561, as follows: "Defendant's witnesses are of the opinion the Rainbow and Jersey Blue *are of the same age and unite,* the latter a strand of the former. Plaintiff's witnesses are of contrary opinion. The latter definitely describe places where the Jersey Blue *crosses* the Rainbow, from observation." (Italics added.) Plaintiff also

refers to page 568 of that opinion where the court stated: "* * * the Jersey Blue is found *cutting* the Rainbow." There is no doubt implicit in these quotations the thought that veins of different age cross, while those of the same age unite, and that such crossing can be observed visibly.

Plaintiff also refers to four quotations from Clark-Montana Realty Co. v. Anaconda Copper Mining Co., D.C., 20 F.2d 1008, 1010, where the court in discussing the facts and contentions of the parties there involved stated: "* * * at crossing, the Emily vein penetrates the Poser vein"; "* * * And in lower levels certain veins of East-West age * * * are intersected by veins of Northwest age"; "* * * plaintiffs' theory that the Poser vein is of Steward age * * *"; "* * * intersection affords an infallible test of age."

Plaintiff also places some reliance upon Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., C.C., 63 F. 540, where the court seemed to imply that there is a union, rather than an intersection, where veins are formed and filled "at the same period of time, by the same force of nature." Page 545.

From these isolated phrases and sentences plaintiff draws the implication that intersection is an infallible test of age, and that the term "intersection," in mining law, can only be used in the sense of a later vein cutting across an earlier one.

Defendant cites Esselstyn v. United States Gold Corporation, 59 Colo. 294, 149 P. 93, and Butte & B. Min. Co. v. Societe Anonyme des Mines, 23 Mont. 177, 58 P. 111, 75 Am.St.Rep. 505, as discussing the nature of an intersection without indicating that a tracing through is required.

The text-writers have little to say on the subject. Defendant includes in his briefs diagrams copied from Costigan's Mining Law purporting to illustrate "veins uniting" and "veins crossing." (Op.Br., pp. 40-41; Clos.Br. p. 10; Costigan, Mining Law, p. 455, p. 457.) In these illustrations each vein is represented by a single dark line. They show two single lines meeting to illustrate "veins uniting" and two single lines crossing to show "veins crossing." The discussion in connection with the diagrams says nothing of tracing through, or of age. Since the veins are illustrated by single dark lines on these diagrams, rather than by double lines, as on the Mann and Buwalda drawings, it cannot be ascertained from them whether the writers regarded one vein as passing through the other in the sense of being traceable through.

Plaintiff quotes from Le Conte's Elements of Geology, p. 248, as follows: "The relative age of veins in the same region is determined in the same way as that of dikes, viz., by the manner in which they intersect each other: the intersecting vein being, of course, younger than the intersected vein." This statement can be construed to mean that if veins do intersect in the sense of a later vein cutting across an earlier one, the vein which is the younger is, as the writer says, of course, the *intersecting* vein, while the older vein is *intersected*, rather than as expressing a view that in the law of mines there cannot be an intersection, as that term is used in the statute, if two veins are of the same age.

It is apparent that there are neither definitive decisions nor convincing analysis by textwriters specializing in mining law on this subject. However, we are not without a guide to the proper meaning of the term. We think that the language and theory of the statute which the parties had in mind in drafting the contract demonstrates, to a certainty, that a tracing through is not essential to show an intersection. Section 2336, Revised Statutes, 30 U.S.C.A. § 41, may well be quoted again: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purpose of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Under plaintiff's definition there must be a visible tracing through of the intersected vein by the later intersecting vein, or, perhaps plaintiff would admit that if that evidence has been obliterated by time, other evidence may be offered that in fact a later vein cut across an earlier one. If either of these tests be applied to the statute, strange results follow. Under the terms of the statute where veins "intersect or cross" the mineral within the space of intersection is given to the prior locator. If an intersection existed within the meaning of the

statute only where one vein could be traced through another, then but one vein, the intersecting vein, exists in the area of intersection. If that is so, then the vein traced through in the space of intersection logically should be the property of the person who owned that vein, rather than of the prior locator, and it is reasonable to infer that the statute would have so provided. The only reasonable interpretation of the statute, is that it is drawn on the assumption that it may be impossible to tell one intersecting vein from the other in the space of intersection. Otherwise, why give the vein in that space to the one who happens to be the prior locator, rather than to the one whose vein occupies the space?

The same result follows if the test that is applied is that, where there has been an obliteration of evidence that a later vein has cut across an earlier one, other evidence must be introduced to show a difference in age and to show that in fact a later vein cut across an earlier one. Such proof, if required to establish an intersection within the meaning of the statute, would at the same time establish to which owner should belong the ore in the space of intersection, without necessity for assigning it arbitrarily to the prior locator, as the statute does. The later vein would, by virtue of plaintiff's very definition, occupy the space of intersection.

[9] From this reasoning it seems apparent that, while the words "intersect" and "intersection" are used to describe the geological process by which one vein cuts across another of earlier formation, in which sense a time element inheres in the use of these words, that they were not used with that limited meaning in the statute, or, consequently, in the contract of 1915. The statute was designed to regulate subsurface ownership, rather than to describe geological development.

Defendant's definition is not only a more logical one than that presented by plaintiff, but it results in a more equitable division of natural resources. Under plaintiff's construction, even though veins or vein segments meet at right angles, and are equally strong, unless one can be traced through the other the owner of one upper member, the prior locator under the statute, the plaintiff under the contract of 1915, takes both lower members. A fairer division of the earth's bounty is to give the owner of either upper member one of the lower members, and this is what the statute does.

Plaintiff envisions great difficulty and uncertainty in mining operations unless the tracing through test be accepted. It is urged that if tracing through is the test, an owner can know which downward member connects with an upper intersecting member. Without that criterion he may go off upon the wrong down dipping member. But any test involves difficulties. Under the tracing through test experts may differ as to whether tracing is possible, as they have done in this case.

[10] We do not hold that a down dipping member however remote from an opposite up dipping member will be held to correlate with it. Nor do we hold that a lower vein however weak it may be, and unlike an up dipping fork, will be held to be the fourth member of an intersection of veins, rather than a branch of a single vein below a junction point. The question of intersection depends on a careful study of position and physical characteristics of veins and must be determined on the particular facts of each case. There are many problems in the law which admit of no other basis of decision.

Since it is our conclusion that a tracing through is not essential to establish an intersection, the question is whether, as defendant contends, the factors of position and appearance, as a matter of law, show an intersection. As already pointed out, these were the factors, and not plaintiff's definition, that led the trial court to find there was a junction and not an intersection. The real question presented is whether, independent of the definition urged by plaintiff, and adopting the definition of defendants, as did the trial court, there is any substantial evidence to support the finding that a junction and not an intersection occurred between these two veins.

Burden of Proof.

Before directly discussing the sufficiency of the evidence, brief mention should be made of the contentions of the parties in relation to the burden of proof. Each party contends that the other has the burden of proof. Plaintiff urges that defendants must prove an intersection, while defendants insist that plaintiff has the burden of showing there is not an intersection, but a junction. Defendants' theory is that

since the Empire Star Mines Company is plaintiff, and its right depends on their being a junction, rather than an intersection, it had the burden of proving that there was a junction, in accordance with the usual rule that the plaintiff has the burden of proof.

[11] Plaintiff refers to extralateral right cases involving conflicting claims between those holding mining patents from the federal government, which indicate that although the plaintiff has the burden of proof, he makes a prima facie case of ownership of subsurface minerals by showing that they lie within his surface boundaries projected into the earth. The burden of going forward is then on the defendant, who must show that the mineral beneath plaintiff's land is part of a vein which apexes outside plaintiff's boundaries, and one line of authority holds that, in addition, defendant must show that the vein apexes within defendant's surface boundaries. 3 Lindley on Mines, 3d Ed., p. 2163, § 866; 36 Am.Jur. §§ 109–114, pp. 359–365. By analogy plaintiff would apply a similar rule in this case. It claims that it made a prima facie case by showing that it owned the mineral rights to lots 6 and 7, block 18, below a depth of 200 feet from the surface, under grant from the surface owners. But the adjudication of ownership, as hereafter will be pointed out, goes beyond those lots to the extent that the workings immediately below and above the 2400 level drift extend beyond the lines of said lots. Plaintiff did not show that the parts of such workings lying outside lots 6 and 7 were beneath lots which it owned. Upon the trial plaintiff did not rest upon a mere showing of ownership of lots 6 and 7, but, rather, set out affirmatively to prove a junction. We are of the view, therefore, that the burden was on plaintiff to establish a junction. However, we are also of the view that plaintiff has satisfactorily discharged that burden. We turn now to a discussion of that problem.

Sufficiency of the evidence to support the finding that there was a junction.

[12] Plaintiff and defendants introduced into evidence models of workings of the Pennsylvania mine, and of the Golden Center mine, in which the Dromedary vein is located. These models show drifts, winzes, raises and stopes in the general area where the two veins meet. A drift is a horizontal mine passageway driven on, or parallel to, the course of a vein. A vertical or steeply inclined passageway driven to connect a mine working with another at a lower level is a winze. Where a passageway is driven from a lower level to a higher, it is a raise. Excavations formed by mining ore are known as stopes. The position of veins in a general way is indicated by the workings, since they are run on the veins. The models show that the veins here involved are vast bodies of mineral which descend into the earth and extend on strike for hundreds of feet. The average strike of the Pennsylvania vein is just off due north and south, being N.10°W. The strike of the Dromedary vein is N.40°E. The veins vary in thickness from a few inches to four or five feet. Since the apex of the Penn-yellow vein lies east of the apex of the Dromedary, and since the dip of the veins is from east to west, the Penn-yellow vein may be said to underlie the Dromedary vein.

The plaintiff's 2400 level drift was run along the Penn-yellow vein in a northerly direction for a considerable distance to the meeting of that vein and the Dromedary vein. The drift was continued without break beyond the rake of encounter along a vein which plaintiff contends is a single vein formed by a union of the Dromedary and Penn-yellow, which single vein below the junction, it is contended, is the property of plaintiff under the 1915 agreement. It is plaintiff's position that the Wiggly vein is a minor, insignificant down dipping branch of the single vein formed by the union of the Dromedary and Penn-yellow vein.

Defendants contend that where this 2400 level drift proceeds in a northerly direction after the meeting of the Dromedary and Penn-yellow veins, it is on a continuation of the Dromedary vein beyond the intersection. The vein followed by the 2400 level drift where that drift continues northerly beyond the meeting of the Dromedary and Penn-yellow is called the disputed vein by defendants. From this portion of the 2400 level drift, that is, the portion north of the rake of encounter, stoping extends up dip to the east. The stoped area, from which ore has been removed, extends some distance south of the rake of encounter of the Dromedary and Penn-yellow veins onto what is admittedly Penn-yellow vein. According to the evidence produced by plaintiff, the stoping extends up dip 80 feet south

of the meeting of the Dromedary and Penn-yellow. This factor is of considerable importance, as will later appear.

It is defendants' theory that, in the area in which the stoping took place above the 2400 level drift to the north of the rake of the Dromedary and Penn-yellow veins, the veins, both Dromedary and Penn-yellow, must be said to follow a common course, which constitutes a space of intersection, notwithstanding it is not possible to identify two separate veins in that area. In defendants' analysis, as depicted on its model S, the two lower down dipping members, disputed and Wiggly, take off just above the 2400 level drift, with the result, in defendants' view, that the 2400 level drift and lower workings of plaintiff are in fact upon the downward continuation of defendant's Dromedary vein. On the model a space on the stope, just above the 2400 level drift, is colored a mottled red and yellow indicating the area of commingling of the two veins before the separation into the disputed and Wiggly veins. Under the contract of 1915 both parties agree that the plaintiff is the owner of any vein material in the space of intersection. The basic question involved is whether there is, as defendants contend, a space of intersection, and then two veins, or whether, as plaintiff contends, after the rake of encounter, there is merely the downward continuation of a single vein formed by a junction of the Dromedary and Penn-yellow, with the Wiggly vein constituting a branch of the Pennsylvania. The drill holes through which water was introduced into the plaintiff's workings penetrate the vein below the 2400 level, that is, the disputed vein, rather than what defendants contend is the space of intersection.

The plaintiff's Go Devil raise leads up dip from the 2400 level drift, commencing at a point north of where the Dromedary and Pennsylvania meet. For the most part it is upon the Penn-yellow vein, although it is defendants' contention that immediately above the 2400 level drift it follows up the space of intersection where, in defendants' view, the two veins, Pennsylvania and Dromedary, mingle before they separate again. The lower end of the Go Devil raise is shown on defendants' model S in the mottled red and yellow which defendants use to depict what they contend is the space of intersection. The Prospect drift, a short drift, is run from the Go Devil raise in a southerly direction for a distance of 40 or 50 feet.

Below the 2400 level drift are the Y and Z level drifts, both workings of plaintiff, the Z level being the lowest of plaintiff's workings. It is conceded that these drifts are run along the same vein as the 2400 level drift north of the meeting of the Dromedary and Penn-yellow veins, that is, that they are upon the disputed vein down dip from the 2400 level drift. The Y and Z level drifts are reached by the No. 4 winze which extends down dip along the vein from the 2400 level drift, starting at a point a short distance north of the meeting of the Dromedary and Penn-yellow veins. The X level drift, on the same level as the 2400 level drift, is upon a branch of the vein followed by the 2400 level drift. The Y and Z level drifts extend on both sides of the No. 4 winze. There are large stopes between the X level and the Y level, and between the Y level and the Z level south of the No. 4 winze, and smaller stopes up dip from the Y level and Z level north of that winze. Two of the three drill holes through which the water entered plaintiff's workings penetrated the stope south of the No. 4 winze between the X and Y levels. The earliest of the three holes penetrated the No. 4 winze below the Y level.

The models also show workings upon the Dromedary vein above its encounter with the Penn-yellow vein. The 1800 level drift of the Golden Center mine, which is upon the Dromedary vein, is but a few feet above and northwest of that portion of plaintiff's 2400 level drift south of the meeting of the Dromedary and Penn-yellow. Above the Golden Center 1800 level drift are the 1650, 1400 and 1100 level Golden Center drifts, connected by winzes along the dip of the vein. The enjoined winze extends from above the 1650 Golden Center level drift to below the 1800 level drift. Plaintiff seeks to enjoin defendant from continuing that winze downward to a point where it will break into plaintiff's workings.

Before directly discussing defendants' contentions as to the evidence, consideration must first be given to the argument of defendants that plaintiff has made an admission that demonstrates, to a certainty, the error of plaintiff's position. Defendants place such emphasis on this alleged admission that it may be said to constitute a cornerstone of their argument. Plaintiff emphatically denies making the alleged ad-

mission. After considering the portions of the record involved we are convinced that defendants misinterpret the evidence, and that, in fact, no such admission was made.

Throughout defendants' briefs, and on defendants' numerous diagrams, the statement is repeated many times that plaintiff has admitted that the Dromedary and disputed veins occupy the same fracture or fissure, and that the Wiggly and Penn-yellow veins occupy the same fracture or fissure. From this alleged admission defendants imply, although they do not put the thought into express words, that plaintiff has admitted that the Pennsylvania and Wiggly veins occupy a different fracture or fissure from that in which the Dromedary and disputed veins are to be found. Thus, defendants seek to put the plaintiff in the position of urging that the disputed and Penn-yellow veins are the same vein, while admitting that they are in a different fracture or fissure, and while admitting that the Dromedary and disputed veins occupy the same fracture or fissure.

[13] Defendants do not elaborate as to their interpretation of the alleged admission—they simply state that it has been made. If they seek to imply, which apparently they do, that plaintiff admitted that the fissure occupied by the Dromedary and disputed veins came into existence at one time, while the fissure occupied by the Penn-yellow and Wiggly veins came into existence at another time, the implication is directly and unequivocally contrary to the direct positive testimony of plaintiff's experts that the cracking which produced all four veins occurred at the same moment of time. Without such an implication the admission is meaningless, and to indulge in the implication is to disregard the direct evidence of all these experts. Even if the interpretation of defendants of a portion of somewhat equivocal testimony was a possible interpretation, and even if the inference sought was a reasonable one from the testimony relied upon, in view of the findings of the trial court, we would be required to hold that the inference must yield to positive, direct and unequivocal testimony on the issue.

However, the error of defendants goes beyond the mere indulging in an inference rebutted by positive testimony. In addition, we think defendants misinterpret the record. An examination of the transcript demonstrates that no such admission was in fact made. The testimony relied upon to support the alleged admission, upon which the inference above discussed must be predicated, is a small portion of the testimony of the witness Buwalda appearing in the Reporter's Transcript, pp. 862 to 864. Buwalda had testified that the disputed vein was part and parcel of the Pennsylvania vein. He then sought to explain the curve which the Pennsylvania vein in the disputed area takes on the 2400 level. The gist of his testimony was, and on this the witness was unequivocal, that the fracturing which produced the Pennsylvania, Dromedary, disputed and Wiggly veins was simultaneous, but that the interaction of the stresses that produced the cracking, which he described, would be likely to produce a curve at the meeting of the two cracks. The portion of the testimony upon which defendants especially rely as an admission is the following:

"A. [of Dr. Buwalda]: That is, geometrically there is probably some relation between this fracture and this fracture.

"Q. [of Mr. Butler]: Which is this and this? A. Between the fracture occupied by the Dromedary vein and the fracture occupied by the Pennsylvania vein, and the change of trend in the Pennsylvania vein." (Rep.Tr. p. 862.)

Defendants interpret this testimony as an admission that the Dromedary vein fracture and the disputed fracture are related, by construing the witness' first reference therein to "Pennsylvania vein" as referring to the disputed vein. When defendants quote this section of testimony on page 16 of their opening brief and in other places, they interpolate in parenthesis after the first reference to Pennsylvania vein the words "i.e., Disputed Vein." This insertion is unwarranted. From a reading of the testimony it would appear that the witness was referring to the Pennsylvania vein south of its meeting with the Dromedary, or to the Pennsylvania vein as including both the disputed vein and the Pennsylvania south of the meeting with the Dromedary, and was not referring solely to the disputed vein.

In support of the claim that plaintiff admitted that the Wiggly vein and the Penn-yellow vein occupied the same fracture, the defendants lay special stress on the following testimony:

"A. [of Dr. Buwalda]: In my discussion of the northern part of the 2400, I think that something interrupted so that I never did get to the discussion of the Wiggly

drift, but I would comment that the fracture along that northeast branch to the north probably was related to the curvature in the Pennsylvania fracture.

"Q. I see. How about the fracture that came out through the Wiggly drift? A. It may have been related to that, also.

"Q. By related to it, is it part of the same crack? A. Yes." (Rep.Tr. pp. 908, 909.)

The northeast branch to the north departs from the vein just north of the point where the Wiggly vein departs from it on the 2400 level. It is not entirely clear to what the words "it" and "that" refer. Does "it" refer to the Wiggly vein, or to the northeast branch to the north? If "it" refers to the northeast branch to the north, the witness has said that such branch (which defendants contend is disputed, that is, Dromedary) is related to the Wiggly. This possible interpretation is, of course, not acceptable to defendants. On the other hand, if "it" refers to the Wiggly vein, then the word "that" refers either to the northeast branch to the north, or to the curved portion of the vein north of the admitted Dromedary, that is, the disputed vein, which plaintiff contends is Pennsylvania, or to the Pennsylvania vein as plaintiff's witnesses find it curving both north and south of its meeting with the Dromedary. There is certainly no statement that the Wiggly vein is related to or in the same crack as the Pennsylvania confined to the segment south of its meeting with the Dromedary.

It is quite clear that the natural and ordinary meaning of the testimony upon which defendants rely to find an admission by plaintiff is that all the veins—Pennsylvania, Dromedary, disputed and Wiggly—are part of the same crack, in that the fracturing was simultaneous, and that to read any other meaning into this testimony is to distort it. It follows that the implication sought to be conveyed is not only rebutted by positive testimony, but also that the evidence relied upon to raise the inference does not, in fact, support it.

Defendants next contend that the evidence of location and appearance of the veins demonstrates, as a matter of law, that the disputed vein is a continuation of the Dromedary, and that there is an intersection and not a junction of the Dromedary and Pennsylvania veins. They first urge that dip and strike figures in the vicinity of the meeting of the Dromedary and Pennsylvania veins, taken from the maps introduced as exhibits, principally from plaintiff's Exhibit 10, demonstrate, as a matter of law, that the disputed vein is a continuation of the Dromedary vein below its intersection with the Pennsylvania, and that the Wiggly vein is the continuation of the Pennsylvania below the intersection. In determining the identity or continuity of veins defendant contends that the most important test is their position as determined by strike and dip. Defendant says: "The commonest and most important and the decisive test of intersection or junction (or which amounts to the same thing) of identity of veins, is the relative position of the parts of veins." (Op.Br. p. 110.)

The court found that the Pennsylvania vein has a strike varying somewhat, but generally north and south, with "a dip averaging between 30 and 40 degrees on its downward course through the stopes and workings to the lower levels and drifts. It is much flatter in dip in places, for example, in the Go Devil raise, and is steeper than average in other places." (Cl. Tr. p. 66.)

As to the Dromedary, the court found that in the vicinity of the 1650 and 1800 levels, "and especially where the Dromedary vein approaches the Pennsylvania vein, it is a steep dipping vein of approximately 70° and has an average N.40°E. strike" (Cl.Tr. p. 70), and that the "steep dipping Dromedary vein with its different strike, approaches the flatter dipping Pennsylvania vein and merges into and joins the Pennsylvania vein." (Cl.Tr. p. 71.) The findings do not separately set forth the dip and strike of the disputed vein, which is found by the court to be part of the Pennsylvania vein, nor is there a finding as to the dip and strike of the Wiggly vein. The only reference in the findings to this last mentioned vein is the following: "The main Pennsylvania vein does not disappear into the hanging wall of the Dromedary vein in the 'Wiggly' drift as defendants have contended. Said 'Wiggly' drift is run for a short distance on a minor and unimportant hanging wall branch of the Pennsylvania vein, which branch then passes out of one of the walls of the drift and is not disclosed any further." (Cl. Tr. p. 72.)

Defendants observe that the average strike of the Pennsylvania vein on the 2400 level drift for a distance of 590 feet

immediately south of its meeting with the Dromedary vein is N.15°W., and for a distance of 102 feet immediately south of its meeting with the Dromedary, it is N.35°W. (See table, Cl.Br. p. 109.) The average strike of the Dromedary vein as found by the court in accordance with defendants' figures is N.40°E. A northerly segment of the disputed vein followed by the 2400 level drift, measured not from a point immediately north of the meeting of the Dromedary and Penn-yellow, but from a point considerably to the north of such meeting, has a strike of N.40°E. On these figures defendants base their contention that the Dromedary and disputed veins correlate closely on strike, and that the Penn-yellow and disputed do not. But in between the southerly segment of the drift with a northwest strike and the northerly segment with a northeast strike, the drift has a course more nearly north-south. It is this segment which lies immediately north of the meeting of the Dromedary and Penn-yellow. The more nearly north-south strike represents the course of the vein in what defendants contend is the area of intersection where, in their view, the veins follow a common course.

If the disputed vein is the Penn-yellow north of the junction with the Dromedary, as plaintiff contends, then the Penn-yellow vein at the level of the 2400 drift describes a westerly bow south and north of its meeting with the Dromedary. Plaintiff's witnesses explained that bow, by the statement that the coming together of two fractures, such as the Pennsylvania and Dromedary, would be likely to result in a departure of the position of the veins from their normal course—that the natural effect of such an occurrence would be an area of distortion, which, in this case, took the form of the Penn-yellow bowing westerly. The measurements which were used in computing the strike of N.35°W. for the Penn-yellow vein south of its meeting with the Dromedary were taken upon the arc of the bow as it departed from the nearly north-south strike of the vein, while the measurements which lead to the strike of N.20°E. for the disputed vein were taken upon the complementary arc of the bow before the vein had returned to its general more nearly north-south strike. Plaintiff emphasizes the fact that for approximately 160 feet north of the meeting of the Dromedary and Pennsylvania, between these two arcs, including the area where defendants contend the veins commingle, the strike is almost due north and south.

There is also this significant factor that supports the finding of junction. The upper part of the large stope above the 2400 level extends south of the rake of encounter of the Penn-yellow and Dromedary veins, for a distance of 80 feet up dip. It is admitted that south of the rake of encounter the stoping is on Penn-yellow vein. North of the rake of encounter, the upper part of the stope is upon the disputed vein, which defendant contends is Dromedary. The stoping has the same strike and dip immediately north and south of the rake, indicating that the vein material had the same strike and dip. Thus defendant is in the position of contending that the vein suddenly becomes the downward continuation of his Dromedary vein although it has the same strike and dip as the Penn-yellow vein just south of the rake.

Another factor which led the trial court to find a junction was the physical situation relative to the Dromedary vein. The court found that along the rake of encounter of the Pennsylvania and Dromedary vein the "Dromedary vein and its walls 'roll' into the main Pennsylvania vein" (Cl. Tr. p. 71), and that "the rolling of the weaker and steeper dipping Dromedary vein into the stronger and flatter dipping Pennsylvania vein establishes that a union of the two veins takes place * * *" (Cl. Tr. p. 72). The plaintiff's witnesses testified as to the existence of this roll, and photographs were introduced showing the roll. It appears that this roll of the Dromedary consists in that vein changing its course rather sharply on dip to conform to the dip and strike of the Pennsylvania vein south of the encounter, indicating that the vein beyond the meeting should be held to be Pennsylvania, rather than Dromedary or a commingled area of intersection. Defendants attempt to minimize the significance of this roll, pointing out that the Pennsylvania vein itself is a rolling or undulating vein. But such roll is obviously a different matter from the roll which takes place where one vein changes course to assume the position of another.

Defendants contend that the so-called westerly bow in the Pennsylvania vein is obtained on the 2400 level by "jumping" from the Pennsylvania, south of the rake of encounter, to the disputed vein north of that meeting, instead of following the

Pennsylvania vein out the Wiggly vein; that a bow is not found on the levels of the disputed below the 2400 level drift, nor in the Pennsylvania vein above the 2400 level, which indicates that the bow results from jumping from the Pennsylvania vein to the disputed vein on the 2400 level where they are both present. The question whether the Pennsylvania vein formed such a bow was a question of fact to be decided by the trial court. Its finding, based on the testimony of plaintiff's experts, must be held to be supported by the evidence.

The parties also analyze the figures for the dip of the veins to support their respective contentions. The disputed vein is steeper than the Pennsylvania vein in the Go Devil raise, and not so steep as the Dromedary vein. The court did not separately find the dip of the disputed vein. Defendants calculate it at 43° 15′ from the 2400 level drift to the Z level drift, the lowest depth to which it has been followed. Plaintiff contends that it is not that steep, since the dip taken down the number 4 winze, which follows the vein, is admitted by witnesses on both sides to be 34°. Accepting defendants' figure at 65° 54′ as the dip of the Dromedary from the 1650 Golden Center level to the 2400 level, and their figure of 43° 15′ for the dip of the disputed vein, the difference is 22° 39′. The court found that the Dromedary where it approached the Pennsylvania vein had a dip of 70°. This finding is based on dip figures taken on a single level, the Golden Center 1800 level, which is but a few feet above the Pennsylvania 2400 level. The dip figure of 65° 54′ is an average of dip figures taken from the Golden Center 1650 level to the Pennsylvania 2400 level. Using the 70° dip figure found by the court, and the figure of 34° as the dip of the disputed vein, the difference is greater than calculated by defendants, the Dromedary vein being much steeper.

The Pennsylvania vein in the Go Devil raise is admittedly less steeply inclined than the disputed vein. Defendants calculated the dip to an average of 20° 51′ for a distance of 375 feet in the Go Devil raise, a difference of 22° 24′ from the dip of the disputed vein, accepting defendants' figure of 43° 15′ as the dip of the disputed vein below the 2400 level. But, as plaintiff points out, the 43° 15′ figure is for the dip of the vein below the 2400 level drift. Plaintiff notes that the vein in what defendants contend is space of intersection between the Pennsylvania vein in the Go Devil raise and the disputed vein gradually steepens, and plaintiff also emphasizes the fact that the vein material in the upper part of the stope above the 2400 level immediately north and south of the rake of the Dromedary and Pennsylvania has the same dip on both sides of the rake, as it has the same strike. Yet defendant contends that on one side of the line the vein is Dromedary while admitting that on the other it is Pennsylvania.

Defendants next contend that the correlation between the Wiggly vein and the Pennsylvania vein is even closer than that between the Dromedary and disputed, so close that the Wiggly, they contend, must be held to be the downward continuation of the Pennsylvania, leaving the disputed as the down dipping continuation of the Dromedary. The strike of the segment of Pennsylvania vein south of its meeting with the Dromedary for a distance of 102 feet, as noted above, is N.35°W. The strike of the Wiggly vein as it takes off from the 2400 level drift north of the meeting is N.38°W., a difference of only 3°. Defendants here compare the strike of the Wiggly vein with a segment of Pennsylvania vein which, in the testimony of plaintiff's witnesses, is in an area of distortion. The defendants compute the dip of the Pennsylvania vein in the Go Devil raise at 20° 51′, that of the Wiggly vein at 20°. But the court found on competent evidence, to which we shall hereafter refer, that the Wiggly vein was a minor and unimportant feature. The fact that such feature correlates on strike and dip with a segment of Pennsylvania vein does not require a holding that, as a matter of law, there is an intersection of veins, and that the unimportant Wiggly vein is the downward extension of the Pennsylvania vein, thus leaving the valuable disputed vein as the continuation of the Dromedary and the property of defendants.

The models show, in line with plaintiff's testimony, that in the vicinity of the encounter of the Dromedary and Pennsylvania veins on the 2400 level there is an area of distortion in position of vein material. The trial court had the configuration before it as depicted by models and heard the testimony of the witnesses, on the basis of which it was warranted in finding that the Pennsylvania vein commenced to bow westerly before the Dromedary encountered it from above, and that the arc north

of the meeting was the other part of a bow in the vein, a situation not unusual where two veins encounter each other according to plaintiff's witnesses. In this analysis the Pennsylvania vein as a continuous sheet passes beneath the Dromedary vein, which comes down from above to join the Pennsylvania, but does not pass through it, nor continue beyond it.

Defendants' definition of intersection depends largely on position, with other physical characteristics a secondary feature. Defendants refer to an intersection of streets by way of analogy. But, obviously, and defendants do not contend to the contrary, an encounter of two ore bodies descending downward into the earth will not have the same regularity and freedom from complexity characteristic of street intersections. To the existence of an intersection there must be four members. If that which is claimed to be the fourth member is insignificant in comparison with the other three it may well be held that its relation is that of a branch of a single vein formed by a union of two upper members, rather than that there is an intersection. In the case herein the trial court was of the view that the Wiggly vein was such a feature. It found, as noted above, that the Wiggly vein was a "minor and unimportant hanging wall branch of the Pennsylvania vein" (Cl.Tr. p. 72), which passed out one of the walls of the drift and was not disclosed any further.

The defendants take issue sharply with the court's finding as to the Wiggly vein. In defendants' analysis of the evidence the Wiggly vein is a strong feature closely resembling the Pennsylvania vein. The Wiggly vein was exposed in the Wiggly drift, which was run for a distance of about 200 feet. The vein was found to be unproductive of ore of commercial value in that distance, and hence is without stoping. Exploration ceased because of the opinion of those in charge that the vein was without commercial value.

Defendants note that the Pennsylvania vein in the 2400 level drift for a distance of 570 feet immediately south of the meeting of the Pennsylvania and Dromedary had no stopes, indicating that it also was commercially unproductive in that distance, and plaintiff's own witnesses testified that the Pennsylvania vein in the Go Devil raise lacked ore. It appears, however, that the Dromedary also is unproductive in the area of its encounter with the Pennsylvania. There is no stoping on the Golden Center (Dromedary vein) 1800 level drift, which is a few feet above the Pennsylvania 2400 level drift. On the next drift above, the Golden Center 1650 level, stoping commences more than 700 feet south of the meeting of the Dromedary and Pennsylvania. It cannot, therefore, be argued that the Dromedary and disputed vein in the area of the meeting of the Dromedary and Pennsylvania resemble each other in that the Dromedary, like the disputed, is productive. Not only is the disputed vein productive, but that area above the 2400 level through which defendants contend the veins commingle was productive immediately to the north of the rake of encounter of the Dromedary and Pennsylvania, and, what is most important, this area of great productivity continued south of the rake, the stoping extending up dip 80 feet on what is admittedly Pennsylvania vein. Thus the Pennsylvania, rather than the Dromedary, is productive as it approaches its meeting with the Dromedary, which productive area exists both north and south of the meeting, at the same strike and dip. Plaintiff's witness Buwalda testified that an area where veins meet was likely to be highly productive.

The court found that the Pennsylvania vein was a dominant, persistent feature over a wide area. The evidence supports this finding as to the general nature of the Pennsylvania vein, notwithstanding the vein is admittedly barren of ore over not inconsiderable distances and in places pinches down to a small feature, as in the Go Devil raise. In this quality of barrenness the Pennsylvania vein in its approaches to the Dromedary resembles the Wiggly, except for the important factor that the productive area in the large stope above the 2400 level drift continued south of the meeting 80 feet up dip over a productive area admittedly Pennsylvania vein. The portion of the vein which defendants contend is the area of intersection where the two veins commingle is highly productive and this high productivity continues on down the disputed vein. The Wiggly vein was disclosed in the Wiggly drift to be dipping southwesterly and would soon encounter the disputed vein, and there was evidence on behalf of plaintiff that up dip 12 feet above the main 2400 level the Wiggly vein joined with the north south spur taking off north of the Wiggly vein, which spur defendants contended was Dromedary,

and there the Wiggly ceased to be a separate vein or branch. Plaintiff's witness Nobs testified that as he followed the vein out the Wiggly drift it just about "pinched out." The court was unwilling to believe that the strong dominant Pennsylvania vein would end thus in a vein in the position and of the character of the Wiggly vein.

Paragraph V of the findings includes the following: "The Pennsylvania vein has a strike varying somewhat, but it is generally north and south and is properly described as a dominant and persistent vein. (117 F. 509.)" The citation is to Pennsylvania Consol. Min. Co. v. Grass Valley Expl. Co., C.C., decided in 1902. It was the theory of plaintiff herein that the cited case involved the same Pennsylvania vein as the present case, but nearer the shaft and at a much higher level than the instant case. The record herein supports this contention of plaintiff. The controversy in the cited case differed from that in the instant case, but the opinion of the Circuit Court noted that the evidence there showed that the Pennsylvania vein was a dominant, persistent vein. The defendants herein contend that the citation of the federal case in the findings indicates that the court herein relied on the decision in the federal case to establish a fact in this unrelated case between different parties. The finding herein is supported by evidence introduced on the trial of the present case. The reference to the federal decision is incidental.

The defendants place special emphasis on their photographic exhibit A with which they confronted plaintiff's witness Simkins without identifying the place where the photograph was taken. The witness testified to the photograph showing a vein about 14 inches wide, as measured by a hammer driven into the rock wall at the top of the vein to show the scale of the photograph, and that it appeared to be a strong feature. He testified that it looked like Pennsylvania, rather than Dromedary. The photograph was then identified as having been taken near the end of the Wiggly drift. There is no showing, however, that the vein, whatever its width, carried ore. All the testimony was to the effect that the vein did not carry ore in commercial quantities. As to the vein looking like Pennsylvania, rather than Dromedary, the court found that the Wiggly was a minor and unimportant branch of the Pennsylvania. Witnesses for plaintiff testified to photographs sometimes being misleading in suggesting a situation not borne out by actual examination of the underground workings. In this instance the witness Simkins testified that the vein looked strong in the photograph, but that underground it was a weak feature.

The court found differences in the appearance of the Pennsylvania and Dromedary veins. As to the Pennsylvania vein the court found that it is continuous and well defined with gouge lying between the veins and the walls, that it is seldom if ever frozen to the walls and not infrequently it consists of two or more strands of quartz, with gouge and "formation" consisting of crushed rock. One of its characteristics, the court found, is its branches and spurs. The court made no separate finding as to the appearance of the disputed vein but included it within the description of the Pennsylvania vein.

The court found that the Dromedary vein in the vicinity of its meeting with the Pennsylvania, as compared with the Pennsylvania, has a noticeable lack of gouge, that in many places it is frozen and tightly attached to its walls, that it is a narrow feature pinching down in places to an inch or two in width.

Defendants contend that the court's finding as to the Pennsylvania vein is not true of that vein within 300 feet of its meeting with the Dromedary; that in fact the characteristics of the veins are interchangeable, sections on each resembling sections on the other; that some of plaintiff's witnesses testified that sections of the Dromedary could not be distinguished from sections of the Pennsylvania. But, as one of the witnesses for plaintiff put the matter, it may be impossible to identify two men from their shoes alone, but when the men are viewed at full height there is no difficulty at all. The thought of the witness was that each vein, considered over a broad area, had characteristics which distinguished it from the other. Since the veins were part of a vein structure of simultaneous origin, according to plaintiff's witnesses, it was to be expected that they would not differ widely in their characteristics, and that sections of one might closely resemble sections of the other. The determination of the identity or continuity of veins in this case was a difficult one, in which it was necessary for the court to arrive at a decision on the basis of the only evidence available. If the evidence is not as clear and decisive as might be desired, the difficulty inheres

in the nature of the problem presented by the underground vein structure. It was necessary that the court base its decision on the differences found, although the distinctions were not as marked as one would hope to find.

[14] It is true that both veins are unproductive in the area just before they encounter each other, except for the 80 feet of stoping on the Pennsylvania south of the meeting, and in these unproductive areas both are narrow features. But the court was of the view that the disputed vein, a highly productive area, had the characteristics of the Pennsylvania in its productive areas. The characteristics of the productive disputed vein differ from the characteristics of both Dromedary and Pennsylvania immediately south of the meeting, except as they resemble the attributes of the vein in the 80 feet of stoping immediately south of that meeting, which is admittedly Pennsylvania. In this situation correlation of characteristics of the productive disputed vein with productive areas of the Pennsylvania over a wide extent and with the productive area of the Pennsylvania in the 80 feet of stoping immediately south of the meeting, the only productive area in the vicinity of the meeting, was properly considered by the trial court in reaching its conclusion that the disputed vein was Pennsylvania. The testimony of those of plaintiff's witnesses who had participated in mining operations on the disputed vein and in the vicinity of the rake of encounter of the two veins is important. Pennsylvania Consol. M. Co. v. Grass Valley Expl. Co., C.C., 117 F. 509; Carson City G. & S. Min. Co. v. North Star Min. Co., C.C., 73 F. 597; Star Mining Co. v. Fed. Mining & Smelting Co., 9 Cir., 265 F. 881; Cheesman v. Shreeve, C.C., 40 F. 787.

Defendants contend that what plaintiff has done is to describe as a double junction what is in fact an intersection; that where there is a junction the configuration of veins resembles the letter Y; that where there is an intersection the veins are in the position of a letter X. In defendants' view plaintiff has refused to recognize the existence of the X formation by the device of saying that there are two junctions, a double junction, in effect two Vs with the points together. The formation possesses no such regularity as is found in the letters of the alphabet. Moreover, to arrive at the X configuration defendants are forced to treat the weak insignificant Wiggly vein as the fourth member of the cross. Upon the basis of the testimony as to position and other characteristics the court found that the veins joined and that the Wiggly vein was a down dipping insignificant branch of the single vein below the junction. As to Diagram II, which is repeated many times in defendants' briefs and represents a cross section of the veins, plaintiff points out that it gives a distorted impression in that it is taken almost at right angles to the strike of the Dromedary vein, with the result that the trace of that vein on the section would approximate its true dip, but it is not at right angles to the strike of the Pennsylvania vein. This argument as to the so-called double junction adds nothing to defendants' position. The finding that there was a junction is supported, and that is conclusive on this phase of the controversy.

Defendants find proof that the disputed vein is the Dromedary in the fact, as defendants claim it to be, that both the Dromedary and the disputed vein are affected in the same manner by what are called "northeast crossings," while the Pennsylvania vein is not thus affected. Plaintiff concedes that the Dromedary is thus affected, but denies that the disputed vein shows any such condition. Since the Dromedary admittedly shows this phenomenon and the Pennsylvania admittedly lacks it, the important question is whether it appears in the disputed vein.

The crossings are steep-dipping structures with a northeast strike. They do not carry ore except occasionally for a short distance where they meet a vein. It is conceded that there are a number of them and that they form intersections with both the Dromedary and Pennsylvania veins. Defendants' witnesses testified that the structure formed by the contact of the Dromedary vein with these crossings was unique, that they had not observed it on the Pennsylvania or elsewhere in the district. Defendants' witness Tolman likened the formation to a staircase. He thus described it: "This structure is developed by quartz that at one place takes the trend of a flatter structure, a little flatter, and then climbs along a steeper structure, takes a flatter dip and then climbs a steeper structure. It was the most striking fea-

ture, without any question, in the Dromedary area that I saw. That structure is only developed where a swarm of these northeasters, steep northeasters, cross. Where the northeasters are not found in the vein then that staircase is lost and the vein goes up at a somewhat gentler dip. In other words, in my opinion, the structure is due to the fact that these northeasters become an integral part of the vein between walls and this steep structure then is developed by the two elements of the vein, the steeper northeaster and a flatter vein, which also has a northeasterly strike. * * * This steep structure developed in this way, I think, is unusual. Personally, I have only seen it in the Dromedary and as far as the literature goes, and as far as I know, it has only been described in the Dromedary." (Rep. Tr. p. 1578.)

The defendants' witness Kildale testified as follows: "It [the vein] tends to follow the northeast steep structure for greater or less distances and then often has a tendency to flatten off and jump, as it were, from one steep northeaster to another, and then it follows another northeaster, both on strike and dip, and then may turn off from one northeaster to another. It has variation from NE, a structure similar to the so-called Grass Valley crossing, to a flatter structure." (Rep.Tr. p. 1507.)

Thus the defendants draw a picture of the Dromedary vein immediately above its meeting with the Pennsylvania as jumping from one northeast crossing to another, becoming a part of such a crossing and assuming its steeper dip for a distance, then leaving such crossing to proceed at a flatter dip until it encounters the next northeast crossing, which it follows to depart again to reach a subsequent crossing. Both plaintiff's and defendants' witnesses are agreed that such a formation is not found where the crossings encounter the Pennsylvania vein, which does not assume for any distance the path of the crossing. The parties are, however, in sharp disagreement as to whether this staircase type of structure is to be found in the disputed vein. Defendants do not claim that it is to be found in the disputed vein except in that vein as shown in the Z level, and then only at the ends of the drift on that level. The flatter dip of the disputed vein where the No. 4 winze follows it is explained by defendants as due to the circumstance that the vein there lies between steep crossings, and the winze follows the shallower aspect of the vein.

The court found: "Both the Pennsylvania and Dromedary veins encounter what have been referred to in the testimony as 'northeast crossings' which appear to form intersections with the veins where encountered, but these crossings seldom carry mineral in paying quantities and are of a steep dip. They are separated and unrelated features which lend no material aid to a determination of the critical issue concerning intersection or junction of separate veins." (Cl.Tr. p. 70.)

The plaintiff's witnesses testified categorically that they had not observed the staircase structure in the ends of the Z level drift, or any place else on the disputed vein. They admitted that steep structures were found there, but denied that they united with the vein to form the staircase type of structure. In plaintiff's analysis the steep structures encountered in the ends of the Z drift were small branch veins, or lacers. The plaintiff's witnesses testified that in the wedge formed between veins coming together it was a common phenomenon to find stringers or lacers running from one vein to the other.

The question is clearly one of fact. The evidence is not in such condition that we can say, as a matter of law, that defendants have demonstrated that the staircase structure characteristic of the Dromedary vein is also found in the disputed vein. To decide this question in defendants' favor would be to accept the testimony of defendants' witnesses while denying validity to the testimony on behalf of plaintiff. It was the province of the trial court to resolve conflicts in the evidence. Defendants counter with the assertion that plaintiff's witnesses, while denying in their verbal testimony that the staircase structure is found in the Z level, have depicted it on their maps. What the maps show in this particular was a subject for the experts. As non-experts in the field of geology and mining engineering this court cannot say, in opposition to the testimony of plaintiff's witnesses, that the maps show a staircase structure in the disputed vein. There may be features revealed so plainly by a map that expert testimony to the contrary would palpably be false, but this

matter is not of such nature. The absence of the staircase structure in the disputed vein thus is a circumstance correlating the disputed with the Pennsylvania in which, admittedly, that structure was not found.

Defendants next contend that further evidence that the disputed vein is the Dromedary is to be found in the fact that from the disputed vein on the 2400 level north of the Wiggly drift there is a spur called the north spur which correlates with spurs found north of the enjoined winze in the Dromedary 1650 and 1400 level drifts. This indicates to defendants that the spurs as revealed in the 2400 level of the disputed and the 1650 and 1400 level of the Dromedary are part of a continuous vein sheet which forks off from the Dromedary. Defendants find a close correlation between the strike and dip of the north spur drift and the spurs on the Dromedary 1650 and 1400 levels, known as West Dromedary. Plaintiff's witnesses deny that such a correlation exists. They point to the fact that the strike of the spur called West Dromedary on the 1400 level, as shown on defendant's diagram XVII (Op. Br. p. 203), differs radically from that of the spur shown on the 1650 level, which indicates to plaintiff that there is not a continuous vein sheet downward from the Dromedary 1400 level to the Dromedary 1650 level, and thence down to the 2400 level on the disputed vein. These spurs are found by plaintiff's experts to be "erratic and inconsequential." Under the circumstances, the determination of the trial court that this factor was not convincing cannot be disturbed.

Defendants' witnesses testified to finding both the Dromedary and Pennsylvania in the so-called Fishtail stope, a northeast extension of the large stope above the 2400 level drift. In the view of defendants' witnesses the two veins separated in this area, the Pennsylvania to continue downward as the Wiggly vein, the Dromedary as the disputed vein. Defendants emphasize the fact that in this area one stope lies just above another, as indicating that there are two intersecting veins there. But plaintiff's experts testified that these overlapping stopes are on branches of the Pennsylvania vein. The trial court accepted plaintiff's explanation and found that the steep structure which appeared in the raise was a lacer within the walls of the Pennsylvania vein. This finding, under the circumstances, cannot be disturbed.

Defendants object that if there was a junction of the Dromedary and Pennsylvania veins, as plaintiff contends, the Pennsylvania vein must exist south of the line of junction and that it was not shown to exist there in the Y and Z level drifts. Defendants analyze the testimony of plaintiff's witness Hardy as constituting an admission that he based the existence of the Pennsylvania vein south of the junction in those drifts on his "blind guess." In plaintiff's view Hardy meant not that he based the existence of the vein south of the junction on his own blind guess, but that his statement as to just where the vein would be found beneath concealing rubble shown in the photograph concerning which he was testifying was a "blind guess." The trial court apparently agreed with this interpretation of the evidence. We agree with the trial court.

Defendants contend that they were prevented from obtaining relevant evidence by the plaintiff's denying defendants' engineers access to certain workings in violation of inspection orders made by the court. Defendants hoped to find evidence in the places to which they were denied access of another intersection between the Dromedary and Pennsylvania veins. If the veins encountered each other in those places the meeting would be a different one from that in the vicinity of the No. 4 winze, upon the nature of which depends the ownership of the disputed vein. The existence of an intersection at the places to which defendants were denied access would not establish that the encounter south of the No. 4 winze was an intersection, rather than a junction. The testimony on behalf of plaintiff was that the workings to which defendants claim plaintiff denied them entry were inaccessible because filled with water and debris from plaintiff's mining operations. Plaintiff urges that defendants desired through inspecting workings remote from the controversial area to obtain information relevant to other litigation with plaintiff.

[15] The questions as to the extent to which defendants should be permitted to examine plaintiff's workings, and as to whether plaintiff refused to permit inspection to the extent directed by the court's orders were matters for the trial court as to which no abuse of discretion appears from the record.

Conclusion on evidentiary issue.

On the issue of whether there was a junction or an intersection, the trial court was presented with a typical fact problem—did the two veins intersect or form a junction? The plaintiff's experts gave a definition of "intersection" that the trial court refused, and, in our opinion, properly refused to adopt. The trial court determined that this issue should depend upon the appearance of the veins, their position, their strike and dip as they approached the meeting, the fact the Dromedary vein rolled into the Pennsylvania vein, and other facts. The experts of plaintiff, as already pointed out, testified that from appearance—gouge, whether the vein was frozen to walls, formation, etc.—if a large enough area of the veins was disclosed, they could identify the Pennsylvania vein and could distinguish it from the Dromedary. They positively identified the disputed vein as a continuation of the Pennsylvania. The evidence also shows that the strike and dip of the admitted Pennsylvania vein in the stoped area immediately south of the rake of encounter is similar to the strike and dip of the vein immediately north of the rake of encounter. There is substantial evidence that the Dromedary rolls into the Pennsylvania along the rake of encounter. The evidence shows that what would have to be the fourth member were there an intersection—the Wiggly vein—is a weak, insignificant branch or spur of the Pennsylvania, and not the main Pennsylvania vein. The trial court, in disregard of the definitions given by plaintiff's witnesses, based upon all of the above mentioned evidence, found that there was a junction and not an intersection. That finding, being supported by substantial evidence, cannot be successfully attacked on this appeal.

Contentions in reference to the scope of the judgment.

A. Propriety of adjudication of ownership of the disputed vein.

Defendants attack the form of the judgment in several respects. They first urge that the issue of ownership of the disputed vein was not properly before the court, and that it was error to pass upon that issue. Defendants' thought is that, because the water artificially introduced through the drill holes eventually reached those portions of plaintiff's workings that defendants concede are located on the vein owned by plaintiffs, and because the defendants concede that the introduction of water into those workings constituted a trespass, that it was not necessary for the trial court to determine the ownership of the vein where the drill holes broke through. Defendants have even expressed a willingness to have any such further trespasses enjoined. (Op.Br. p. 4.)

[16] Defendants' position is unsound. Throughout this controversy plaintiff has always claimed ownership of the disputed vein into which the drill holes penetrated. The complaint so alleged. Defendants not only denied the allegations of the complaint on this issue, but affirmatively alleged ownership in defendant Cooley Butler, in the following language (Cl.Tr. p. 52): "In further answer thereto these defendants allege that at all places in the Pennsylvania mine and in the said 2400 level thereof whereat trespass is alleged in the complaint herein to have taken place, and at all places therein whereat trespass is alleged in the complaint herein to be threatened, and at all places therein in respect to which any relief is sought in the complaint including the said lots 6 and 7 below a depth of 200 feet from the surface, the defendant Cooley Butler now, and at all times heretofore is, and has been the owner of all and each thereof and that any claim of the plaintiff to said places and lots is without any right whatever and that the plaintiff has no estate, right, title or interest whatever, and defendant, Cooley Butler, is entitled to the possession thereof * * *."

The original answer affirmatively requested that defendant Cooley Butler have judgment that he owns the property where the alleged trespasses occurred, were alleged to have occurred, or were threatened. When the case came on for trial, and before the opening statements were made, defendant deleted his prayer for judgment of ownership, and asked only that plaintiff take nothing and that defendants have judgment for their costs of suit and for such other and further relief as might be just and applicable. But the allegations of the answer, which stood also as the answer to the amended complaint filed thereafter, were not changed, and the case was tried on the theory that ownership was the decisive issue, and that that issue depended on whether there was a junction or intersection of the Pennsylvania and Dromedary veins. In his opening statement defendants' counsel stated, in response to a

question by the court, that the sole issue was whether there was a junction or intersection, and that the whole future of defendants, not only in this case, but in other matters, depended on that point. (Rep.Tr. pp. 31 and 32.) In view of these factors, defendants cannot by admitting now that a trespass took place elsewhere, deprive plaintiff of the right to an adjudication that a trespass took place where the drill holes penetrated and where the water flowed into workings on the disputed vein. The damages which plaintiff sought for removal of the water introduced through the holes were for removal from the area immediately surrounding the holes, as well as for removal after it reached plaintiff's workings admittedly on plaintiff's vein. The scope of the judgment must be determined in the light of the pleadings and the issues as made upon the trial. So considered, the trial court properly included within the judgment a determination of title of the disputed vein.

B. Should the adjudication of ownership have been limited to the area beneath lots 6 and 7, block 18?

[17] Defendants vehemently urge that the judgment goes beyond the issues in another respect. It is contended that, if title to the disputed vein was in issue (and we have held it was), the adjudication of ownership, and the relief dependent thereon, should have been confined to the area vertically beneath lots 6 and 7, block 18, and that the court should not have adjudicated title to the portions of the disputed vein lying outside that area. We are of the opinion that the issues as framed by the parties compelled the trial court to make findings as to the title to the vein beyond the limited area located beneath lots 6 and 7 of block 18.

The allegations of the amended complaint, filed after the trial commenced, follow, in most respects, those of the complaint. The complaint alleges that plaintiff owns a mine known as the Pennsylvania mine, which includes the 2400 level drift; that that drift is on the main Pennsylvania vein and more than 1200 feet vertically beneath the surface; that the vein apexes east of Auburn Street; that the 2400 level drift on the Pennsylvania vein passes beneath lots 6 and 7, block 18, Grass Valley Townsite; that plaintiff owns the mineral rights in these lots below a depth of 200 feet from the surface.

Paragraph IV contains the following: "In and beneath said Lots 6 and 7 of Block 18, plaintiff's said predecessors in interest constructed a winze, known as the No. 4 winze, leading down from said 2400 level to a depth of approximately 200 feet, a drift at the bottom of said winze running on said Pennsylvania vein at right angles to said winze and stopes, extending from said drift on both sides of said winze, upward on said vein to a short distance below the said 2400 level." Thus the complaint describes the No. 4 winze, the drift at the bottom of it, and the stopes extending upward from the drift on both sides of the winze as "in and beneath said Lots 6 and 7 of Block 18." In fact, the evidence shows that the Z level drift at the bottom of the winze only crosses the southwest corner of the area bounded by the lot lines projected beneath the surface and otherwise lies entirely without those lines. Plaintiff has never contended otherwise. The Y drift, lying between the 2400 level drift and the Z drift, and the X drift on the same level as the 2400 level drift, are not referred to in the complaint. The X drift is entirely within the lot lines; the greater part of the Y drift is within, but it extends a short distance south of the south boundary of lot 7. The greater portion of the stoped area below the 2400 level lies within the lines of lots 6 and 7 projected downward, but there is stoping both north and south of those lines. Thus the undisputed fact, as shown by the evidence, is that plaintiff's workings below the 2400 level drift for the most part lie beneath lots 6 and 7, but that they do extend beyond the lot lines.

As to the drill holes of defendants, it is alleged that they penetrated "said workings of plaintiff below the 2400 level of the Pennsylvania mine." The word "said" in the phrase "said workings" can refer only to the workings described in paragraph IV, quoted above, that is, to workings beneath lots 6 and 7. The water introduced through the drill holes is also described as passing "into said workings in plaintiff's mine below said 2400 level."

The drill holes in fact penetrate the vein within the lot lines. The water which passed through the holes did not, of course, confine itself to such part of the plaintiff's workings below the 2400 level as were within lots 6 and 7, but spread into the workings as they extended beyond the lot lines.

As to the defendant's winze, referred to in the trial as the enjoined winze, it is alleged that it was being driven into lots 6 and 7 at a depth of more than 200 feet below the surface, and that it was pointed toward and penetrating within the vertical bounding planes of those lots. If defendants continue the winze, the complaint proceeds, it will shortly break "into plaintiff's workings on and near said 2400 level of the Pennsylvania mine." As constructed downward at an angle, the winze had in fact reached a place where it was well within the lot lines.

It is thus true that in the complaint as originally filed plaintiff based the rights which it claimed in this case on ownership of lots 6 and 7 below a depth of 200 feet from the surface. It alleged: "Plaintiff bases its claim of ownership of said vein and the workings thereon in Lots 6 and 7 of Block 18 upon the ownership of all of said lots below a depth of 200 feet from the surface, and upon the open, peaceable, quiet and undisturbed possession of said vein and workings by plaintiff and its predecessors in interest." Pursuant to stipulation this allegation was omitted from the amended complaint, which was not otherwise substantially changed except to make certain corrections in paragraph VI which need not be noted here.

On the other hand, if the contract of 1915 controlled, the rights of the parties did not depend at all upon ownership of the subsurface under grants of the surface owners, but upon whether the vein where the trespass took place was part of a vein which apexed within the area bounded by Main Street, Auburn Street and the south townsite boundary, or without that area. Plaintiff has always considered the contract as operative and controlling. Whatever may have been plaintiff's reason for drawing the complaint as it did, it was agreed in the proceedings before trial that the rights of the parties depended on the 1915 contract, under which the issue determinative of ownership was the location of the apex of the disputed vein upon which the trespass took place. That issue, in turn, depended on whether the meeting of the Dromedary and Pennsylvania veins south of the drill holes was a junction or an intersection. We have heretofore referred to the remarks of defendants' counsel in his opening statement to the effect that the whole case depended on that point. If there is a junction, then those workings on the disputed vein outside the boundaries of lots 6 and 7, as well as such part of the workings as lay beneath those lots, are owned by plaintiff. We do not understand that defendants contend otherwise. Their contention was that there was an intersection, with the result that the workings on the disputed vein outside, as well as inside the lots' boundaries projected downward, were on the Dromedary vein. Since the water spread throughout these workings on the disputed vein below the 2400 level, the trespass was not confined to the workings lying beneath lots 6 and 7. It is quite clear, therefore, that it was proper for the court to make an adjudication of ownership coextensive with the trespass, that is, to determine ownership of the disputed vein to the full extent that it had been followed by plaintiff's workings below the 2400 level, and this the findings and judgment did.

Properly interpreted, the findings and judgment also correctly determine plaintiff to be the owner of the vein and workings immediately above the 2400 level. It is alleged and found that the water trespass extended only up to the 2400 level drift. But the court found that a trespass was threatened to the workings above that level through extension of the defendant's 1800 level drift. Defendants concede that these workings just above the 2400 level are in part on vein material owned by plaintiff, since in defendants' analysis the space of intersection lies there, which is plaintiff's under the contract of 1915. But as to part of the area, defendants contend that it lies upon Dromedary vein after an intersection with the Pennsylvania vein. Hence ownership depends on the issue of junction versus intersection, as does ownership below the 2400 level. It follows that the determination of ownership of the vein to the full extent that it had been followed by the 2400 level drift and workings just above that drift was within the issues of the case as developed on the trial.

Although defendants state that they object to an adjudication of ownership beyond lots 6 and 7, block 18, it is apparent that their real objection is not to an adjudication confined to the workings immediately below and above the 2400 level drift. Defendants concede that if these existing workings as they lie beneath lots 6 and 7, block 18, are on the Pennsylvania vein, they are also on that vein as they extend outside the lot lines. Their real objection is that the findings and judgment determine

ownership far beyond those workings. In our opinion the findings and judgment should not be so interpreted.

[18] The court found that "the Dromedary vein wherever it meets the Pennsylvania vein, as more fully described in the Findings of Fact hereof, forms a junction or union with said Pennsylvania vein, both in contemplation of the provisions of said contract of 1915 and as a matter of fact and law, and below said line of junction only one vein exists, namely, the Pennsylvania vein." Defendants contend that under this finding and the portion of the judgment based thereon, it has been determined that wherever the Dromedary, or other vein owned by defendant, and the Pennsylvania vein, or its branches, may meet, the plaintiff has been decreed to be the owner of all branches below the point of meeting. Defendants also object that the extent of the Pennsylvania vein is not clearly defined, and fear that future litigation may result.

These fears of defendants are not well founded. In addition to the finding above quoted, the trial court found that plaintiff is the owner of the Pennsylvania Mine, containing the Pennsylvania vein, and that defendant is the owner of the Golden Center Mine, containing the Dromedary vein; that the main Pennsylvania vein has its apex beyond and east of Auburn Street; that the underground workings are entered through the main Pennsylvania shaft, three to four thousand feet southerly from the area in dispute, and that the Pennsylvania vein is followed continuously out each the 1700 and 2400 Pennsylvania levels, which levels penetrate beneath the surface of the Grass Valley Townsite and extend to the area here in dispute, which area is vertically beneath the surface of the townsite. The court also found that plaintiff owns all the mineral rights in the subsurface portion of lots 6 and 7 in Block 18 of the Grass Valley Townsite below a depth of 200 feet from the surface, save any portion of the Dromedary vein as may exist above the junction of the Dromedary vein with the Pennsylvania vein, and also excepting any other veins, or portions of veins, not now disclosed which may be owned by defendant Cooley Butler by virtue of the 1915 agreement. It was also found that from all of the points where the Pennsylvania vein exists below lots 6 and 7 of Block 18 it can be traced upward on its rise through workings continuously constructed at least to the 1000 foot level of the Pennsylvania mine, which level lies entirely to the east of Auburn Street; that the apex of the Pennsylvania vein is still further to the east of Auburn Street; that the vein on its downward dip from its apex includes all of the area of the vein lying vertically beneath lots 6 and 7 of Block 18, and for a considerable distance both to the north and south of said lots. The court then identifies two branches of the Pennsylvania vein appearing in the Middle raise of the Pennsylvania mine, and finds that both branches apex to the east of Auburn Street. These general findings, as well as those relating to the Golden Center Mine and Dromedary vein, were necessary because of the provisions of the 1915 agreement, quoted in the findings, giving all veins and parts of veins that apex east of Auburn Street to plaintiff and those that apexed west of Auburn Street to defendant. These findings are all amply supported by the record. The trial court did not purport to define the exact extent of the Pennsylvania vein except in the area in dispute. It traced the vein sufficiently to demonstrate that its apex was east of Auburn Street. It did not, as defendants contend, adjudicate that all veins in the area were part of the Pennsylvania or were branches of that vein. If there are other controversies existing over the extent of the Pennsylvania vein other than in the area in dispute, the judgment in this case will not affect those controversies.

The main issue in controversy was the ownership of the vein disclosed by the workings north of the rake of encounter of the Dromedary and Pennsylvania veins. This rake of encounter was disclosed in the workings of plaintiff. But the workings did not disclose the entire rake of encounter of those two veins. The trial court was called upon to determine whether below the rake of the encounter the vein was Dromedary or Pennsylvania. To determine this it had to determine whether at any place along the rake of encounter there was an intersection. If such intersection in fact existed any place along the rake of encounter, an intersection, and not a junction, was proved. As already pointed out, the trial court found that along this rake of encounter there was a junction and not an intersection. In Finding XVI the trial court found in detail just where that rake of encounter existed and could be observed in the existing workings. No ambiguity

exists as to that finding. The rake of encounter had not been entirely disclosed, but the trial court was entitled to infer that since there was a junction in the developed area, there was a junction in the undeveloped area. All that the trial court determined was that along the rake of encounter, as described in Finding XVI, there was a junction. It did not, and could not, find that if the Dromedary, or any other vein of defendant meets the Pennsylvania at any other place below the Grass Valley Townsite, such meeting was a junction. The general terms of the judgment must be interpreted in connection with the findings and conclusions upon which it is based. So interpreted, it simply decrees that the plaintiff owns the Pennsylvania vein from the area in dispute down dip and up dip. That portion of the judgment is predicated upon the findings and conclusions that along the rake of encounter in the area here in dispute there is a junction and not an intersection. The findings and judgment do not determine what occurs in any meeting of defendant's veins with the Pennsylvania in any other area.

The findings and judgment declare plaintiff to be the owner of the Pennsylvania mine and vein, without particularly locating either mine or vein, the effect of which, defendants contend, is to adjudge plaintiff to be the owner of any vein it may claim to be Pennsylvania. It is conceded, of course, that plaintiff owns a Pennsylvania mine and a Pennsylvania vein. But the purpose of this action was not to locate the mine nor the vein in its entirety, nor to prejudge any disputes which may arise hereafter between the parties and which depend for their solution on other issues than whether the particular rake herein involved is an intersection or a junction. Should the existing workings of plaintiff be extended, and in their extensions depart from the Pennsylvania vein onto a vein of defendant, he would not be without remedy. Of course, in any future dispute the present decision would be res judicata as to the particular meeting of the two veins being a junction and as to the ownership of the vein to the extent that it had been followed by plaintiff's workings shown to exist on the trial.

C. Error in judgment in including certain areas within plaintiff's ownership.

[19] In one respect, however, the findings and judgment are ambiguous and must be corrected. The findings, and consequently the judgment, omit any reference to the fact that the southern ends of the X, Y and Z drifts, the Prospect drift and a segment of the Powder Magazine cut-off are, by plaintiff's own admission, on the Dromedary vein. The findings and judgment declare these workings to be on plaintiff's vein. The necessary implication is that these workings are *entirely* on a vein owned by plaintiff, that is, on the Pennsylvania vein, although plaintiff concedes that in the exploratory process the drifts were run onto the Dromedary vein a short distance. The points at which the drifts passed from the disputed vein, found to be Pennsylvania, to the Dromedary vein are not disputed. The findings and judgment should be modified insofar as plaintiff is adjudged to be the owner of any part of the Dromedary vein and workings thereon.

D. Other alleged errors in judgment.

The court enjoined defendants from introducing water through the three drill holes "or any other drill holes similarly driven, or through any artificial conduits * * * from the Golden Center Mine so that it will escape through artificial means into the Pennsylvania Mine." This provision must be read in the light of the issues of the case, that is, as enjoining introduction of water into workings of plaintiff existing at the time of trial lying immediately above and below the 2400 level drift and north of the rake herein involved, including also the stoping which extends up dip 80 feet south of that rake.

[20] Defendant contends that the court erred in overruling the demurrer and motion to strike for the reason that the complaint was uncertain in that it could not be ascertained whether the action concerned "the entire so-called Pennsylvania vein," or only the vein and workings within lots 6 and 7. Defendant urges that the court erred in denying his motion for new trial made on the ground that the judgment went beyond the issues of the case in that it related to the entire vein and mine. Since we have held that the judgment did not have such effect, this ground of motion is without merit. The judgment will not be reversed because of uncertainty in the complaint which was ground for special demurrer where, as here, the issues were agreed upon when the trial commenced and the defendant has not been prejudiced by the uncertainty.

E. Propriety of injunctive relief as to future water trespasses.

Defendants contend that on the facts found plaintiff was not entitled to injunctive relief.

In the first cause of action plaintiff complains of the introduction of water into its workings through the three drill holes made by defendants. In the second cause of action it complains of the winze, which, it alleges, will if continued break into plaintiff's workings on and near the 2400 level. Responsive to the first cause of action, the decree herein, in addition to awarding plaintiff damages, enjoined defendants "from introducing or causing to flow through said drill holes, or any other drill holes similarly driven, or through any artificial conduits, any water from the Golden Center Mine so that it will escape into the Pennsylvania Mine." (Cl.Tr. p. 87.)

The complaint alleged that unless the deliveries of water into the drill holes ceased, great and irreparable damage would result even though the holes were temporarily plugged by plaintiff because the water would spread through the adjacent crevices and interstices in the rock and soften it and cause the rock in the roof of the No. 4 winze and stopes to cave, with great danger to the lives and physical well-being of plaintiff's employees engaged in working there and to the safety of said stopes and winze. The complaint further alleged that the construction of the drill holes and the induction of the water by artificial methods from defendants' mine constituted a deliberate, willful and malicious trespass by defendants upon plaintiff's property, for which plaintiff had no plain, speedy or adequate remedy at law, and unless prevented by order of the court the trespass would cause plaintiff great, continuing and irreparable damage. (Cl.Tr. p. 8.)

We have heretofore referred to the court's findings as to defendants' drilling the first of the three holes in 1936 on the 1100 level, laying pipes along that level after they realized they had encountered an opening, and by means of a pump artificially forcing the water through these pipes into a dammed up area surrounding the top of the drill hole and thence down the hole into plaintiff's workings on the disputed vein, which the court held to be Pennsylvania and the property of plaintiff. The defendants continued to artificially deliver the water into plaintiff's workings through this hole until January, 1940, the court found, when plaintiff plugged it up. In January, 1939, according to the findings, they replaced the original pump by a second one. When plaintiff plugged the first drill hole immediately following its discovery in December, 1939, the defendants artificially introduced mine drainage water through a second hole, drilled in 1939. When that was plugged, they sent water down a third hole. The court found: "The defendants' agents and employees knew, or reasonably should have known, that the drill holes drilled by defendant had penetrated lower levels of plaintiff's mine. The water of the Golden Center Mine thereafter wrongfully, wilfully and intentionally diverted by defendant by artificial means down through these holes and into plaintiff's mine caused plaintiff injury and put plaintiff to the expense of pumping and removing from plaintiff's mine this water originating in defendants' mine. The court finds the reasonable amount of these damages to be that indicated in the computation made by representatives of both parties, namely the sum of $2,531.34." (Finding XXI. Cl.Tr. p. 76.)

The court did not expressly find in the terms of paragraph X of the complaint that great and irreparable damage would result, even though plaintiff plugged the holes, due to the softening of rock in the roofs of plaintiff's winze and stopes, but it impliedly so held by Finding XXV as follows: "Each and all of the allegations of plaintiff's Amended Complaint not inconsistent with the foregoing findings are hereby found to be true and correct statements of fact." (Cl.Tr. p. 78.)

[21] The defendants do not contend that the findings as to the drilling of the holes and the introduction of water into plaintiff's workings through them are unsupported by the plaintiff's evidence. They point to testimony of Cooley Butler to the effect that the holes were driven for exploratory purposes, that he was ignorant of the fact that plaintiff had workings on the disputed vein, and that he believed the opening which the drill holes penetrated was a natural one. This evidence merely created a conflict. In the state of the record, the question of what defendants knew and should have known in this connection was for the trial court, which resolved this conflict in plaintiff's favor.

[22] Although defendants stated in their opening brief (Op.Br. p. 4) that they

"agreed that an injunction might issue against pouring further water into the drill holes" (see, also, Op.Br. p. 318), they now contend, in their supplemental briefs, that, insofar as the complaint seeks to enjoin future water trespasses, it should be dismissed with prejudice for the reason that there is no showing that future water trespasses were apt to recur or that such trespasses were continuous, or were irreparable, or serious, or not compensable in money. The water trespass had been going on for a considerable period when plaintiff discovered it late in 1939. The court found upon plaintiff's evidence that defendants' agents and employees knew or reasonably should have known that the drill holes had penetrated lower levels of plaintiff's mine, and that when plaintiff plugged up the first hole, defendants artificially introduced the water through a second hole, and when that was plugged they sent it down a third hole. The plaintiff obtained an injunction pendente lite restraining defendants from introducing water by artificial means into plaintiff's workings. Under such circumstances, the trial court did not exceed its powers in enjoining future trespasses.

[23-25] It is well settled that an injunction may be granted against repeated or continuous trespasses. The property owner will not be relegated to successive suits for damages. Slater v. Pacific Amer. Oil Co., 212 Cal. 648, 655, 300 P. 31; Watson v. Heger, 48 Cal.App.2d 417, 120 P.2d 153; Eames v. Philpot, 72 Cal.App. 151, 236 P. 373; 28 Am.Jur. 318-330; notes, 32 A.L.R. 463; 92 A.L.R. 578. Injunction against repeated or continuous trespasses on real property. It is not a ground for denying an injunction that the defendants ceased to deliver water into plaintiff's mine while the temporary injunction has continued in effect. Vaughan v. John C. Winston Co., 10 Cir., 83 F.2d 370, 373, 374; Goshen Manufacturing Co. v. Hubert A. Myers Manufacturing Co., 242 U.S. 202, 207, 208, 37 S.Ct. 105, 61 L.Ed. 248; Walling v. Haile Gold Mines, Inc., 4 Cir., 136 F.2d 102, 105. Moreover, litigants are entitled to reasonable repose from future unnecessary litigation. The plain and direct manner of giving this repose is by enjoining the defeated party from continuing to perform the acts found to be wrongful. If he has no intent to continue the wrongful acts he is not injured by the decree. If he has such intent the injunction protects the successful party from the necessity of bringing successive actions for damages. Thus, in quiet title suits, in the discretion of the court, the decree frequently includes an injunctive provision. Wolf v. Gall, 174 Cal. 140, 162 P. 115; Brooks v. Calderwood, 34 Cal. 563; Taylor v. Hawley, 6 Cal.App.2d 576, 45 P.2d 226; see discussion and cases collected 22 Cal.Jur. p. 133, § 20.

For these reasons it is apparent that the portion of the decree enjoining future water trespasses was proper.

F. *Propriety of that portion of the decree enjoining defendants from breaking into the workings of plaintiff.*

The provisions of the decree based upon the second cause of action have been described above. Defendants are enjoined "from continuing to sink defendants' 'enjoined winze,' * * * or continuing or extending any other workings in the vicinity of said winze and particularly the levels extending therefrom so that said winze or workings shall break into or penetrate or materially injure any of the workings of plaintiff's Pennsylvania mine." (Cl.Tr. p. 88.) The effect of the decree is to require defendant in the course of mining operations upon his own vein to leave a barrier between his workings on the Dromedary vein and the earlier workings of plaintiff's Pennsylvania mine, with provision for appraisal of the ore in the "protective pillar of rock" which defendant is required to leave, and payment of the value thereof by plaintiff to defendant. The portions of the decree which provide for such appraisal and payment are set forth in the early pages of this opinion.

[26] It appears from the plaintiff's own model (Ex. 5) that the enjoined winze if continued will break into that portion of plaintiff's X drift which plaintiff's predecessor had carried beyond the junction of the Dromedary and Pennsylvania veins, and which is admittedly upon defendant's own Dromedary vein south of the injunction. The defendant's 1800 level drift if continued will break into that part of the plaintiff's Prospect drift, which is on defendant's Dromedary vein. Hence the effect of the decree is to enjoin defendants from breaking into workings of plaintiff which are on defendant's vein. Insofar as the decree enjoins defendants from continuing the enjoined winze or the 1800 level drift to the point of break through, plaintiff in a supplemental brief filed at the re-

quest of the court virtually concedes that it is improper. The court requested the parties to file briefs on the following questions:

"1. As a condition of securing equitable relief should the plaintiff be required to seal up the southerly portions of the Prospect, X, Y and Z drifts of its mine at the rake of encounter of the Dromedary and Pennsylvania veins, and be required to seal up the Powder Magazine Crosscut where it cuts into the Dromedary vein, so that defendants will not be prohibited from mining a portion of their Dromedary vein?

"2. If such condition should be imposed, should such condition be imposed by this court or should the case be returned to the trial court for that purpose?

"In addition to these points, the court desires counsel to furnish it with any further comments and authorities that may be available on the propriety of the exact form of the injunctive relief granted in this case."

Plaintiff has filed a brief in which it consents and offers to stipulate to a decree imposing upon it an obligation to seal off these drifts to the extent that its predecessor had inadvertently run them onto the Dromedary vein. Plaintiff's consent is to seal off these ends in the event operations should be resumed in the mines, which are now shut down. Plaintiff makes this offer to enable defendant to mine its Dromedary vein in these drifts. Defendants in their supplemental brief, however, reject the tendered stipulation and reply that it is a "matter of indifference" to them whether plaintiff constructs such barriers. For this reason the decision of this court makes no provision therefor. But the consent and tendered stipulation are referred to here for the reason that plaintiff thereby concedes the right of defendants to break into the ends of these workings of plaintiff which extend onto the Dromedary vein.

This concession of plaintiff does not entirely dispose of the problems raised by the portion of the decree requiring defendants to leave a protective pillar of rock between their workings and those of plaintiff. This is so because the decree forbids defendants from continuing any of their workings to the point of break through. Obviously, workings of defendants now in existence or hereafter constructed if continued to the junction of the Dromedary and Pennsylvania veins might break into plaintiff's workings on the plaintiff's Pennsylvania vein. It is, therefore, necessary to consider the propriety of the provision of the injunction which provides for the barrier.

Plaintiff cites no precedent for a decree adjusting in this fashion the rights of owners of two veins which join to form a single vein. As grounds for equitable relief in the form of a decree requiring defendant to leave a natural barrier between his workings and plaintiff's, plaintiff alleges as to the enjoined winze: "Said winze is being driven without any notice to or permission or authority from the plaintiff, and if and when, by blasting, defendants cause said winze to break into plaintiff's workings, there is grave danger that serious injury will be caused plaintiff's employees engaged in work therein; that the roof and supporting timbers in said workings will thereupon be damaged and injured; and that additional floods of water, artificially induced thereupon will be permitted to flow into plaintiff's mine through said workings." (Cl.Tr. p. 23.)

Thus plaintiff fears: (1) Injury to its workmen due to blasting; (2) injury to the roof and supporting timbers of its workings near the threatened break through from blasting; (3) additional floods of water artificially induced in plaintiff's workings by reason of the plaintiff's workings and those of defendant opening into each other.

The court's findings omit as an element of the injury to be feared "additional floods of water artificially induced," and add as a reason for the decree a "distinct danger" of "possible highgrading" in the Pennsylvania mine. The court's full finding as to the necessity for equitable relief in the form awarded is as follows: "The essential operations of drilling and blasting and removing the supporting rock in the vicinity by defendants will jeopardize and cause injury to said Pennsylvania mine workings and will endanger the lives and safety of men therein and create a distinct hazard. Breaking into said workings will afford access to said Pennsylvania mine, which access will not be under the control of the Pennsylvania mine management. High grade ore is at times encountered in said Pennsylvania mine operations and the entry of persons into said mine not under the control of the Pennsylvania mine management would be a distinct danger and give

an opportunity for possible 'highgrading' in the Pennsylvania mine. All of this threatened injury to plaintiff's mine, as aforesaid, if consummated, is serious, wrongful, wilful and irreparable and of a character not readily measured in money damages, whereas any possible injury to defendant, Cooley Butler, is not irreparable but can be readily measured in money damages." (Cl.Tr. p. 77.)

Defendants' brief contains the following statement: "The defendant is willing, and has so expressed himself on trial, to be enjoined from causing water to flow into the plaintiff's mine by artificial means other than the ordinary and prudent working of the defendant's own veins. The defendant is willing, and has so expressed himself on trial, that if in the prosecution of his own work on his own veins he shall be approaching any workings of the plaintiff on plaintiff's veins of which he shall have notice, he, the defendant, will accede to any reasonable arrangement that the court may order that will permit the pursuit of his own vein and remove all possibility of danger to persons or property in plaintiff's own workings, and will so conduct his operations at such times and in such manner that no danger will be entailed, details to be decided by the court." (Op.Br. p. 318.)

[27-29] Plaintiff relies on cases which affirm the right of lateral and subjacent support as affording authority by analogy for the decree herein. At common law a landowner as a general rule is entitled to have his soil remain in its natural position, without being caused to fall away by reason of excavations or other improvements on neighboring land. 3 Tiffany, Real Property, 3d Ed., p. 186, § 752. The right is to support of the land in its natural state, without the added weight of a building upon it. 3 Tiffany, Real Property, 3d Ed., p. 190, § 753. Similarly, where one person owns the surface of land and another the subjacent land, or the minerals therein, the owner of the surface is entitled to have it remain in its natural condition, without any subsidence by reason of the withdrawal of the land or minerals thereunder by the subjacent owners. 3 Tiffany, supra, p. 196, § 754. Violation of the rights of lateral and subjacent support gave rise to an action for damages which was ordinarily held not to accrue until a subsidence had taken place, although occasionally a right to an injunction against further excavations was recognized after some damage had resulted. 3 Tiffany, supra, p. 187, § 752; Costigan, Mining Law, p. 508, Note 46.

The right to lateral and subjacent support is a right pertaining generally to land ownership. It does not depend on the facts of the particular case. Where such right exists it is in the nature of an easement. It is not required that the servient owner be compensated in money for the inconvenience and restriction in use which the duty to maintain lateral and subjacent support entails.

In the case herein plaintiff fears that the blasting and drilling incident to defendant's mining his own vein to its junction with plaintiff's Pennsylvania vein will cause injury to the roof and supporting timbers of plaintiff's workings in the vicinity of the junction. Where a mine owner extends his own workings by blasting and drilling it would seem that there usually will be some injury to the adjacent area. It is not found in the case herein that the damage to plaintiff's workings which will result from defendant's extending his workings to the junction, will be any greater than the damage which occurred to the vicinity when plaintiff extended its own workings along its vein. Plaintiff cites no authority for the proposition that a mine owner who first mines to a junction has a right, either in law or equity, to require the owner of the other vein to refrain from mining his vein to the junction in order that a natural barrier may remain, lest the workings of the owner first to mine suffer only such damage as is incident to careful operations by the owner last to mine.

[30] The doctrines of lateral and subjacent support were anciently established. But there is no body of law declaring that the owner of minerals must refrain from mining to his mineral boundary, whether that boundary is a fixed line projected beneath the surface or at a junction of veins where there is a right to follow a vein extralaterally, in order that there may be no injury whatsoever to earlier mine workings. On the contrary such statements as are found in the cases cited herein are to the effect that a mine owner may follow his vein to the limit of his ownership. In Lord v. Carbon Iron Manufacturing Co., 42 N.J.Eq. 157, 6 A. 812, 825, the court quoted from the English case of Baird v.

Williamson, 15 C.B.,N.S., 376, as follows: "The general rule of law is that the owner of one piece of land has a right to use it in the natural course of user, unless in doing so he interferes with some right created either by law or contract; and, as a branch of that law, the owner of mineral land has a right to take away the whole of the minerals [iron ore] in his land, for such is the natural course of the user of mineral land; and that a servitude to prevent such a user must be founded on something more than neighborhood."

In Jones v. Robertson, 116 Ill. 543, 6 N.E. 890, 894, 56 Am.Rep. 786, the court said: "We understand that each owner of mines thus situated has the right to take out all the coal within the limits of his own boundaries; that is, each may work to the dividing line in every direction, but, of course, cannot cross it without becoming a trespasser."

The court's statement in National Copper Co. v. Minnesota Min. Co., 57 Mich. 83, 23 N.W. 781, 786, 58 Am.Rep. 333, is as follows: "The mere fact that an opening was made by the defendant between the two mines, would not of itself have been a trespass unless the defendant invaded the plaintiff's premises in making it. Each party had a right to mine on its own side to the boundary."

The following statement is made in Duff v. United States Gypsum Co., C.C., 189 F. 234, 235: "* * * it had the right, under the authorities, to which the court has been referred, in England and in this country, to mine all of its property profitable to be mined, provided it operated in a reasonable and natural way, no matter what the consequences might be to its neighbor."

The wording of § 2336, Revised Statutes, is also significant. When two veins intersect the prior location is "entitled to all ore or mineral contained within the space of intersection," but the subsequent locator has a right of way through the space of intersection. Where two or more veins unite the prior location takes the vein *below* the point of union. The implication is, of course, that the subsequent locator takes his vein *to* the point of union. The language of the section excludes the idea that a property right shall exist generally in a prior locator to require the subsequent locator whose workings are later to stop short of the line of union, or, in case of an intersection, to leave a natural barrier on each side of the space of intersection.

[31] For these reasons, and upon the authorities above cited, we conclude that there is no general right in a mine owner who has first opened up his mine to the limits of his boundary to require the adjoining owner to leave a natural barrier by stopping short of the common boundary. But plaintiff contends that in the particular circumstances of this case an equitable decree in the form herein rendered is proper.

Based on the premise that no such general right exists, defendants contend that the effect of the portion of the decree now under discussion is to give to plaintiff, a private corporation, the right of eminent domain, contrary to the constitution and statutes, which permit private property to be taken only for a public use. In plaintiff's view there is here nothing more than an equitable adjustment of the rights of the parties, dictated by the circumstances of the particular case, which by reason of the fact that it resolves problems between adjoining mine owners does not involve an exercise of eminent domain.

[32] Without now determining whether a situation might arise where a decree in the form herein would be lawful, we are of the view that upon the facts alleged and found in this case there is no showing of special injury which justifies such unusual equitable relief. If plaintiff upon the facts alleged and found here is entitled to an equitable decree requiring defendant to leave a natural barrier, our decision will constitute a precedent for granting such a decree in practically all cases where later workings, if continued, will break into earlier workings of another mine owner, since plaintiff alleges no threatened injury which would not be present in all, or in most, cases. Furthermore, it would seem that as to all injuries feared except some damage to plaintiff's workings, adequate protection may be had without the necessity of an equitable decree for a natural barrier. Plaintiff fears injury to its workmen from defendant's blasting. It is not to be anticipated that defendant will blast without warning plaintiff so that its workmen may leave the danger zone. Furthermore, the decree of the trial court provides for an exchange of maps whenever a close approach of the workings of the two mines is indicated by sounds of blasting or other operations, and that defendants should "advise plaintiff of the time of defendants' blasting in order that plaintiff's employees in that vicinity may be duly warned." This

portion of the decree is not seriously challenged by defendants and should be affirmed.

Plaintiff fears highgrading. It can protect itself by constructing a barrier near the place of break through to prevent the entry of persons through defendant's workings. Defendant is also interested in preventing the entry of highgraders into his mine. It is not to be expected that he will fail to take steps to secure his own workings against wrongful entry by persons who might pass from plaintiff's workings into defendant's.

[33] It has been noted heretofore that the court did not list the danger of additional floods of water artificially introduced as a reason for the injunctive decree, although listed by plaintiff in its complaint. By other provisions of the decree, heretofore discussed, future water trespasses were enjoined. Doubtless the court was of the view that its mandate to defendant constituted a sufficient protection to plaintiff without necessity for a natural barrier to prevent entry of such water. For water which flows into a lower mine naturally as a result of operations conducted in a careful manner, the lower owner cannot complain. Costigan on Mining Law, p. 534, § 158; 3 Lindley on Mines, 3d Ed., p. 1985, § 807; Lord v. Carbon Iron Manuf'g. Co., 42 N.J.Eq. 157, 6 A. 812, 824; Spadra Creek Coal Co. v. Eureka Anthracite Coal Co., 104 Ark. 359, 148 S.W. 644, 646, Ann. Cas.1914C, 454; 55 A.L.R. 1470. The decree in its references to "artificial conduits" and "artificial means" recognizes this and plaintiff concedes in its brief that it is the law. For such water as may reach plaintiff's mine as a natural result of defendant's mining operations conducted in a prudent manner, as well as for any injury which may inevitably result to plaintiff's workings from defendant following his vein to the junction in a careful manner, plaintiff cannot complain. Its loss, if any, will be damnum absque injuria. The decree of the court below retains continuing jurisdiction for purposes relating to the enforcement of the decree. Under this provision the court may enforce the obligation of defendants to mine in a careful manner. Defendants do not dispute their obligation in this respect.

G. Defendants' contention that the case is moot because of facts occurring since the trial.

As already pointed out, the court directed the parties in their supplemental briefs to consider further the propriety of the exact form of injunctive relief granted by the trial court. In those briefs it was brought out by statements in which both sides concur, and also by affidavit of Wallace Butler, that, after the entry of the decree herein, mining operations on defendant's property ceased about March, 1942, and that the mine has been allowed to fill with water. The affidavit states that this suspension was made necessary by government restriction, by inability to obtain labor and materials and by general economic conditions. On October 7, 1942, the War Production Board by its order L-208 directed the closing of all gold mines. According to the affidavit, prior to suspension of operations, the collars of the three drill holes were filled with cement, and all underground equipment in defendant's mine was removed, including ore cars, rails, track, pipe and pumps. The mill equipment has been partially dismantled and large amounts of other surface equipment have been removed.

Defendants now argue that the plaintiff has no need of injunctive relief while this situation continues. It is pointed out that it is physically impossible for defendant to operate its mine while filled with water and legally impossible while the government's closure order is in force. Therefore, defendants argue, the case has become moot insofar as plaintiff seeks injunctive relief. In their analysis the injunctive provisions of the judgment should be reversed with directions to the court below to dismiss the action without prejudice insofar as it seeks an injunction against defendants breaking into plaintiff's workings. The fact that, in the future, production of gold may become legal and profitable, is not, in defendants' view, sufficient to support entry of an equitable decree now. The defendants' contention that, insofar as the action seeks an injunction against future water trespasses, it should be dismissed with prejudice, has been considered above.

[34] Based on the premise that the injunctive provisions of the decree are now moot, defendants further contend that the adjudication of ownership is an incident of the injunctive decree, and that such adjudication of ownership must fall with the equitable provisions of the decree. The de-

fendants attach a proposed form of judgment to their supplemental brief in which it is merely adjudged that plaintiff recover $2,531.34. They also propose amended findings and conclusions of law in which it is found that defendants introduced water into plaintiff's workings on plaintiff's Pennsylvania vein, which was removed by pumping at a cost of $2,531.34, and that plaintiff's and defendant's mines are shut down in compliance with federal order, and defendant's workings are filled with water. In these proposed findings the defendants evidently use the phrase "plaintiff's workings on the Pennsylvania vein" as referring to the workings on the vein which defendants admit is Pennsylvania. The suggested findings do not determine the ownership of the disputed vein, nor the question of junction versus intersection on which that ownership depends.

We have heretofore said that since the drill holes emptied into plaintiff's workings on the disputed vein, and the water was pumped from plaintiff's workings on that vein, the ownership of the vein was relevant to the action for damages, as well as to the injunction, notwithstanding the water reached beyond the disputed vein into workings which defendants concede are on plaintiff's Pennsylvania vein. Furthermore, apart from the cause of action for damages, the fact that the plaintiff does not immediately need injunctive relief in the form awarded by the decree, by reason of the closing of the mines, does not render moot the question of ownership of the disputed vein, to which both parties claim title. Should we refuse to consider the propriety of the injunctive decree in the form rendered by reason of the fact that plaintiff has no need for it while the mines are shut down, we would, nevertheless, determine the propriety of the trial court's adjudication of ownership of the disputed vein in favor of plaintiff. It is true that the ownership of that vein was incidental to the right to injunction in the sense that unless plaintiff owned the vein it was not in any event entitled to the injunction against defendants' breaking through. But plaintiff desires an adjudication of ownership even though we should hold, which we do not, that we will not consider the propriety of the injunctive provisions. The trial court has decided the issue of ownership in plaintiff's favor. The trial was devoted largely to that issue. The reporter's transcript contains more than 2,000 pages, indicating an exhaustive inquiry. The adjudication of ownership in favor of plaintiff is not to be cast aside because facts arising pending appeal remove the immediate need for injunctive relief. Plaintiff is not to be deprived of that adjudication by reason of facts occurring after judgment because he brought his action in the form of a suit for injunction, rather than a quiet title suit.

In the case herein we have not refrained from passing on the propriety of the injunction, but we have held, in favor of defendant, that the injunction is improper insofar as it requires plaintiff to leave a barrier. The plaintiff is not urging that this question be left undecided. We have held above that the injunction is proper insofar as it restrains future water trespasses.

In Walling v. Haile Gold Mines, Inc., 4 Cir., 136 F.2d 102, the administrator of the Wage and Hour Division, United States Department of Labor, sought an injunction to restrain a company engaged in gold mining from violating the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. The District Court denied the injunction. The company moved to dismiss the administrator's appeal on the ground that "the question presented by this appeal is now a moot question for the reason that the appellee is no longer engaged in the mining and reduction of gold-bearing ore, has dismantled its former gold mine and removed its machinery to the State of Alabama, where it is engaged in mining graphite, in which it is in full compliance with the Fair Labor Standards Act, and its license is expired." 136 F.2d 102, 105. There, as here, the War Production Board's order prevented reopening of the mine. In refusing to leave undecided the question of the administrator's right to an injunction, the court said: "It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot. [Citing cases.] This particularly is true where the challenged practices are capable of repetition. * * * Nor is a case rendered moot where there is a need for the determination of a question of law to serve as a guide to the public agency which may be called upon to act again in the same matter." 136 F.2d 102, 105.

[35] But that the court did not place its decision solely on the ground that a public agency was involved is indicated by the following: "Haile [the gold mining company] is still a going concern and it still owns the gold mines and the equipment to operate them. The admitted likelihood of Haile's resuming operations as soon as the ban on gold mining has been lifted clearly indicates that a genuine and substantial controversy exists between the parties. The possibility of future violations of the Act by Haile is very much with us and not merely within the realm of prophecy. Moreover, an adjudication on the merits by us at this time will finally resolve the instant dispute and obviate the need for, and the expense of, repetitious litigation in the future if, as, and when Haile resumes mining operations." 136 F.2d 102, 105. The court said of United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 239 U.S. 466, 36 S.Ct. 212, 60 L.Ed. 387, one of the cases relied upon by defendants herein, that it was distinguishable. As applied to the present case the same may be said of other cases cited by defendants herein, including United States v. Alaska S. S. Co., 253 U.S. 113, 40 S.Ct. 448, 64 L.Ed. 808; Commercial Cable Co. v. Burleson, 250 U.S. 360, 39 S.Ct. 512, 63 L.Ed. 1030; Berry v. Davis, 242 U.S. 468, 37 S.Ct. 208, 61 L.Ed. 441. In the case herein we have held that plaintiff is in any event entitled to a decision on the question of ownership of the disputed vein. In our view it is proper at this time to dispose of the whole case, rather than to leave to subsequent litigation the decision as to the propriety of the injunction concerning which the briefs contain extensive argument.

Conclusion.

From what has been said we conclude that the judgment should be affirmed as to the award of damages. We also conclude that the trial court correctly determined that the Dromedary and Pennsylvania veins form a junction and not an intersection in the area in dispute, and that the adjudication that plaintiff owns the vein north of the rake of encounter of the Dromedary and Pennsylvania vein should be affirmed. However, insofar as the findings and judgment imply that the plaintiff owns the southern tips of the X, Y and Z drifts, the Prospect drift and a segment of the Powder Magazine cutoff, as depicted in green on plaintiff's model, Exhibit 5, the judgment should be reversed and the trial court instructed to modify its findings and judgment so as to declare the defendant Cooley Butler is the owner of these segments as shown on said exhibit. We also conclude that the judgment should be affirmed insofar as it enjoins future water trespasses by defendants, and insofar as it requires defendants to give warnings to plaintiff and to exchange maps with plaintiff as their workings approach those of plaintiff, and insofar as the trial court retains jurisdiction to enforce this and other portions of the decree. We conclude that insofar as the decree enjoins defendants from continuing the enjoined winze or their 1800 level drift, or continuing or extending any of their other workings to the point of break through with plaintiff's workings, and insofar as the decree requires defendants to leave a protective pillar of rock between their workings and those of plaintiff, it should be reversed. In all other respects not specifically enumerated the judgment should be affirmed. It is so ordered. Appellants and respondent to bear their own costs on this appeal.

KNIGHT and WARD, JJ., concur.



62 Cal.App.2d 588

In re FLEISHMAN'S ESTATE.

HOSPITAL FOR CHILDREN AND TRAINING SCHOOL FOR NURSES et al. v. KOHN et al.

Civ. 12511.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1944.

Hearing Denied March 27, 1944.

Wills ⇐16

Where will executed within 30 days of testatrix' death ordered her jewels and furs to be sold and the proceeds divided among specified charitable organizations, and testatrix left as her sole heirs at law two nephews, to whom she left nothing by the will, the bequests were invalid and proceeds of the sale were distributable to testatrix' nephew and the assigns of the other nephew. Probate Code, § 41.

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Carrie H. Fleishman, also known as Carrie Heller Fleishman, Mrs. Isidor Fleishman, and Mrs. I. Fleishman, by the Hospital for Children and Training School for Nurses and others, against Marion Kohn and others. From an adverse decree, the Hospital for Children and Training School for Nurses and others appeal.

Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, for appellant Hospital for Children and Training School for Nurses.

Sloss & Turner, of San Francisco, for appellant Jewish National Welfare Fund.

Esmond Schapiro, of San Francisco, for appellant Federation of Jewish Charities of San Francisco, Cal.

Philip S. Ehrlich and Albert A. Axelrod, both of San Francisco, for respondent Marion Kohn.

SPENCE, Justice.

This is an appeal by three charitable organizations from a decree denying their petition for partial distribution and granting partial distribution to others, which decree was based upon the ground that the bequests to said charitable institutions were invalid under the provisions of section 41 of the Probate Code.

Carrie H. Fleishman, deceased, died on February 6, 1941. On January 20, 1941, being within thirty days before her death, said deceased executed an olographic will which was admitted to probate as her last will and testament. She did not leave surviving her a spouse, brother, sister, descendant or ancestor, but she did leave as her sole heirs at law two nephews, Edward H. Heller and Marion H. Kohn. By her will, she made certain specific bequests to others and then provided: "The rest and residue of my estate is to be divided equally among the children of Edward H. Heller, namely E. Clarence Heller, Alfred E. Heller and Elizabeth Heller." It thus appears that the residuary legatees and devisees were two grandnephews and one grandniece and that nothing was left by the terms of the will to the nephews who were the heirs at law.

Among the specific provisions of the will was the following: "I desire my jewels and furs to be sold and the proceeds to be divided among the following charitable organizations: The Federation of Jewish Charities of S. F. The Jewish National Welfare Fund (S. F. section) and The Children's Hospital."

The executors filed a petition for partial distribution "to the persons entitled thereto" of the sum of $23,050, which sum represented the net proceeds from the sale of the above mentioned jewels and furs. One nephew, Marion H. Kohn, also filed a petition seeking distribution to him of one-half of said sum alleging the invalidity of the bequests to the charitable organizations. It appears from both petitions that the other nephew, Edward H. Heller, had assigned any interest which he had in said sum to his children, who were the residuary legatees and devisees under the will. The charitable organizations filed an answer and a petition seeking distribution to said organizations of the entire sum alleging the validity of the above mentioned bequests.

A hearing was had and the court found and concluded that the decedent had died within thirty days after the execution of the will; that the above mentioned bequests to the charitable organizations were therefore invalid; and that the proceeds of the sale of the jewelry and furs were properly distributable to the heirs at law. The court therefore entered its decree denying the petition of the charitable organizations and distributing said proceeds as follows: One-half thereof to Marion H. Kohn and the remaining one-half thereof to the assignees of Edward H. Heller. The charitable organizations appeal from said decree.

The decree entered by the trial court was based upon the construction placed upon section 41 of the Probate Code in the majority opinion in Re Estate of Broad, 20 Cal.2d 612, 128 P.2d 1. The contentions of the appealing charitable organizations are based upon the reasoning found in the dissenting opinion in the cited case. But as the majority opinion in the cited case fully sustains the decree entered herein, this court is bound by that decision and must affirm the decree upon the authority of that case. Brunvold v. Victor Johnson & Co., Inc., 59 Cal.App.2d 75, 138 P.2d 32. It would therefore serve no useful purpose for this court to discuss appellants' claim that "The decision of the Supreme Court in Estate of Broad is clearly erroneous and should be overruled."

The decree is affirmed.

NOURSE, P. J., and STURTEVANT J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

62 Cal.App.2d 441

TRUAX v. TRUAX.

Civ. No. 14083.

District Court of Appeal, Second District, Division 3, California.

Jan. 24, 1944.

1. Divorce ⇐130

Evidence was insufficient to support interlocutory judgment of divorce in husband's favor on ground of extreme cruelty. Civ.Code, § 94.

2. Divorce ⇐27(8)

Where wife's objections to husband's conduct with opposite sex were not without foundation according to husband's own testimony, husband could not claim that wife's objections inflicted grievous mental anguish on him, so as to entitle him to divorce for extreme cruelty. Civ.Code, § 94.

3. Divorce ⇐127(4)

In divorce action, letters written by wife to husband's sister complaining of husband's conduct with various women could not be used as corroboration of husband's testimony that wife's objections to his conduct with opposite sex inflicted grievous mental anguish on him. Civ. Code, § 130.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Charles Murray Truax against Mary Cecelia Truax for a divorce, wherein the defendant filed a cross-complaint. From an interlocutory judgment of divorce in plaintiff's favor, the defendant appeals.

Reversed.

Samuel Mirman, of Los Angeles, for appellant.

Mildred Gilmore, of Los Angeles, for respondent.

SHAW, Justice pro tem.

[1] Defendant appeals from an interlocutory judgment of divorce in plaintiff's favor. In his amended complaint plaintiff set up two grounds for divorce: first, desertion, and second, extreme cruelty. Defendant answered and filed a cross-complaint which plaintiff answered. There were no findings, nor was there any recital in the decree of the facts found to be true. We pass this point, as appellant does, to consider the sufficiency of plaintiff's evidence to justify a divorce. At the trial no evidence at all in support of the allegations of desertion was produced, so the judgment cannot be upheld on that ground. Some effort was made to prove extreme cruelty, but after examination of the evidence we conclude that it is insufficient to warrant the granting of a divorce on that ground.

The amended complaint alleges as to that ground that the defendant inflicted on the plaintiff "grievious mental suffering," and then specifies several particulars, the only ones to which any proof was directed being: "That almost immediately after the marriage of plaintiff and defendant, defendant would indulge in severe fits of temper and outbursts of jealousy. That she would become so violent towards plaintiff that he became afraid of rendering the smallest social courtesy to their mutual friends and acquaintances. That the defendant on various occasions would become so enraged she would dig her nails into the palms of her hands until she would bring blood, and would berate and abuse plaintiff and accuse him of improper acts and conduct towards all of their female friends and acquaintances. * * * That in the year 1922, the exact month and date not now being remembered by plaintiff, and after plaintiff and defendant had retired for the night, the defendant produced from under her pillow a large kitchen carving knife and stated, 'I'm going to kill you.'"

At the time this action was filed, the parties had been married twenty-six years and separated a little over twelve years. They had two children, who were adults when the action was begun. The plaintiff was in the Navy during much of their life together, and was consequently away from home much of the time.

In an effort to establish his cause of action for cruelty, plaintiff produced his own testimony and that of one corroborating witness, his sister, Mrs. Patton. Plaintiff gave this testimony:

"Q. This course of conduct set forth in your complaint, of your wife's cruelty, upset you, made you nervous and ill, didn't it? A. That is true. * * *

"Q. You have alleged in your complaint that your wife did certain things which made you nervous and ill. What were those things? A. She was extremely jealous and demonstrated it in many ways, even threatening on one occasion to kill me.

"Q. When was that? A. The date is more or less obscure.

"Q. I mean the year? A. I wouldn't even say the year right now. But it actually did happen, and I swore to the fact it did happen.

"Q. Did you take it seriously? A. I did not, for I went to sleep.

"Q. What do you mean by her being jealous; what did she do? A. She objected to my even conversing with anyone of the opposite sex, no matter what their age might be. More so if I danced with them."

Mrs. Patton, the corroborating witness, after testifying that she knew both parties and had visited in their home for several weeks and had received numerous letters from defendant, proceeded:

"Q. By the Court: You know, during their course of married life, that she sort of upset Mr. Truax? A. Yes.

"Q. Made him nervous and ill? A. Very true.

"Q. You witnessed these matters? A. Yes. * * *

"Q. What were these acts that caused the plaintiff mental anguish? A. Well, I would say that, while I never saw them really disagree, still I felt she was very resentful and that she would sulk.

"Q. Did she say anything in your presence? A. No, I don't recall that, but there were slight disagreements that we could see that she would not talk and had a very resentful attitude which I could see would react—."

[2] Section 94 of the Civil Code defines extreme cruelty as "the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." To constitute the sort of extreme cruelty involving no bodily injury there must be grievous mental suffering by the injured party, resulting from the conduct of the other party. The threat to kill, testified to by plaintiff, did not have this effect, for he said he did not take it seriously, but went to sleep. The other matters complained of, the defendant's exhibitions of jealousy, upset him and made him nervous and ill, he said, in response to a very leading question. The nature and extent of this nervousness and illness were not stated. This hardly rises to the level of "grievous mental suffering." The defendant's objections to his conduct with the opposite sex were not without foundation, according to his own testimony. He admitted that in 1923 he quite often danced with another woman who was named to him and occasionally took her home from dances, that in 1929 he was demoted by reason of relations with still another woman, and that at some time not stated he had committed adultery with a third woman. All of these actions were known to defendant. It does not lie in the mouth of a husband who so conducts himself to claim that his wife's quite natural objections to such conduct have inflicted grievous mental anguish on him. See Annen v. Annen, 1926, 79 Cal.App. 626, 628, 250 P. 580.

[3] The corroborating testimony is even weaker than that of plaintiff. It does not appear to relate to the conduct to which plaintiff testified. The witness, Mrs. Patton, "never saw them really disagree" but "could see that she would not talk and had a very resentful attitude." Her statements, in response to leading questions, that defendant "sort of upset" plaintiff and made him nervous and ill seem to be mere conclusions. As already stated, the "resentful attitude" was justified. This testimony is not sufficient to establish or corroborate the charge of cruelty. Mrs. Patton also produced several letters written to her by the defendant, and it is claimed that these letters prove or corroborate the charge. They do contain complaints of plaintiff's conduct with various women, as to whom, on the stand, he denied the misconduct. But it does not appear that these letters were ever read by or made known to plaintiff. They cannot, therefore, have caused him any mental suffering. Being mere admissions or statements of defendant, they cannot be used as corroboration of plaintiff's testimony. Civil Code, sec. 130.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.

62 Cal.App.2d 463

In re SCHNEIDER'S ESTATE.

SCHNEIDER v. STATE BOARD OF EQUALIZATION.

Civ. 3135.

District Court of Appeal, Fourth District, California.

Jan. 25, 1944.

1. Courts ⇐198

The jurisdiction of trial court sitting as a probate court is only statutory.

2. Courts ⇐472(4)

An administrator's petition for probate court's advice as to whether Retail Sales Tax Act applied to sale of airplanes which intestate had used in connection with flying school was properly dismissed for lack of jurisdiction, since petition should be addressed to equity side of court. Probate Code, § 588; St. 1939, p. 2184, § 31.

3. Executors and administrators ⇐82

An administrator's petition for probate court's advice as to whether Retail Sales Tax Act applied to sale of airplanes which intestate had used in connection with flying school was properly dismissed for lack of jurisdiction, since a declaratory judgment would have same effect as an injunction and would be contrary to statutory prohibition. St. 1939, p. 2184, § 31.

4. Courts ⇐202(5)

Where probate court lacked jurisdiction to grant relief asked for in administrator's petition, it was proper to dismiss the appeal from order dismissing the petition rather than go on with hearing, which could only result in affirmance of order appealed from.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

In the matter of the estate of Jack Schneider, deceased, wherein Carl Schneider, administrator of the estate of Jack Schneider, deceased, filed a petition in the estate proceeding that the administrator should be advised as to whether any sales taxes would become due and payable on sale of airplanes belonging to the estate. An order to show cause was served on the State Board of Equalization, which board filed a demurrer. From an order sustaining the demurrer without leave to amend, and thereafter entering a judgment dismissing the petition, the administrator appeals, and the Board moves to dismiss the appeal.

Motion granted and appeal dismissed.

F. C. Huebner, of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., Hartwell H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The appellant is the administrator of the estate of Jack Schneider, deceased. Among the assets of the estate were eleven airplanes which the deceased had used in his lifetime in connection with a school to teach students the art of flying. With permission of the court that part of the decedent's business which consisted in the operation of this school was continued for a time by the administrator. The permission thus granted by the court did not include the right to conduct a mercantile business or to sell anything. In due course, it was decided to discontinue this flying school and to sell the airplanes.

On January 8, 1943, the administrator filed a petition in the estate proceeding reciting, so far as material here, that it had been decided to discontinue this school and to sell these airplanes together with certain tools and accessories, that these chattels had not been bought for the purpose of resale but had been bought with the intent that the purchaser was to be the ultimate consumer thereof, and that the petitioner was advised and believed that an effort was being made and would be made to collect a sales tax under the Retail Sales Tax Act of this state. The prayer was that the Retail Sales Tax Act be construed by this court as to its application to the sale of this property, and that the administrator be advised as to whether any sales taxes would become due and payable on any such sale of the property.

An order to show cause was served on the State Board of Equalization and that board filed a demurrer. The court entered an order sustaining the demurrer without leave to amend and, thereafter, entered a judgment dismissing the petition. From that judgment of dismissal the administrator appealed. The respondent board has now moved to dismiss this appeal.

[1-3] The trial court, while sitting as a probate court, has only the jurisdiction conferred upon it by statute. Texas Co. v. Bank of America N. T. & S. A., 5 Cal.2d 35, 53 P.2d 127. The petition asking the court to construe the Sales Tax Act was, in effect, a petition for declaratory relief. As such, if otherwise permissible, it would be addressed to the equity side of the court under its general jurisdiction. No authority to grant such relief is provided for in the Probate Code. Section 588 of that Code is not only not sufficiently broad to provide for such relief, but it is limited to cases where no other procedure is provided by statute. Another method of determining whether a sales tax is due is provided by statute in this state. Section 31 of the Retail Sales Tax Act (Stats. 1933, p. 2610, as amended, St.1939, p. 2184) provides that no injunction or other legal or equitable process shall issue in any action or proceeding in any court to prevent the collection of any tax to be collected under that act. A procedure for determining the legality of any such tax is then provided for in that section, consisting of the payment of the tax in question, the filing of a claim for a refund, and the bringing of an action based upon a denial of the claim. A declaratory judgment, if one had been entered as here asked for, would have had the same effect as an injunction and would have been clearly contrary to the statutory prohibition just referred to. Louis Eckert Brewing Co. v. Unemployment Reserves Commission, 47 Cal.App.2d 844, 119 P.2d 227.

[4] The probate court lacked jurisdiction to act in this matter in any way other than a dismissal thereof for both of the reasons above mentioned. Since that court lacked jurisdiction to grant the relief asked for, it is proper to dismiss the appeal rather than to go on with a hearing thereof which could only result in an affirmance of the order appealed from. O'Donnell v. Board of Medical Examiners, 22 Cal.App.2d 80, 70 P.2d 246; MacCracken v. Board of Medical Examiners, 24 Cal.App.2d 58, 74 P.2d 289. The appellant argues that he should not be required to pay such a tax when the court might refuse to approve that payment on his final account, in which event he would be personally charged with that amount. In the event an attempt is made to collect such a tax, the appellant can probably protect himself by asking the permission of the court to pay the same and to make the necessary demand and bring an action to recover the payment so made.

The motion is granted and the appeal is dismissed.

MARKS and GRIFFIN, JJ., concur.



62 Cal.App.2d 621

CAMPBELL v. SUTTON et al.
Civ. No. 6914.

District Court of Appeal, Third District, California.
Jan. 28, 1944.

1. Contracts ⇐141(1)

Where defendant affirmatively alleged that renewal chattel mortgage note sued upon was in contravention of Emergency Farm Mortgage Act, and therefore without consideration and against public policy, defendant assumed burden of proving such allegations by preponderance of evidence. Code Civ.Proc. §§ 1869, 1981; Emergency Farm Mortgage Act, 12 U.S.C.A. § 1016 et seq.

2. Chattel mortgages ⇐117
Crops ⇐1

Growing crops are "personal property," and crop mortgages do not affect land upon which mortgaged crops are being grown, and such mortgages do not constitute a lien or charge upon the land. Civ. Code, § 2955 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

3. Contracts ⇐123(1)
United States ⇐53

The Home Owners' Loan Act and Emergency Farm Mortgage Act were intended solely for benefit of home owners and farmers who were in financial difficulty, any benefit to creditors is purely incidental, and a creditor will not be permitted to effect a second lien which would in effect confer upon creditors, rather than on debtor, benefits of such acts. Emergency Farm Mortgage Act, 12 U.S.C.A. § 1016 et seq.; Home Owners' Loan Act, 12 U.S.C.A. § 1461 et seq.

4. Appeal and error ⇐1010(1)

Where there is evidence to support findings of trial court, District Court of Appeal cannot substitute its deductions for those of trial court.

5. Appeal and error ⇐1008(1)

In action on renewal chattel mortgage note with defense of failure of consideration and illegality because renewal note was allegedly given to defeat purpose of Emergency Farm Mortgage Act, whether federal land bank, in making loan to defendant, knew that only debt secured by trust deed was being satisfied or made loan upon representation that debt to be scaled down was that represented by trust deed note and original chattel mortgage notes was for trial court. Emergency Farm Mortgage Act, 12 U.S.C.A. § 1016 et seq.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by E. B. Campbell against Thomas Sutton and Adelaide M. Sutton upon a note and to foreclose a crop and chattel mortgage. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. C. Webster, of Sonora, for appellants.

C. H. White, of San Francisco, Rowan Hardin, of Sonora, and Louis Ferrari, G. D. Schilling, and Keyes & Erskine, all of San Francisco, for respondent.

PEEK, Justice.

The plaintiff, as assignee of the Bank of America National Trust and Savings Association, brought an action to collect a note dated October 19, 1936, in the amount of $775, and to foreclose a crop and chattel mortgage of March 30, 1935, which mortgage secured said promissory note but had become worthless. A demurrer to the complaint was overruled and defendants answered, alleging in effect that the note sued upon was executed by mistake; that there was no consideration therefor in that it had been given in renewal of certain notes which had been paid and discharged through the proceeds of a loan made to defendants by the Federal Land Bank, and therefore such note was against public policy.

At the conclusion of the hearing the court found that defendants were indebted to plaintiff in the sum of $975.78. It is from such judgment that defendants now appeal.

The record discloses that the note in question was a renewal of two previous notes dated March 18, 1933, in the amounts of $200 and $575 respectively, which in turn had been executed in renewal of the balance due on a note of March 21, 1928, secured by a crop and chattel mortgage of even date in the amount of $900. Defendants were also indebted to the bank in the sum of $3,575, secured by a deed of trust on defendants' farm. In order to refinance their indebtedness the defendants made application to the Federal Land Bank for a loan under the Emergency Farm Mortgage Act.

The Land Bank, in its "notice of approval of loan", informed the defendants, "your application * * * has been approved in the amount of * * * $3800.-00 * * *." The notice also stated "* * * within six months from the date your loan is closed, furnish the Commissioner an itemized statement of purposes for which your loan funds have been used. Your acceptance of this loan is an agreement to that effect." On the reverse side of said notice appeared what was entitled "acceptance notice" which was dated approximately one month after the notice of approval, and contained the following: "I accept the loan and agree to conditions as above. (Signed) Adelaide M. Sutton—Thos. Sutton."

Also as a part of said notice of approval appeared the following: "Please give us the following information concerning all creditors, secured and unsecured, whose loans are to be paid by the funds received from this loan * * *." The defendants appealed to Mr. Raffetto, assistant cashier of the Sonora Branch of the Bank of America, to assist in filling out this information. This he did, but listing the Bank of America as a secured creditor in the amount of $3500, and unsecured as to the $575 and $200 notes. On the reverse side of said notice of approval appeared the notation: "Approved on condition that you are able to arrange a scale down of all liens against this farm to an amount not to exceed $3,800. This will call for cooperation on the part of your creditors, and in view of the importance of this scale-down, it is required that releases or other definite evidence be furnished from your creditors as an indication that the indebtedness has been irrevocably compromised." The notice of

acceptance was returned to the Land Bank together with a letter which had been dictated by said assistant cashier of the Bank of America to his stenographer and signed by the defendants, which letter in part, stated: "* * * Our debts are listed on the reversal of this application and proper adjustments have been made with the bank * * *." Some time thereafter a letter was received by the defendants from the Land Bank requesting information concerning what progress was being made "in arranging your scale down evidence * * *." To this letter the Bank of America, again by said assistant cashier, informed the Land Bank, "We wish to report that some time ago we sent you in a notice for the acceptance of bonds and have agreed to accept the loan of $3,800.00 granted, subject to the necessary expenses to be deducted from the above amount." The escrow instructions of the Land Bank to the Sonora Abstract and Title Company in part, stated as follows: "We have in our files a statement from the following creditor of the borrower to the effect that it will accept the amount set after its name below, in full satisfaction of its existing claim: Bank of America National Trust and Savings Association $3800.00."

[1] By affirmatively alleging that the note sued upon was in contravention of the act and therefore without consideration and against public policy, defendants assumed the burden of proving such allegations by a preponderance of the evidence. Sections 1869 and 1981 of the Code of Civil Procedure; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533.

Defendants earnestly insisted at the trial of the action, and in their appeal to this court renew their contention that as the proceeds of the Land Bank loan paid to the Bank of America were intended to include the two notes of $575 and $200 in the scale down agreement, the said $775 note subsequently taken in renewal thereof was in contravention of said agreement and contrary to public policy and the intent of the Emergency Farm Mortgage Act, 12 U.S.C.A. § 1016 et seq.; that unless the two notes in question were included in the refinancing there was nothing to scale down, and defendants would be in the same financial straits as before, in direct opposition to the primary purpose of the act, but that in any event even under the construction placed upon the wording of the preliminary negotiations by the Bank of America, and the notice of approval by the Land Bank, inasmuch as growing crops are a part of the land, said crop mortgage was a lien against the land and therefore was included with the note and trust deed as the indebtedness to be paid off by the loan from the Land Bank.

[2] With defendants' last contention we cannot agree. It has been consistently held that growing crops are personal property (Marshall v. Ferguson, 23 Cal. 65, 66; Davis v. McFarlane, 37 Cal. 634, 99 Am. Dec. 340), and that crop mortgages executed under the provisions of Section 2955 et seq. of the Civil Code do not affect in any degree the land upon which the crops covered by said crop mortgage are being grown, nor do such mortgages constitute a lien or charge upon the land. Congdon v. G. M. H. Wagner & Sons, 207 Cal. 373, 278 P. 863; First National Bank of Oakdale v. Brashear, 200 Cal. 389, 253 P. 143.

However, the first point raised by defendants does present a contentious problem. Plaintiff's answer to defendants' argument is that the agreement was to scale down *only* the secured loan of $3,575, and that the note sued upon as well as the two notes for which it was a renewal, at all times have been considered as unsecured. The apparent reason for plaintiff's insistence that such loans were unsecured was the wording of the approval of the loan by the Land Bank that "liens against this farm" were to be refinanced, and any indebtedness which did not constitute a lien against the land was not included in the $3,800 loan. Therefore such renewal note could not be against the expressed public policy of the act.

The plaintiff's sole witness was Mr. Odgers, the business manager of the branch, who admittedly knew nothing of the facts surrounding the transaction in question. His testimony was limited to an identification of the notes in controversy. No further evidence was offered by plaintiff.

Counsel for defendants likewise failed to call Mr. Raffetto, the assistant cashier, who was the only employee of the bank conversant with the facts surrounding the transaction. He also failed to call a representative of the Land Bank. No evidence was introduced to show that the Land Bank, before turning over the $3,800, required evidence that the notes in question had been paid or other surrender required. Although the "notice of approval" stated that definite evidence was to be furnished from

the creditor as an indication that the indebtedness had been irrevocably compromised defendants made no attempt at such a showing or that they had ever secured such evidence. The notice of approval also required the Suttons to furnish the Land Bank, within six months, an itemized statement of the purposes for which the loan funds were used, but the record is void of evidence that such a statement was ever made.

The record further discloses that the note sued upon was dated October 19, 1936, more than two years after the culmination of the negotiations resulting in the reconveyance of the note and trust deed against the farm. The defendants paid interest on the $200 and $575 notes until the date of renewal. If the Federal Land Bank had discharged the notes by the $3,800 paid to the Bank of America, then the act of defendants in paying interest thereon for such period without protest was entirely incompatible with the contentions they now advance.

At the conclusion of the hearing the trial court specifically found that it was not true that the said $775 was without consideration nor was it true that it had been paid or discharged by the $3,800 loan of the Land Bank. Such findings are supported by the evidence, and therefore will not be disturbed on appeal without a clear showing to the contrary.

The cases cited by defendants in substantiation of their contention that the renewal note was against public policy are of little assistance to them under the facts herein presented. Each case so cited contains facts showing that the second note was obtained either by coercion, fraud, secrecy or other circumstances disclosing deliberate evasions of the purpose and intent of the act, and therefore was against public policy. In the present case no such showing has been made by the defendants.

[3] This court is entirely in agreement with the cases so cited by defendants and in particular with the holding of the District Court of Appeal in the recent case of Morrison v. Landers, 56 Cal.App.2d 607, 133 P. 2d 34. The court therein stated that the act in question (H.O.L.C.) was intended solely for the benefit of home owners who were in financial difficulties; that no one else was eligible for its benefits; that any benefit to creditors was purely incidental, and that if any creditor could exact a second lien the effect would be to confer upon him, rather than the debtor, the benefits of the act. There is also a very obvious result which is mentioned in the case of McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800, and likewise cited by defendants, that if a creditor could legally exact a second lien, then in the event of the failure of the debtor to meet his obligations on both liens, the creditor could obtain the property subject only to a long term amortized obligation at an extremely low rate of interest, and in this way successfully circumvent the very purposes of the act and obtain benefits never intended for him. Both cases ably review the economic situation necessitating the enactment of the Home Owners' Loan Act, 12 U.S.C.A. § 1461 et seq., and the principles to be followed by the courts in construing matters arising thereunder which are identical with the problems presented by the Emergency Farm Mortgage Act. However, the record in the present case, viewed in the most favorable light as regards defendants' contentions, presents but a conflict in the evidence and therefore further discussion of the principles enunciated in the cited cases would serve no useful purpose.

[4, 5] That there is evidence to support the findings of the trial court cannot be denied, and this court is therefore without power to substitute its deductions for those of the trial court. Morrison v. Landers, supra. Whether, as contended by defendants, the Land Bank made the loan on account of and in reliance upon their representations (or the Bank of America) that the debt to be scaled down was that represented by all of the three notes or whether the Land Bank knew that only the debt secured by the trust deed was being satisfied, were questions of fact for the trial court. Had that court found that the Land Bank made the loan on the understanding and condition that all three of the notes were being satisfied, it might well have held for defendants, and this court could not have said there was not evidence to sustain it. But the trial court did not so hold, and we cannot say that its conclusion to the contrary was without support.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

62 Cal.App.2d 612

CLEVERDON et al. v. GRAY et al.

Civ. 6787.

District Court of Appeal, Third District, California.

Jan. 28, 1944.

Hearing Denied March 27, 1944.

1. Abatement and revival ⇐47

The fact that holders of mechanic's lien, while foreclosure action was under submission, assigned rights to a third party without substituting third party as plaintiff or obtaining order for continuation of action in name of original plaintiffs did not invalidate foreclosure judgment subsequently entered. Code Civ.Proc. §§ 367, 385.

2. Abatement and revival ⇐47

Where plaintiffs assign cause of action and no substitution is asked for, case will proceed in name of original plaintiffs as if no transfer was made, and no application to or action by court is necessary. Code Civ.Proc. §§ 367, 385.

3. Mechanics' liens ⇐290(2)

In mechanic's lien foreclosure action, finding that a specified amount was reasonable value of material and equipment furnished and labor and services performed and that after deducting specified credit a specified amount was due for which judgment was given was not insufficient for failure to find number of hours worked or amount of materials furnished.

4. Trial ⇐395(5)

The function of "findings" is to declare only ultimate facts determined, and trial court is not required to incorporate evidentiary facts in its findings.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding".

5. Trial ⇐395(6)

Finding that allegations contained in designated paragraphs of plaintiffs' complaint were true, by reference to such paragraphs, incorporated allegations contained therein to same extent as though court had specifically set forth allegations in detail.

6. Trial ⇐395(6)

Findings that allegations contained in designated paragraphs of plaintiffs' complaint are true are sufficient without setting forth such allegations in detail.

7. Trial ⇐396(1)

Findings need not follow precise language of pleadings but must be so drawn that truth or falsity of material allegations may be demonstrated.

8. Trial ⇐397(1)

Where findings, taken as a whole, clearly show that they include court's conclusions upon material issues, it is unnecessary to make specific findings on each of material issues.

9. Appeal and error ⇐1071(6)

The failure to find on a particular issue is not ground for reversal unless it appears that there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellant.

10. Appeal and error ⇐901, 1033(7)

Where defendant in mechanics' lien foreclosure action, on appeal, failed to show that there was evidence sufficient to sustain a finding in his favor on an issue on which no finding was made and failed to show wherein he was prejudiced by failure to make separate findings as regards amount of work done, materials furnished and rates to be paid therefor, defendant could not complain of error in the findings.

11. Trial ⇐395(1)

In mechanics' lien foreclosure action, where general finding, by reference to plaintiffs' complaint, was a complete negation of defendant's claims, findings were sufficient.

12. Appeal and error ⇐931(1)

Findings are construed to uphold rather than defeat a judgment, and, if it is necessary in construing findings to indulge in an inference, appellate court will not draw a possible inference contrary to that which, in light of evidence, may have been drawn by trial court for purpose of rendering judgment.

13. Appeal and error ⇐1011(1)

Where evidence is in irreconcilable conflict, a doubt entertained by appellate court, however grave, as to correctness of a particular finding upon such conflicting evidence is not sufficient to authorize reversal.

14. Appeal and error ⇐1002, 1011(1)

The verdict of a jury or a finding of fact by court will not be reversed where there is a substantial conflict in evidence upon which such verdict or finding is based.

15. Appeal and error ⇐1033(8)

Where amount of judgment rendered in favor of plaintiff is less than would have been justified under evidence, defendant cannot complain even though evidence would have also authorized a lesser amount than that for which judgment was given.

16. Appeal and error ⇐989

When a judgment is attacked as being unsupported, sole function of appellate court is to determine whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

17. Appeal and error ⇐1151(1)

Where findings and judgment were challenged as unsupported and District Court of Appeal, on review, found two minor errors in computation, findings and judgment were amended to correct errors so as to finally dispose of the case. Code Civ.Proc. § 956a.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Richard M. Cleverdon and Joseph T. White, copartners, against William E. Gray and others to foreclose a mechanic's lien. Judgment for plaintiffs, and named defendant appeals.

Affirmed as modified.

K. M. Allen, of Auburn, and Sefton & Quattrin, of San Francisco, for appellant.

Sumner Mering, of Sacramento, for respondents.

S. H. Jones, of Sacramento, for Central Bank.

K. D. Robinson, of Auburn, for defendants Gray & Oest.

PEEK, Justice.

This is an appeal by William E. Gray from a judgment in favor of plaintiffs Richard H. Cleverdon and Joseph T. White, respondents herein, foreclosing a mechanic's lien on certain real property belonging to appellant and located on Lake Tahoe. The only issue concerning the defendants, other than Gray was that of priority of a lien, which issue was decided in their favor. The appeal from the judgment is prosecuted by Gray alone.

Cleverdon and White, as co-partners, entered into an agreement with Gray which provided, in addition to other matters now unimportant, that certain materials, equipment and labor were to be furnished by them in the construction of a log lodge to be erected on the lake property belonging to Gray.

A controversy arose between the parties concerning the amount of money owed respondents by appellant and as a result thereof respondents filed a mechanic's lien against appellant's property, and subsequently instituted the present suit to foreclose such lien.

Their complaint prayed for judgment in the sum of $2,342.70, but asked for a lien on the real property of only $2,247.70. The answer of appellant denied that any such sum of money was due respondents.

At the conclusion of the hearing which consisted principally of testimony relating to the materials furnished and the character and amount of labor performed, the trial court indicated it would give judgment for the respondents. Respondents presented to the court a proposed set of findings calling for judgment in the sum of $1,176.89. This figure represented the amount claimed by respondents after deduction of an admitted credit to appellant. On July 2, 1941, the trial court signed the findings proposed by respondents but gave appellant a further credit and entered judgment for respondents in the sum of $1,099.-89.

During the pendency of the action and while the matter remained under submission, the respondents on October 21, 1940, assigned "all their right, title and interest in and to the above entitled case, the cause of action therein expressed, and any judgment to be therein entered", to a third party, Freda Bell. This assignment first became known to appellant when it was filed for record in the County Clerk's office on July 25, 1941, approximately three weeks after the judgment had been signed and entered.

Appellant contends in this appeal that the judgment must be reversed for the following stated reasons:

(1) That the assignment by respondents of their interest in the cause of action resulted in their losing all right to continue the litigation in the names of the original parties plaintiff, and that under such circumstances the judgment rendered in their behalf is void as the assignment constituted a fraud on the court; (2) because the trial court failed to find upon the material

issues as regards the amount of work done, materials furnished and the rates to be paid; (3) because the judgment is not supported by the findings; (4) because the findings are not supported by the evidence, and (5) because the evidence does not support the judgment.

[1, 2] As regards appellant's first contention it is argued that as section 367 of the Code of Civil Procedure requires in part that "every action must be prosecuted in the name of the real party in interest * * *", the respondents lost all interest in their cause of action unless they can come within the provisions of Section 385 of the Code of Civil Procedure, which provides: "In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding." Appellant then concludes that as the court did not authorize a continuation in the name of the original plaintiffs nor did it allow a substitution, the judgment procured by respondents in their own name is void, and therefore must be reversed by this court.

Such claim is without merit and is not supported by the authorities. To the contrary it has been consistently held, as in the case of Malone v. Big Flat Gravel Mining Co., 93 Cal. 384, 28 P. 1063, 1065, that "under this section (385 C.C.P.), * * * if no substitution is asked for, the case will go on in the name of the original party, as if no transfer had been made; and to have it do so, no application to or action by the court is necessary." See also Vance v. Gilbert, 178 Cal. 574, 174 P. 42; Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 57 P. 69; Walker v. Felt, 54 Cal. 386; Harlan Douglas Co. v. Moncur, 19 Cal.App. 177, 124 P. 1053; Hentig v. Johnson, 12 Cal. App. 423, 107 P. 582.

The case of Tuller v. Arnold, 98 Cal. 522, 33 P. 445, the sole authority cited by appellant in support of his contention, is not in point, as that case was concerned with the question of the right to maintain suit where the assignment of certain claims was made prior to the bringing of suit. Such was not the situation in the present action, and the Tuller case, therefore, cannot be deemed authority in support of appellant's contention.

[3] Appellant's second contention is that the judgment must be reversed because finding IX of the trial court "that the sum of $1,847 was and is the reasonable value of the materials and equipment furnished, and the labor and services performed and contributed by the plaintiffs, pursuant to the said agreement * * *", and finding XII "that of said value of $1847.00, the sum of $749.11 has been paid; that after deducting all just credits and off-sets, the sum of $1097.89 is due, owing and unpaid from the defendant, William E. Gray, to the plaintiffs * * *", are not findings as to the number of hours worked or to the amount of materials furnished, and therefore there is no support in the findings for the ultimate judgment of $1097.89.

[4] The case of Culjak v. Better Built Homes, Inc., 58 Cal.App.2d 720, 137 P.2d 492, 495, is a complete answer to appellant's contention herein. The trial court therein found that plaintiffs had constructed a sanitary system for defendants and that the reasonable cost of such construction was a certain amount. The appellant therein contended that it was prejudiced by the failure of the court to show by its finding "the calculation by which the court arrived at its judgment." The court in determining the issue so presented stated: "Evidently appellant desires to have the court's opinion or a picture of the court's mental process by which the ultimate fact of the aggregate cost was derived. To such contention we do not yield. While it is essential that the 'reasonable values' be alleged and that they be proved by competent evidence yet the function of the finding is to declare only the ultimate fact determined. * * * The trial court is not required to incorporate evidentiary facts in its findings."

In the present case there is substantial evidence as to each item included in the ultimate judgment of the court and such items establish the basis of the court's computation. "Since the pleadings and the evidence both warrant the finding of the amount to which plaintiffs are entitled more details of fact in the finding would be surplusage." Culjak v. Better Built Homes, Inc., supra.

[5, 6] The trial court herein found that all of the allegations contained in certain designated paragraphs of the plaintiffs' complaint were true, and by such reference to such paragraphs it thereby incorporated in its findings all of the allegations contained in the designated portions of the

complaint to the same extent as though the court had specifically set forth the same in detail. It has long been the rule that such findings are sufficient. Hackler v. Tubach, 129 Cal.App. 680, 19 P.2d 295.

[7, 8] While it is not necessary that findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or falsity of their material allegation may be demonstrated therefrom. But that is not to say that it is necessary to make specific findings as to each of several material issues where the findings, taken as a whole or construed together clearly show that they include the court's conclusion upon the material issues. Bowers v. Union Trust Co., 117 Cal.App. 259, 3 P.2d 614.

[9, 10] If we were to assume that the findings as made herein do not cover all of the material issues raised by the pleadings, nevertheless the failure to find on a particular issue is not ground for reversal unless it appears that there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellant. Powell v. Johnson, 50 Cal.App.2d 680, 123 P.2d 875. No such showing has been made by appellant. Nor has he shown wherein he has been prejudiced by the failure, if any, of the trial court to make separate findings as regards the amount of work done, materials furnished and rates to be paid to respondents for such services and materials so furnished pursuant to the alleged contract.

[11] This court said in the recent case of Petersen v. Murphy, 59 Cal.App.2d 528, 139 P.2d 49, 52: "If the findings made necessarily negative the allegations of defendants' answer as to which specific findings are not made, the findings are sufficient." Citing Remillard Brick Co. v. Remillard-Dandini Co., 51 Cal.App.2d 744, 125 P.2d 548. Here the general finding, by reference to plaintiffs' complaint that certain services were performed and materials furnished by plaintiffs pursuant to the agreement alleged in plaintiffs' complaint, was a complete negation to defendant's claim that there was no such agreement and his general denials of the labor and materials furnished thereunder.

[12] In summation of this question it may be stated that findings are to receive such a construction as will uphold rather than defeat the judgment, and if it be necessary in construing the findings to indulge in any inference, this court will not draw from the facts produced at the trial a possible inference of fact contrary to that which in the light of the evidence may have been drawn by the trial court for the purpose of rendering such judgment (Breeze v. Brooks, 97 Cal. 72, 31 P. 742, 22 L.R.A. 257); and thereby substitute its deductions for those of the trial court (Crawford v. S. P. Co., 3 Cal.2d 427, 45 P.2d 183).

Appellants third, fourth and fifth contentions, as is disclosed by the argument contained in his brief, are, in effect, but an attack upon the sufficiency of the findings and the evidence in support thereof.

[13] An examination of the record discloses what might well be termed an irreconcilable conflict in practically all of the evidence introduced at the trial. Under such circumstances to discuss at length such evidence would be of no avail, for even though this court might have some doubt, however grave, as to the correctness of a particular finding upon such conflicting evidence, a doubt is not sufficient to authorize a reversal in view of such conflict.

[14] The rule that the verdict of a jury or a finding of fact by a court will not be reversed, where there is a substantial conflict in the evidence upon which such verdict or finding is based, is so firmly established as to amount to a maxim. Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 40 P.2d 432, 48 Am.St.Rep. 132.

[15] It is self evident from such conflicting evidence that the judgment as rendered by the trial court might well have been either for a greater or a lesser amount. Under such circumstances one cannot complain where the amount of a judgment rendered in favor of an adverse party is less than would have been justified under the evidence.

[16] When a judgment is attacked as being unsupported, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. Estate of Bristol, Cal.App., 143 P.2d 689.

Our examination of the record has disclosed but two errors of computation in the findings (1) the price to be paid to respondents by appellant for pine lumber used in

the construction of the buildings and (2) the rate to be paid to respondents by appellant for truck driving.

The transcript shows testimony by respondent Cleverdon that 5200 board feet of pine lumber was furnished at $40 per thousand board feet, while a witness for defendant testified that less than 1400 board feet was used. It is therefore apparent that there is at least some evidence to support the finding in regard to the amount of pine lumber furnished in the construction of the lodge. However, the evidence only supports a charge of $40 per thousand board feet rather than $42 per thousand board feet as alleged in the complaint, or a difference of $10.40 between the amount of $218.40 as found by the trial court, and the correct amount of $208. Respondents in their brief concede this fact to be true.

The finding of the trial court as regards the charge for truck driving likewise is supported in part by the evidence. The respondents' testimony was that such charges were to be the prevailing union scale and that such scale was 87½ cents an hour up to 12 hours, and for 12 hours and over it was to be $1 per hour retroactive to the first hour. Cleverdon testified to 74 hours of truck driving at the regular rate and 59 hours of overtime, but stated that because they were always on the road for more than 12 hours he computed it all at the rate of $1 per hour. The trial court, however, calculated that rate to be $1.10 as alleged in plaintiffs' complaint, for the entire 118 hours or $129.80. Even giving respondents the benefit of the maximum for the entire time they would be entitled to only $118.00 for such trucking work or $11.80 less than the amount found by the court.

[17] This is a case which fails directly within the express purpose and intent of section 956a of the Code of Civil Procedure, wherein it is said that the section shall be liberally construed in order that whenever possible, causes may be finally disposed of by a single appeal without further proceedings in the trial court. Therefore, paragraph VII of the findings is hereby amended to read as follows: "That the allegations contained in sub-paragraphs (a), (b) and (c) of paragraph VII are true; that the allegations contained in sub-paragraphs (f) of said paragraph VII are untrue; that the allegations contained in sub-paragraph (d) of said paragraph VII are true, save and except that the services performed by plaintiffs as automobile truck operators is found to be in the sum of $1.00 per hour; that the allegations contained in sub-paragraph (e) of said paragraph VII are true, save and except the price to be paid for pine wood furnished by plaintiffs under said agreement is found to be at the rate of $40.00 per thousand board feet. In all other respects the allegations contained in said paragraph VII and the whole thereof are found to be true."

The judgment is accordingly reduced to the extent of the errors in computation as previously indicated, to-wit: $10.40 in the amount found to be due for the pine lumber used by plaintiffs and $11.80 in the amount found to be due them for trucking services rendered, or a total of $22.20, thereby reducing the judgment to the sum of $1,075.69.

As modified the judgment is affirmed. Respondents to recover costs on appeal.

ADAMS, P. J., and THOMPSON, J., concur.

23 Cal.2d 535

BUXBOM v. SMITH et al.

L. A. No. 18380.

Supreme Court of California.

Jan. 18, 1944.

1. Principal and agent ⇐190(3)

In action for breaches of contracts made by agent of defendant, evidence as to defendant's statements that all matters involved should be taken up with agents who handled such matters, and that anything agent did would be all right, and that thereafter plaintiff made contracts with agent, supported finding that contracts were made by principal through agent.

2. Damages ⇐124(3)

Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance. Civ.Code, §§ 1512, 3300.

3. Pleading ⇐1, 34(1)

While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the Code system is that the administration of justice shall not be embarrassed by technicalities, fixed rules of construction or useless forms. Code Civ.Proc. §§ 452, 475, 580; Civ.Code, § 3281; Const. art. 6, § 4½.

4. Pleading ⇐34(1)

In the construction of a pleading for purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties. Code Civ.Proc. §§ 452, 475, 580; Const. art. 6, § 4½.

5. Pleading ⇐4, 49

The subject matter of an action and the issues involved are determinable from the facts alleged rather than from the title of the pleading or the character of damage recovery suggested in connection with the prayer for relief. Code Civ.Proc. §§ 452, 475, 580.

6. Appeal and error ⇐1170(3)

The matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury. Code Civ.Proc. §§ 452, 475, 580; Const. art. 6, § 4½.

7. Damages ⇐157(1)

In action to recover damages arising out of breaches of contract, allegations seeking damages for loss of plaintiff's trained organization and good will and for general damages to business, caused by defendant in hiring away plaintiff's men after breach of contract, were sufficiently broad to secure in one action redress not only for breach of contract but for subsequent wrongs and injuries committed by defendant in connection with a related set of operative facts. Code Civ.Proc. § 430.

8. Damages ⇐162

In action for breach of contract to distribute newspapers, damages for loss of plaintiff's trained organization and good will through subsequent misconduct of defendant arising out of related facts were recoverable when responsive to the pleadings and the proof, in the absence of objection thereto.

9. Constitutional law ⇐88
Trade-marks and trade-names and unfair competition ⇐77

Every one has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded, and any one intentionally interfering with that right without justifiable cause or excuse commits an actionable wrong.

10. Trade-marks and trade-names and unfair competition ⇐77

Where the means of interference with the right to establish and conduct a lawful business in competition with that of another involves no more than recognized trade practices such as advertising or price cutting, plaintiff's loss as the result of the competitive strife is damnum absque injuria.

11. Master and servant ⇐339
Trade-marks and trade-names and unfair competition ⇐77

It is not ordinarily a tort to hire the employees of another for use in hirer's business, but such immunity against liability is not retained if unfair methods are used in interfering with such advantageous relations.

12. Trade-marks and trade-names and unfair competition ⇐77

Where defendant induced plaintiff to build up distributing organization to a level consistent with advertising needs of defendant's noncompeting business and having acquired complete knowledge of plaintiff's business methods and records, defendant undertook to cancel distributing contract, hired plaintiff's crews and assumed control of his valuable enterprise, defendant thereby committed a tort and was liable for plaintiff's damages for loss of distributing crews and good will.

13. Contracts ⇐321(1)
Master and servant ⇐339
Trade-marks and trade-names and unfair competition ⇐77

A breach of contract is a wrong and in itself actionable, and it is also wrongful when intentionally utilized as a means of depriving plaintiff of his employees, and constitutes an unfair method of interference with advantageous relationship between plaintiff and employees for which damages are recoverable.

EDMONDS, J., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

On rehearing.

Judgment affirmed in part, and reversed in part.

Prior opinion, 132 P.2d 4.

W. T. Stockman and John L. Flynn, both of Los Angeles, for appellants.

Franz R. Sachse, Jesse E. Jacobson, John C. Packard, and E. A. Oppenheim, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an action for damages sustained in conjunction with a breach of two contracts of employment. The cause was tried before the court sitting without a jury, findings were made in favor of the plaintiff, and from the judgment based thereon the defendants now appeal.

The complaint sets forth two oral contracts contemporaneously made on February 12, 1939, and the purported cancellation of both of them as the preliminary basis for relief. One was a contract by which the defendants employed the plaintiff for a period of six months to handle the publication of a newspaper—a "shopping news"—to carry free of charge all advertising of a chain of public markets owned and operated by the defendant Smith and to carry at reasonable rates advertising of other merchants in the same area, the plaintiff to receive 25 per cent of the gross advertising receipts for his management services. The other was a contract whereby the defendants employed the plaintiff for the same term of six months to distribute weekly the newspaper above mentioned at the rate of five dollars per thousand copies. The defendants purported to cancel these two contracts soon after they were made—the first some nine days and the second some six weeks following the date of agreement—and they refused to perform them further, both purported cancellations being without the plaintiff's consent. It is also alleged that at the time of making the contracts the plaintiff was the owner of a distributing business and was engaged in distributing handbills, newspapers and advertising matter in the region where this newspaper was to be circulated, and that immediately after the contracts were made the plaintiff solicited advertising from merchants in the designated area, enlarged his distributing crews, employed additional supervisors, mapped out districts and routes for circulation, and prepared to handle the distribution of 40,000 copies of said newspaper. It is further alleged that immediately following the defendants' purported cancellation of the second or distribution contract, "defendants employed plaintiff's distributing crews and supervisors in said area." The complaint finally enumerates seven items of damage sustained by plaintiff in connection with the breach of these two contracts, including the recital of "the sum of $5,000 for the loss of plaintiff's trained organization, supervisors and good will and for general damages to plaintiff's business," and it concludes with a prayer for the aggregate amount of these several damage specifications, "for costs of suit and for such other and further relief as may seem just and equitable."

No demurrer was interposed to the complaint, but an answer was filed by the defendants herein denying specifically the material allegations of the plaintiff's pleading. At the conclusion of the trial upon

the issues as so framed, the court, in making its findings generally in the plaintiff's favor, followed in substance the language of the complaint as above outlined, except as to damages. Specifically in this latter connection, while the court denied the plaintiff any commissions for the sale of advertising and his claim for certain miscellaneous expenditures in relation thereto, it awarded the plaintiff "the sum of $1,121.40, representing the profit which would have been derived by plaintiff from the distribution of said paper for the remainder of the term of said distribution contract," the sum of $35 in compensation for two items of expense incurred with reference to preparation for performance of the publication contract, and "the further sum of $4,000 for the loss of plaintiff's trained organization, supervisors, good will and for general damages to plaintiff's business." Judgment accordingly was entered in favor of the plaintiff and against the defendants in the sum of $5,156.40, and costs.

[1] The main point in controversy on this appeal concerns the amount of damages recoverable by the plaintiff in this action. However, before considering the principles of law relating to that question, certain preliminary observations should be made. The evidence establishes without conflict that the defendant Wright acted in all the matters involved herein as the agent of the defendant Smith and that this fact was at all times known to the plaintiff. The defendant Wright therefore contends that he is not liable at all for any part of the damage award. The plaintiff does not dispute this proposition, but, on the contrary, he states in his brief addressed to this court that "no question is directed to [a] reversal of the judgment against the defendant Wright." This unequivocal concession by the plaintiff will be accepted as determinative of this issue in favor of the defendant Wright, and there only remains to be considered the propriety of the judgment as rendered against the defendant Smith. There can be no argument under the record as to the authority of Wright to act for Smith in making the contracts here involved. The plaintiff testified that before these contracts were made, and at a time when he was negotiating with Wright on the subject, he saw Smith and told him he had been talking to Wright about distributing circulars, and discussed the newspaper, "and he seemed rather busy; and he said, 'No you take all those matters up with Mr. Wright; he handles all that; and anything you do with him is all right for the company.'" Accordingly, the plaintiff made no further effort to deal with Smith directly but made his arrangements with Wright. This status of affairs was not controverted by any witness in the case, and Smith, though present at the trial, did not testify at all in challenge of the plaintiff's account of these business dealings. Thus, the evidence amply sustains the finding of liability against the defendant Smith as a party to the contracts in question.

[2] Passing now to a consideration of the principal question here presented for determination—the amount of damages recoverable in this action—complaint on this appeal is directed solely to the $4,000 item awarded "for the loss of plaintiff's trained organization, supervisors, good will and for general damages to plaintiff's business." It is argued that such award could be made only in some action sounding in tort, and that it therefore has no place in litigation promised on a "breach of contract of employment." There can be no doubt as to the proposition that this damage assessment cannot be sustained as compensation for the direct breach of either of the six-month contracts here involved. Obviously, the item for loss of plaintiff's distributing organization, etc., has no relation to the breach of the contract for managing the publication of the newspaper. For the purpose of fulfilling his obligations under that contract the plaintiff needed no such organization and could use none, and the defendants' refusal to perform that contract could not have affected it. Equally plain is the fact that such item could not be a proper element of damages for breach of the distribution contract. That contract provided for the weekly circulation of newspapers at a definite price, and by the defendants' acts the plaintiff was prevented from performing it after a short period of time. He was fully paid for the performance rendered, and his damages for that specified default on the part of the defendants would be limited to compensation for the performance prevented. The rule in such case is stated in 25 Corpus Juris Secundum, Damages, § 78, p. 575, as follows: "Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which

may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." In conformity with this rule see sections 1512 and 3300 of the Civil Code; also Cederberg v. Robison, 100 Cal. 93, 97–99, 34 P. 625; Shoemaker v. Acker, 116 Cal. 239, 245, 48 P. 62; Connell v. Higgins, 170 Cal. 541, 549, 150 P. 769; Overstreet v. Merritt, 186 Cal. 494, 502–506, 200 P. 11; Blair v. Brownstone Oil & Refining Co., 35 Cal. App. 394, 396, 170 P. 160; Spitzer v. Pathe Exchange, Inc., 132 Cal.App. 612, 620, 23 P.2d 308; Caspary v. Moore, 21 Cal.App.2d 694, 699, 70 P.2d 224. From the record evidence bearing upon the consequences of the breach of the distribution contract it appears that the plaintiff did not seek to show with any degree of monetary certainty a loss based upon the first-mentioned ground of recoverable damage, that is, some reasonable outlay or expenditure in anticipation of performance—nor does the challenged $4,000 specification purport to be identifiable with that element of recompense—so that the award coincident with the second premise of relief, the amount of profits which the court found from the established facts the plaintiff would have made if allowed to complete the contracted undertaking, constituted the plaintiff's full measure of compensation as to this phase of the case. However, it is the plaintiff's position that his complaint against the defendants presents, in addition to the question of liability for the breach of the specified contractual obligations, the further issue of their tortious interference with his established business by their appropriation of his distributing crews, and that his proof of damages at the trial sustains the propriety of the court's award in this latter connection.

[3-6] While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice shall not be embarrassed by technicalities, strict rules of construction, or useless forms. Rogers v. Duhart, 97 Cal. 500, 32 P. 570; Menefee v. Oxnam, 42 Cal.App. 81, 183 P. 379; Masero v. Bessolo, 87 Cal.App. 262, 262 P. 61. Since the enactment of section 452 of the Code of Civil Procedure in 1872, it has been generally recognized that in the construction of a pleading for the purpose of determining its effect. "its allegations must be liberally construed, with a view to substantial justice between the parties." In re Estate of Wickersham, 153 Cal. 603, 96 P. 311; Mix v. Yoakum, 200 Cal. 681, 254 P. 557; Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474; Von Schrader v. Milton, 96 Cal.App. 192, 273 P. 1074. No error or defect in a pleading is to be regarded unless it affects substantial rights. Code Civ.Proc. sec. 475. "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Civ. Code, sec. 3281. The subject matter of an action and the issues involved are determinable from the facts alleged rather than from the title of the pleading or the character of damage recovery suggested in connection with the prayer for relief. Luckey v. Superior Court, 209 Cal. 360, 287 P. 450; Hinkel v. Crowson, 83 Cal. App. 87, 256 P. 479. In defining the relief which may be awarded to plaintiff where an answer in the action has been filed, section 580 of the Code of Civil Procedure provides that "the court may grant him any relief consistent with the case made by the complaint and embraced within the issues." Moreover, the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleadings misled the unsuccessful litigant to his injury. Stein v. United Railroads of San Francisco, 159 Cal. 368, 113 P. 663; Tietke v. Forrest, 64 Cal.App. 364, 221 P. 681. Consistent with these liberal principles is the mandate of section 4½ of article VI of the state Constitution: "No judgment shall be set aside * * * for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." A careful review of the entire record in this case in the light of the foregoing observations compels the conclusion that the relief awarded plaintiff is commensurate with the injuries shown to have been sustained.

[7] The complaint is in one count, and while independent of its statement of the two breaches of contract, its allegations referable to the loss occasioned by the tortious acts of defendants are somewhat scant, they are sufficient to present the

basis of plaintiff's claim in relation to this objectionable conduct. The complaint recites that after the purported cancellation of the distribution contract, the defendants "employed plaintiff's distributing crews and supervisors in said area," and upon this charge it predicates as an item of damages "the sum of $500 for the loss of plaintiff's trained organization, supervisors and good will and for general damages to plaintiff's business." It is clear from the broad scope of the complaint that the plaintiff was seeking to adjust in a single action the whole matter in controversy between the parties, to secure redress not only for the breaches of contract, but for the subsequent wrongs and injuries committed by the defendants in connection with a related set of operative facts. If the defendants had desired to urge any objection to the form or general character of the plaintiff's charge, they should have availed themselves of the remedy of special demurrer as provided by section 430 of the Code of Civil Procedure. However, instead of taking such step, they filed an answer denying specifically all the material allegations of the complaint, and the case proceeded to trial upon the issues as thus framed by the pleadings.

Turning to the evidence bearing upon this phase of the plaintiff's claim to relief, the record discloses the following pertinent considerations: At the trial the plaintiff testified as to the activity and development of his handbill and advertising distribution business over a period of some four years in the territory here involved; his successful prosecution of certain litigation to test the validity of handbill ordinances in his field of operation as a factor both in establishing the sound basis of his enterprise and in motivating his employment by the defendants some few weeks later to manage the publication of and handle the circulation of their newspaper advertising material in the specified area; defendant Wright's complete understanding of the scope, efficiency and method of operation of plaintiff's organization at the time the contracts were negotiated; the enlargement and improvement of his distributing crews in preparation for immediate performance of the distribution contract; Wright's purported cancellation of the agreement covering the plaintiff's services in connection with the management of the publication—nine days following the date of its making—and re-affirmance then of the contemporaneously negotiated distribution arrangement; plaintiff's loss of several important advertising accounts as the result of his serving defendants in the competitive district, and his communication of this loss to Wright as the basis for his dependence on the completion of the distribution contract to sustain his organization. The plaintiff further testified that incident to the defendants' purported cancellation of the distribution contract some five weeks later, they immediately "took over" his operating crews in the territory wherein he had been circulating their advertising material; that while the value of his organization was probably six or seven thousand dollars, he "should be able to get about $4,000 for it in the market."

One of the supervisors of plaintiff's work crews at the time here involved testified that upon the loss of the defendants' distributing business, the plaintiff's organization in the various districts of the rural area of previous circulation "collapsed completely" and "the boys were taken over" by the defendants. At the introduction of this witness' testimony the defendants' counsel argued that such matter would not prove an element of damage for "the breach of contract for employment." This objection was overruled by the trial court upon the ground that the proffered evidence was properly supportive of the plaintiff's pleading of additional detriment by reason of "the loss of his organization," and the defendants' counsel accepted this construction of the complaint without further protest throughout the remainder of the trial. Thereupon, the plaintiff produced several witnesses to attest to various details in connection with the circumstances of collapse of his business. Among them was another of plaintiff's supervisors, who stated that during the period of performance under the distribution contract he had left with one of the employees of the Smith chain of markets the plaintiff's complete records as to the personnel of the latter's organization, the maps and routing of the districts being serviced for defendants, and the bookkeeping requirements incident to such scope of operation; that so far as he knew, said employee was still in possession of that data on behalf of the defendants. At the trial the defendant Wright admitted in substance that prior to the negotiation of the contracts in question he had full knowledge of the plaintiff's

method of distribution through the employment of crews of boys, although he denied that he was aware that plaintiff's business records were subsequently maintained at any of the Smith markets for checking. In other respects the evidence bearing on this branch of the case as produced on behalf of the defendants presents little conflict with the plaintiff's showing. As above stated, the defendant Smith, though in attendance at the trial, did not testify at all in the matter.

[8] From this review of the record it would appear that the trial court's finding against the defendants on the proposition of their disruption of the plaintiff's established business and the consequent liability of $4,000, the amount the plaintiff fixed as representative of his loss in this connection, was directly responsive to the issues submitted by the parties for consideration both upon the evidence and the pleadings. The single objection of the defendants' counsel to the sufficiency of the complaint to sustain the introduction of proof of damage of a tortious nature following the alleged unjustifiable breaches of contract was directed simply to the form of the plaintiff's statement of the related facts of the case, and in overruling such objection the trial court plainly indicated its theory that the basic sequence of events as charged would warrant an adjustment of the entire matter in controversy between the parties. Neither then nor at any other time in the course of the trial did the defendants' counsel argue any matter of substance as to the plaintiff's right of redress commensurate with proof of the claimed tortious interference with his business, but rather said counsel apparently accepted the issues as defined by the trial court and proceeded to present the evidence for the defendants in accordance therewith. Since the record establishes beyond dispute that the tort damage to the plaintiff—the defendants' appropriation of his work crews immediately following the unjustified repudiation of the distribution contract—was made possible solely by reason of the parties' entry into the contractual arrangement of employment in the first instance, there certainly was some practical foundation for the plaintiff's seeking complete recompense for his combined injuries in one action and for the trial court's undertaking to adjust the rights of the parties by a single judgment on a "just and equitable" basis. The defendants do not contend that they suffered any prejudice or were misled by any formal deficiency or irregularity in the plaintiff's pleading, nor would the record sustain such argument if made. The issues were fully and understandingly tried by the parties, and after a fair and impartial trial of those issues the trial court found upon substantial evidence in accordance with the plaintiff's claim. Consistent with these considerations the award of the $4,000 item of damage for the tort injury involved in this action must be sustained.

[9, 10] Everyone has the right to establish and conduct a lawful business and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded. Such right existing, the commission of an actionable wrong is established against any one who is shown to have intentionally interfered with it, without justifiable cause or excuse. Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L.R.A. 182, 50 Am.St. Rep. 57; Delz v. Winfree, Norman & Pearson, 80 Tex. 400, 16 S.W. 111, 26 Am. St.Rep. 755; Walker v. Cronin, 107 Mass. 555; Schonwald v. Ragains, 32 Okl. 223, 122 P. 203, 39 L.R.A.,N.S., 854. The justification advanced is generally the right to conduct a business in competition with that of the plaintiff, and where the means of interference involve no more than recognized trade practices such as advertising or price-cutting, the plaintiff's loss as the result of the competitive strife is deemed damnum absque injuria. Katz v. Kapper, 7 Cal.App.2d 1, 44 P.2d 1060; see Carpenter, Interference with Contract Relations, 41 Harv.L.Rev. 728, 743; Rest. Torts, secs. 766-768; Prosser, Torts, p. 1015. Similarly, it is not ordinarily a tort to hire the employees of another for use in the hirer's business. Triangle Film Corp. v. Artcraft Pictures Corp., 2 Cir., 250 F. 981, 163 C.C.A. 231; Harley & Lund Corporation v. Murray Rubber Co., 2 Cir., 31 F.2d 932; McCluer v. Super Maid Cook-Ware Corporation, 10 Cir., 62 F.2d 426; Driver v. Smith, 89 N.J.Eq. 339, 357, 104 A. 717; Jones v. Ernst & Ernst, 172 La. 406, 410, 134 So. 375; see Beekman v. Marsters, 195 Mass. 205, 211, 80 N.E. 817, 11 L.R.A.,N.S., 201, 122 Am.St. Rep. 232, 11 Ann.Cas. 332.

[11-13] This immunity against liability is not retained, however, if unfair methods are used in interfering in such advantageous relations. Prosser, Torts, p. 1023

et seq., and cases cited. In this particular case there are special circumstances which bring it outside the ordinary course of competition. Here the record shows that the defendants gained an unfair advantage over the plaintiff through deceptive dealings in the form of a contractual arrangement whereby they deliberately induced the plaintiff to build up his distributing organization to a level consistent with the advertising needs of their then noncompeting business—a chain of public markets—for circulation of a "shopping news," and then, having acquired through their employment agreement with the plaintiff, complete knowledge of his business methods and records, they undertook to terminate their relationship with him, hired his crews, and assumed control of his valuable enterprise. The defendants knew that the plaintiff relied upon the performance of the distributing contract as a sustaining factor in the maintenance of his organization, for, as above noted, on the defendants' unjustified repudiation of their obligations under the publication contract, the plaintiff told the defendant Wright of his loss of other customers incident to his servicing the defendants in the competitive field. On the subject of his conversation with the defendant Wright at that time, the plaintiff further testified: "I said, 'Now, you have taken the advertising away from me, and how do I know you won't take this distribution away from me?' I said, 'I would like to have the distribution agreement on a written contract.' He said, 'We do not need a written contract; our word is good enough.' * * * 'You need not worry about it.' * * * 'You can be assured that you will have our distribution, as we agreed to'; * * * 'Don't worry'; * * * 'You are the only one that can handle the circulars out here anyway,' or something like that." Yet despite this solemn assurance of good faith in the matter, the defendants, having successfully evaded the plaintiff's request for a written memorandum of the contractual arrangement, purported to cancel some few weeks later, and concededly without cause, the distribution agreement and immediately thereafter appropriated unto themselves the plaintiff's entire business mechanism. From this evidence the conclusion is inescapable that the defendants, aware that the plaintiff was sacrificing and, to an extent, abandoning his previously established business connections in order to meet the demands of the defendants' advertising program, made false promises to the plaintiff without intention to perform the obligations so assumed in the promotion of their own interests.

As a result of this series of events, the defendant Smith acquired a strategic position. Since he had become plaintiff's sole customer, he was able to cut off the work required to sustain plaintiff's organization at the same time he was proceeding to hire the plaintiff's employees. Through his breach of contract he was able to prevent plaintiff from competing effectively for the retention of those employees. Although defendant's conduct may not have been tortious if he had merely broken the contract and subsequently decided to hire plaintiff's employees, an additional factor is present in this case. From the evidence the trial court could reasonably infer that the breach, at the time it was made, was intended as a means of facilitating defendant's hiring of plaintiff's employees. A breach of contract is a wrong and in itself actionable. It is also wrongful when intentionally utilized as the means of depriving plaintiff of his employees, and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above. It follows that said defendant was guilty of a tortious interference in the relationship between plaintiff and his employees. See Prosser, Torts, p. 1023 et seq.; Rest. Torts, sec. 768.

In accordance with the views herein expressed, the judgment against the defendant Smith is affirmed in its entirety, and the judgment against the defendant Wright is reversed.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, Justice (concurring and dissenting).

Considering the record in this case, I see no basis for the finding that the respondent is entitled to $4,000 for the loss of his trained organization, supervisors, good will and general damages, or the judgment insofar as it includes that amount. By other findings the court declared that one month after the cancellation of the respondent's contract for publishing the newspaper, the appellants "purported" to cancel his con-

tract for the distribution of it and "immediately thereafter" employed his distributing crews and supervisors and "appropriated" his distributing organization. This is almost exactly the language of the complaint.

It is beyond question that a person is privileged to hire the employee of another who is not under a contract for future services and may not be held liable for a tort provided there is a bona fide business or competitive purpose in the hiring and the method of obtaining the employee's services is not unfair. Cf. Rest., Torts, secs. 766-768; Prosser on Torts, 1941, pp. 1015 et seq. The evidence in the present case shows the justification of a business purpose recognized by this rule. True, there is an additional qualification imposed by the courts before a person may escape liability for an interference with the advantageous business relations of another; the method of interference must be lawful and fair. Use of violence, fraud, or other unfair methods will, in effect, destroy the privilege of interfering. Rest. Torts, sec. 768(b), and see at p. 74, "Comment on Clause (b): Means of inducement." Breach of contract may constitute such an unfair method if its purpose was to obtain another's employees. The determining question, therefore, is whether there is any evidence that the breach of contract was intended and used for the purpose of obtaining Buxbom's employees.

There are no allegations in the complaint that the appellants breached either of their contracts for the purpose of interfering with the advantageous relations of Buxbom and his employees. Nor, in my opinion, is there any evidence from which this reasonably may be inferred. Fraud is never presumed; it must be clearly proved and the presumption of fair dealing approximates that of innocence of crime. Very evidently the trial judge drew no inference of fraud or unfair dealing from the testimony presented to him, for the findings do not charge the appellants with any intention to breach the contract for the purpose of facilitating the hiring of Buxbom's employees.

Moreover, the contract as pleaded and found, includes no provision for a distributing organization. It did not require Buxbom to provide such an organization or to render any personal services; on the contrary, he might have complied with his agreement by subcontracting the entire work to others. And from the evidence it appears that Buxbom's "distributing organization" consisted of boys attending high school who were employed to distribute papers after school hours at a specified rate per thousand. The record also shows that after the distribution contract was canceled, Buxbom had no other work for them. Under these circumstances, the acts charged against the appellants come within the exceptions to the rule.

Although I concur in the conclusion of my associates that the judgment against the appellant Wright should be reversed, for the reasons stated I believe that the judgment as to the appellant Smith should be modified by disallowing the amount awarded for the loss of employees, and as so modified, affirmed.



23 Cal.2d 613

BOYD v. OSER.

Sac. 5519.

Supreme Court of California.

Jan. 25, 1944.

1. Husband and wife ⇐247

The income from community property is impressed with same character of ownership as the property itself and, hence, respective rights of spouses in such rents, issues, profits, or other income, and their respective powers of disposition thereof, must be measured by law in force at time of acquisition of the capital or original community property from which such income arose. Civ.Code, § 1401, as amended by St. 1923, p. 29.

2. Husband and wife ⇐273(1)

The 1923 amendment to section 1401, providing that on death of spouse one-half of community property belongs to the surviving spouse and other one-half is subject to testamentary disposition of decedent, does not render community property acquired prior to 1923 subject to wife's testamentary disposition. Civ.Code, § 1401, as amended by St. 1923, p. 29.

3. Husband and wife ⇐273(1)

Husband's right in community property as it stood prior to 1923 amendment to sec-

tion 1401, included that of retaining title to and control over whole of community property, including income therefrom, upon wife's death, and such right could not be divested or impaired by provision in wife's will which, if effective, would take from husband upon her death a portion of either the capital property or accumulations of the income therefrom. Civ.Code, § 1401, as amended by St. 1923, p. 29.

4. Husband and wife ⇐273(1)

Wife did not possess power of testamentary disposition over income from community property acquired prior to effective date of 1923 amendment to section 1401 regardless of when such income accrued or was received by spouses. Civ.Code, § 1401, as amended by St. 1923, p. 29.

5. Husband and wife ⇐249

"Rents, issues, and profits" of community property partake of same attributes of ownership as the capital property. Const. art. 20, § 8; Civ.Code, §§ 162, 163.

6. Husband and wife ⇐249

The rule that a change in form of separate or community property affects neither character of the property nor respective rights of spouses therein also governs rights of spouses in income accruing from such property. Probate Code, § 201; Civ.Code, § 1401, as amended by St. 1923, p. 29.

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by Robert E. Boyd, as executor, etc., against W. L. Oser, as administrator with the will annexed, etc., to quiet title and for declaratory relief. From a judgment for defendant, the plaintiff appeals.

Judgment reversed with directions.

Prior opinion, 138 P.2d 328.

Duard F. Geis, of Williams, for appellant.

J. Oscar Goldstein, Burton J. Goldstein and P. M. Barceloux, all of Chico, for respondent.

Burr & Smith, of Los Angeles, amici curiae on behalf of respondent.

SCHAUER, Justice.

[1] The sole question presented on this appeal is whether a wife is empowered to make testamentary disposition of funds (or other property) accumulated or derived from the rents, issues, profits, or other income accruing subsequent to August 16, 1923 (the effective date of the 1923 amendment of section 1401 of the Civil Code, St. 1923, p. 29, now section 201 of the Probate Code), on community property theretofore acquired by her and her surviving husband. As amended, the section provides as follows: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse * * *." Prior to the 1923 amendment of the quoted section, no portion of the community property (save for an exception not here involved) was subject to testamentary disposition by the wife. We have concluded that income from property—which ordinarily represents the value of its use—is impressed with the same character of ownership as the property itself and, hence, that the respective rights of the spouses in such rents, issues, profits, or other income, and their respective powers of disposition thereof, must be measured and determined by the law in force at the time of the acquisition of the capital or original community property from which such income arose.

Amelia Waterland and G. F. Waterland, generally known as Frank Waterland, intermarried in 1894. No children were born to them. After their marriage and until January 1, 1920, they operated a candy store in Chico, California. Both of them devoted their time and labor to the business. The income therefrom was on various occasions used for the purchase of real estate, which in turn produced income by way of rentals; the deeds to such real estate were taken in the name of Frank Waterland. The candy store was sold on January 1, 1920, and thereafter the community income of the Waterlands consisted of the rentals from the real estate, of interest on occasional loans of money, and of interest on bank accounts into which receipts from the two sources just mentioned were occasionally deposited.

On May 7, 1935, Amelia Waterland made a will, and on September 25 of the same year she died. By her will she made specific disposition of certain personal effects and separate property belonging to her, directed the payment of $50 a month to a sister as long as the sister lived, and left

the residue of her estate to her husband, who was named as executor. Her will was admitted to probate and letters testamentary issued to the surviving husband, Frank Waterland. In July, 1939, and before administration of Amelia's estate had been completed, Frank Waterland died. Thereafter plaintiff herein was appointed executor of his last will and testament, and defendant was appointed administrator with the will annexed of the estate of Amelia Waterland.

Plaintiff filed an inventory and appraisement in the estate of Frank Waterland in which he claimed as separate property of the latter (by reason of the prior demise of the wife) all of the community property acquired by the Waterlands, including the community real estate and bank accounts. Thereupon defendant filed a "Supplemental Amended Inventory and Appraisement" in the estate of Amelia Waterland, in which he included as property of her estate an interest in the real property described in the inventory filed by plaintiff in the estate of Frank Waterland and a one-half interest in several described bank accounts which stood in the name of the husband on the date of the wife's death. Defendant also made demand upon plaintiff to deliver to him from such bank accounts the sum of $13,206.01, claimed to represent the interest therein of Amelia Waterland's estate. Plaintiff refused to pay over the money, and filed this suit, in which he seeks, among other things, to secure a judgment "declaring and adjudicating the respective rights" of the plaintiff and the defendant in and to both the real and the personal property in dispute. Defendant in his answer claimed that one-half of all the community property of the Waterlands, whether acquired before or after the 1923 amendment to section 1401 of the Civil Code, was subject to the testamentary disposition of the wife, and that as administrator of her estate he was entitled to possession and control of such one-half "to the extent necessary to permit the defendant to carry into effect all of the provisions, legacies and bequests set forth and contained" in the will of Amelia Waterland. The separate estate of Amelia Waterland is admittedly insufficient to carry out the provisions of her will.

At the beginning of the trial, which was by the court without a jury, defendant conceded that none of the community property acquired by the Waterlands prior to the effective date of the 1923 amendment "would be subject to the [testamentary] disposition of the wife," but urged that one-half of the income accruing between that date and the date of the wife's death (September 25, 1935) was subject to administration in her estate. Such income was represented, so far as here in controversy, by six bank accounts which stood in the name of the husband and which totaled some twenty-four to twenty-five thousand dollars at the time of the wife's death. The court found, among other things, "that said George Frank Waterland, up to the time of the death of said Amelia Waterland, collected rents and income from the community real estate which was owned by said husband and wife as community property on the 16th day of July,* 1923, and deposited said rentals and income in bank accounts, and withdrew and redeposited and reinvested the same. That all of the personal * * * property described in this finding had its source in said rentals and income so deposited, redeposited and reinvested, and *none of it had its source in the earnings* of said husband and wife after the 16th day of *July,* 1923. That none of said * * * personal property consists of the original rentals or income from said community real estate so owned on the 16th day of *July,* 1923, by said husband or wife or the original deposits of the said rentals and income so received from said property. That the * * * personal property referred to in this finding is specifically described as follows: * * *." (Italics added.) The description which then follows includes the six bank accounts here in dispute. Judgment was entered by which it was adjudged, among other things, "that one-half of all the personal property, including * * * bank accounts acquired on and after the 16th day of *July,* 1923, and owned by George Frank Waterland and Amelia Waterland at the time of the death of said Amelia Waterland, and hereinafter specifically set forth, * * * were and are subject to administration in the estate of Amelia Waterland, deceased, as of the time of her death, to-wit: September 25, 1935," and "that the defendant is en-

* Apparently reference to the month of July rather than of August is due to an erroneous computation of the effective date of the 1923 amendment to section 1401 of the Civil Code.

titled to administer * * * as the property of the estate of Amelia Waterland, deceased, as of the time of her death" one-half of the sums in the bank accounts.

Plaintiff's motion for a new trial was denied, and he thereupon appealed from that portion of the judgment which is quoted immediately hereinabove. We note that neither the findings nor the judgment of the trial court specifically fixes the dates upon or between which the rentals and income found to have been deposited in the bank accounts accrued or were received by the Waterlands. In other words, so far as the language of such findings and judgment is concerned, the funds found to have been deposited may have been income which, in part at least, accrued prior to the 1923 amendment. However, plaintiff in his opening brief makes the following statement: "This appeal is taken from that portion of the judgment which provides in effect that one-half of the community personal property which was originally acquired by the spouses in the form of real property rentals *received on and after the 16th day of July, 1923*, and still owned by George Frank Waterland and Amelia Waterland at the time of the death of said wife on September 25, 1935, is subject to administration in the estate of Amelia Waterland." (Italics added.) Apparently, therefore, plaintiff concedes that the bank accounts had their source in rentals *received*, and which for the purposes of this opinion, we shall presume *accrued*, after the 1923 amendment. (The error as to the effective date of the 1923 amendment is not material in the light of the conclusion we reach.)

In support of the judgment defendant urges:

1. That one-half of all income accruing or received by the spouses after the effective date of the 1923 amendment on community property theretofore acquired is subject to testamentary disposition by the wife.

2. That if no portion of such income in the form in which it was originally received by the spouses was subject to testamentary disposition by the wife, then in any event the "transmutation in form" of such income, even by mere deposit in a bank account, renders it subject to such disposition.

Plaintiff, on the other hand, contends that the respective rights of the spouses in the income from community property are determined by the law existing at the date of acquisition of the community property which produced such income, and that such rights are unaffected by changes in form of the income after it was received. Well-established propositions of law, and fidelity to constitutional standards, require us to agree with plaintiff.

[2] Counsel for defendant state that they have been unable to find a case in point which construes the "character of the income from property acquired prior to the effective date of the amendment of 1923," but argue that the holdings in Re Estate of Phillips (1928), 203 Cal. 106, 263 P. 1017, and McKay v. Lauriston (1928), 204 Cal. 557, 269 P. 519, relied upon by plaintiff, are not in point here and are not inconsistent with defendant's contentions. Those cases establish the proposition, admitted by both parties to be the law, that community property acquired prior to 1923 is not subject to the wife's testamentary disposition, but in neither of them does it appear that the problem of after-acquired income therefrom was involved. However, in the McKay (1928) case, this court made the following statement (at page 566 of 204 Cal., at page 523 of 269 P.):

"It has been consistently and repeatedly held by this court, beginning with the case of Spreckels v. Spreckels [1897], reported in 116 Cal. 339, 48 P. 228, 58 Am.St.Rep. 170, 36 L.R.A. 497, down to the cases of recent determination that amendments whereby it was sought to *lessen, enlarge, or change in any manner the rights of the respective spouses in community property* will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments [citations]. * * *

"At the time of the purchase of said real property [prior to 1923] the respondent [husband] took the absolute title thereto subject to whatever rights his wife had therein by virtue of the fact that the same was the community property of himself and his wife. This right of his wife was * * * to receive upon the death of her husband, and subject to his debts, one-half of the community property. * * * *Her death, however, prior to that of her husband, made the happening of this contingency impossible and thereupon the entire estate belonged to the husband without administration.* Civ.Code, sec. 1401, prior to its amendment in 1923. *These rights of*

*the respective spouses in the community property attached to the property and were acquired by the parties at the time of the conveyance of the property, and * * * said rights cannot be impaired or destroyed by subsequent legislation.* The courts, as above noted, have uniformly held that any legislation affecting the rights of the parties in such cases will not be given a retroactive construction, but that the law in force at the date of acquisition of the property is determinative of the rights of the parties therein." (Italics added.)

[3, 4] It appears to us that the principle thus enunciated, and reiterated in Trimble v. Trimble (1933), 219 Cal. 340, 346, 26 P.2d 477, must be determinative of the instant case. At the time of acquisition of the real property from which arose the income here involved, title to such property vested in the husband, subject only to such rights as the wife then held by reason of the fact that it was community property. The rights of the wife at that time did not include the power of testamentary disposition of the income from community property; that right was in the husband, and, as emphasized in the McKay case, "cannot be impaired or destroyed by subsequent legislation." Moreover, the husband's rights under the law as it then stood included that of retaining title to and control over the whole of the community property, including the income therefrom, upon the wife's death, and such right could not be divested or impaired by provisions in the wife's will which, if effective, would operate to take from the husband upon her death a portion of either the capital property or accumulations of the income therefrom. To hold otherwise would tend to emasculate "ownership" in one of its most essential attributes: the right of use. The husband's community "ownership" of the capital property would be subject to the *ante* 1923 laws but his right to its *use*, i.e., *to control and possess the value and proceeds of its use*, would be subject to partial divestment during his lifetime, by the testamentary act of his wife. This would be an unconstitutional impairment of a vested property right (see George v. Ransom (1860), 15 Cal. 322, 323, 324, 76 Am. Dec. 490). We are therefore of the opinion that the wife cannot be held to now possess the power of testamentary disposition over the income from community property acquired prior to the effective date of the 1923 amendment of section 1401 of the Civil Code, regardless of when such income accrued or was received by the spouses. (See, also, Roberts v. Wehmeyer (1923), 191 Cal. 601, 612, 218 P. 22; In re Estate of Drishaus (1926), 199 Cal. 369, 373, 249 P. 515; and In re Estate of Thornton (1934), 1 Cal.2d 1, 3, 33 P.2d 1, 92 A.L.R. 1343.)

In the case of George v. Ransom, supra, the court was considering a statute which provided, among other things, that "the rents and profits of the separate estate of * * * [the] wife shall be deemed common property." The court held (page 323 of 15 Cal., 76 Am.Dec. 490): "We think the Legislature has not the Constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors. If the Constitutional provision [Const. of 1849, art. XI, sec. 14] be not a protection to the wife against the exercise of this authority, the anomaly would seem to exist, of a right of property in one, divested of all beneficial use—the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was, to protect the wife against the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in the contingency of her surviving her husband."

[5] The 1849 constitutional provision referred to in the above quotation provided that "All property, both real and personal, of the wife, owned or claimed by [her before] marriage, and that acquired afterward by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband. * * *" This section has been succeeded by section 8 of article XX of our present Constitution, which declares that "All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterwards by gift, devise, or descent, shall be their separate property." Definitive of the rights so declared, the Legislature has enacted sections 162 and 163 of the Civil Code, specifying that property of the type described, "with the rents, issues, and profits thereof," shall be the separate property of the respective spouses. There is no constitutional or statutory provision ex-

pressly declaring that "rents, issues, and profits" of community property shall partake of the same attributes of ownership as the capital property, but such characteristic must follow as a matter of law, because the right of beneficial use is an incident of ownership. The provision of the 1849 Constitution, above quoted, likewise made no specific mention of the "rents, issues, and profits" of the separate property of the wife, and the conclusion of the court that the Legislature had no constitutional power "to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors," seems to be sound and worthy of preservation. To hold that the income of property vested in the husband, whether separate or community in tenure, can be taken from him by the Legislature and given to the wife or her testamentary beneficiaries, would be destructive of the principle which it is necessary to maintain if either husband or wife is to be protected in the fruits of his or her separate property. To attempt a distinction on the ground that the property in this case is community property while in the cited case it was separate property, would be doing homage to names at the sacrifice of principle. By whatever name the tenancy be called, the fact remains that the property of the Waterlands was vested in the husband. He could not be divested of his rights therein without due process of law.

Each party to this appeal asserts that certain statements appearing in the opinion in Henry v. Hibernia Sav. & Loan Soc. (1935), 5 Cal.App.2d 141, 144, 42 P.2d 395, support his position here. In that case a wife attempted to make a gift to her son of certain community funds in a bank account which stood in her name. Only $500 of community funds had been deposited in the account after the effective date of the 1923 amendment to section 1401 of the Civil Code. The District Court of Appeal, in its discussion of such rights as might exist in the wife to dispose of a portion of the community property acquired since 1923, stated as follows (page 144 of 5 Cal. App.2d, page 396 of 42 P.2d): "All that acquired prior to 1923, *with the increase thereof* represented by the interest paid by the bank, vested in the husband, and that portion the wife did not have the power to devise or give away. [Citations.] * * * To restate the foregoing—none of the community property acquired prior to the 1923 amendment was subject to the testamentary disposition of the wife * * * [Page 145 of 5 Cal.App.2d, page 397 of 42 P.2d] Upon the authorities above cited, it must be evident that the wife had no power of disposition, either by will or gift, of that portion of the fund acquired before the amendment of 1923, *including the profits thereof*. This would limit the question presented to the sum of $500, with interest thereon, acquired after that date. * * *" (Italics added.) The court then affirmed such portions of the judgment as had denied the right of the wife to dispose of any of the community property other than the $500 deposited after the effective date of the 1923 amendment, together with interest thereon. It thus appears that the District Court of Appeal in the Hibernia case was in accord with the views we have expressed hereinabove.

Further support for our views is found in the cases of Hirsch v. United States (1932, 9 Cir.), 62 F.2d 128, 129, and Rogan v. Delaney (1940, 9 Cir.), 110 F.2d 336, 337, 339, wherein it was held in connection with problems arising under federal income tax laws that the enactment in 1927 of section 161a of the California Civil Code did not operate to increase the rights of a wife in income from community property theretofore acquired, regardless of whether such income accrued before or after enactment of the new section. Speaking for the Ninth Circuit Court of Appeals, Judge Wilbur, a former chief justice of this court, said: "It seems too clear for discussion that, if the Legislature of California was powerless to shift the title to a portion of the community property from the husband to the wife, it is equally powerless to change their relationship to income derived from the community property vested in the husband." (Hirsch v. United States (1932), supra, 62 F.2d at page 129.)

[6] Defendant's second contention—that a change in form of the income accruing after the 1923 amendment, after such income was received, renders it liable to the wife's testamentary disposition—is answered by application of the principles governing a change in form of separate or community property. It is settled that such a change affects neither the character of the property nor the respective rights of the spouses therein. (See 3 Cal.Jur. Ten Year Supp., 520–522, sec. 38, and cases cited therein; see, also, Hannah v. Swift (1932, 9 Cir.), 61 F.2d 307, 310.) We perceive no reason why the same rule should

not be held to govern their rights in the income accruing from such property, and have been cited to no authority intimating to the contrary.

For the reasons above stated, the judgment is reversed and the trial court is directed to enter judgment in accordance with the views herein expressed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment. The decisions that existing statutes changing the rights of husbands and wives in community property can have no retroactive application have become a rule of property in this state and should not now be overruled. It is my opinion, however, that the constitutional theory on which they are based is unsound. Warburton v. White, 176 U.S. 484, 20 S. Ct. 404, 44 L.Ed. 555; Arnett v. Reade, 220 U.S. 311, 31 S.Ct. 425, 55 L.Ed. 477, 36 L.R.A.,N.S., 1040. That theory has not become a rule of property and should not invalidate future legislation in this field intended by the Legislature to operate retroactively. (See Johnston, Community and Separate Property: Constitutionality of Legislation Decreasing Husband's Power of Control Over Property Already Acquired, 27 Cal.L.Rev. 49.)



62 Cal.App.2d 700

PEOPLE v. FLORES et al.

Cr. 481.

District Court of Appeal, Fourth District, California.

Feb. 1, 1944.

Hearing Denied Feb. 28, 1944.

1. Kidnapping ⇐5

In prosecution for kidnapping, there was sufficient evidence of forcible taking and carrying away of complaining witness to sustain conviction. Pen.Code, § 207.

2. Rape ⇐11

A "threat", within statute defining offense of rape accomplished by threats of bodily harm, need not be expressed in words or through exhibition of gun, knife, or other deadly weapon, but may be expressed by other acts and conduct. Pen. Code, § 261, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Threat".

3. Rape ⇐51(4)

In prosecution for rape accomplished by threats of bodily harm, evidence was sufficient to take to jury question whether defendants made threats of great and immediate bodily harm to prosecuting witness and to support conviction. Pen.Code, § 261, subd. 4.

4. Criminal law ⇐622(1)

Four defendants, charged with rapes directly connected together in commission against same woman and involving one set of circumstances, were properly tried together, though all of defendants were not jointly charged with rape in each of several counts of information. Pen.Code, § 261, subd. 4; §§ 954, 1098.

5. Criminal law ⇐808½, 810

In prosecution for kidnapping and rape, an instruction in which court read to jury statutory definition of word "willful" was not erroneous as removing element of specific intent from jury's consideration and conflicting with instruction that specific intent is necessary to constitute crime. Pen.Code, § 7, subd. 1; § 207; § 261, subd. 4.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Joe Flores, Manuel Hanks, Noah P. Rico, and Victor Holman were convicted of kidnapping and rape, and they appeal.

Defendant Hanks' appeal dismissed, and judgments on verdicts against other defendants affirmed.

Henry W. Hache and Edgar G. Langford, both of San Diego, and Noah P. Rico, in pro. per., for appellants.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendants were jointly charged in the first count of an information with the crime of kidnapping, and in four other counts each defendant was separately and respectively charged with the crime of

rape. A jury found each defendant guilty on both charges and judgments were entered sentencing each defendant to the penitentiary, the terms on the two charges to run consecutively. Each defendant appealed from the judgment as to him and from an order denying his motion for a new trial. Thereafter, at the request of the defendant Hanks his appeal was dismissed.

The general facts involved are as follows: The complaining witness was 19 years old and, apparently, had separated from her husband who was in the army. About midnight on December 26, 1942, she came out of a cafe on Fourth Street in downtown San Diego. As she emerged from the cafe she was accidently struck on the forehead by a bottle in the hands of one of several women engaged in a fight in front of the cafe. She was dazed and bleeding from the wound and a passing sailor led her across the street to an automobile occupied by the four defendants. The sailor suggested that she be taken to a doctor and someone of the appellants replied that they would do so. She was taken into the automobile and it was driven away, the appellant Rico doing the driving. They proceeded out Market Street and instead of taking her to a doctor they went out several miles and then left the highway and traveled some distance over a dirt road, eventually stopping at an isolated spot where each of the appellants had sexual intercourse with her. Sometime later, the appellants returned to town and let the complaining witness out of the car in front of or near her home. She hailed a passing car and, at her request, was taken directly to the police station where she told what had occurred. We are unable to find in the record the exact time when she arrived at the police station, but the police surgeon testified that he examined her there at 3:30 A.M. on December 27.

[1] Each of the appellants first contends that the evidence is insufficient to sustain his conviction on the charge of kidnapping. It is argued that the complaining witness voluntarily entered the automobile and that the only evidence of force in connection with the automobile trip is certain evidence that she attempted to jump out of the car at 16th and Market Streets while it was traveling 35 or 40 miles an hour, and that she was restrained and pulled back into the car by one of the appellants in order to save her life. While there is such evidence, there is other evidence that she opened the door of the car and tried to jump out while it was stopped at a stop-sign at 16th and Market, which was less than a block from her home, and that she was forcibly restrained by two of the appellants.

There is ample evidence that the complaining witness was taken out to this lonely spot against her will. She was taken into the car on the representation that she would be taken to a doctor. As they proceeded out Market Street she realized that they were not taking her to a doctor and she repeatedly asked them to take her home or to a doctor. The appellants only laughed and told her she was not hurt, although she was bleeding profusely at the time. According to some of the evidence, which the jury was entitled to accept, she opened the door and tried to jump out when the car stopped at 16th and Market, near her home, and two of the appellants forcibly held her in the car. Although she frequently asked them to take her home the appellants continued on to the lonely spot in question and when they arrived there she was forcibly taken from the car and pushed to the ground. On two occasions she ran away but both times she was caught and brought back. If her testimony, and a part of the testimony of the appellants, is to be believed no reasonable person could doubt that she was taken to this spot against her will and without her consent. She entered the car as the result of a misrepresentation and the appellants actually used some force and repeatedly refused to discontinue the trip or to allow her to leave the car after she discovered she was not being taken to a doctor. There is sufficient evidence of a forceful taking and carrying away of the complaining witness, within the meaning of section 207 of the Penal Code. People v. Rosa, 10 Cal. App.2d 668, 52 P.2d 542; People v. Ogden, 41 Cal.App.2d 447, 107 P.2d 50.

[2] It is next urged by all of the appellants that the evidence is insufficient to sustain their convictions on the charges of rape accomplished by threats of bodily harm. These counts of the information were based upon subd. 4 of Penal Code, sec. 261, which applies where the female is prevented from resisting "by threats of great and immediate bodily harm, accompanied by apparent power of execution." It is argued that since the com-

plaining witness testified that she made no physical resistance at the times in question because she was afraid of the appellants, and because she further testified that no spoken threats were made as to what they would do to her if their demands were refused, it follows that there were no threats of great and immediate bodily harm within the meaning of the statute and that they could not be convicted under this subdivision of section 261.

We are unable to agree with the view that there can be no threat within the meaning of this statute unless it is expressed in words or through the exhibition of a gun, knife or other deadly weapon. A threat may be expressed by acts and conduct as well as by words. If one were met in a lonely place by four big men and told to hold up his hands or to do anything else, he would be doing the reasonable thing if he obeyed, even if they did not say what they would do to him if he refused. Their actions and manner might well indicate their purpose and intention and it would be a mere play on words to say that these actions and circumstances did not constitute and were not the expression of a threat. In fact, it would be a very compelling one. We think similar considerations are applicable here.

[3] There is plenty of evidence not only that the complaining witness was forcibly taken to this secluded spot but that force was there used. Two police officers testified that they talked with three of the defendants two days after the incident occurred. That Flores told them that he and the other defendants were together in Rico's car and picked up the complaining witness, who was bleeding at her forehead; that she asked them to take her to a doctor; that while they were en route she opened the door and attempted to jump out; that he grabbed her and yanked her back into the car, because he feared she would get hurt; that all four had sexual intercourse with her; and that she tried to run away and one of them ran after her and brought her back. That Hanks told them that she tried to jump out of the car and Flores and Holman pulled her back. That Holman told them that after they arrived at the lonely spot and before she was taken from the car she pleaded with him saying "Don't let them strike me any more, I will submit"; that she ran away from the scene and somebody brought her back; and that after two of them had had intercourse with her she grabbed hold of him and pleaded with him not to let them commit these acts any more. There is evidence that her pants were torn off from her before she was taken from the car; that she was dragged from the car; that she was pushed or shoved to the ground; that when she attempted to arise she was shoved back; that after she was assaulted by the second man she succeeded in running away and was caught and brought back by one of the men; that she consented to none of the acts; that she appealed to two of the men to protect her from the others; that through it all she talked to them all and tried to get them to take her home and offered to pay them if they would do so; that she told them she was going to report the matter to the police when she got back; that after the four acts were completed she ran away again and was caught and brought back; that on this occasion she tried to hit Hanks with a board but he grabbed her wrist and took it away from her and brought her back; that all of the men slapped her during the night; that after the acts were accomplished and they were proceeding back to the highway they stopped and one of the men accused her of taking his purse; that while they were stopped a car went by on the highway and she screamed at it; and that one of the men then slapped her and knocked her down. She was then taken back to the spot where the acts occurred and the purse was there found. She testified that she did not put up a fight at the time because she was afraid of them. When asked if they displayed any weapons she replied that four big Mexicans did not need any weapons against her. She testified that they did not tell her they were going to do anything to her if she refused, but she knew they would. When asked if she resisted she said: "I tried to talk to them because I was afraid of them. There was no way I could resist four big men." She was badly hurt at the time and was bleeding. The police surgeon testified that he put in two stitches in the cut on her forehead. He also testified that she was "pretty well beat up around the head", and that in addition to the cut on her forehead there was a marked contusion of the whole left side of her face, a bloody nose, a bruise of the left upper lip and a scratch on her neck.

Whether or not the evidence would have sustained a conviction under subd. 3 of

Penal Code section 261, we think that all of these circumstances and the acts and conduct of the appellants constituted a very real threat to the complaining witness within the meaning of subd. 4, and that they sufficiently explain the absence of final resistance on the part of the complaining witness. While there is much conflicting evidence the question was one of fact for the jury and it cannot be held that its finding thereon is without support in the evidence. People v. Rosa, 10 Cal. App.2d 668, 52 P.2d 542; People v. Ogden, 41 Cal.App.2d 447, 107 P.2d 50.

[4] The appellant Rico raises two other points which require little consideration. He first argues that the court committed prejudicial error in trying all of the defendants together when all of them were not jointly charged in each of the several counts charging rape against a particular individual. The offenses of rape thus charged were directly connected together in their commission and all of the charges on which the several appellants were convicted involved one set of circumstances. Not only does it not appear that this appellant made any objection to this method of trial but it is well settled that charges so arising may be united for trial. Penal Code, secs. 954, 1098; People v. Guerrero, Cal.Sup., 137 P.2d 21; People v. Kaye, 43 Cal.App.2d 802, 111 P.2d 679.

[5] This appellant further argues that the court erred in its instructions to the jury in that it read the definition of the word "willful" as set forth in subdivision 1 of section 7 of the Penal Code, and also gave the following instruction: "A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do and in the absence of satisfactory proof to the contrary, it is presumed that a person intends all the natural, probable and usual consequences of his own acts; except that this instruction does not apply where specific intent is an essential element of the crime charged, in which event, the intent itself must be proved beyond a reasonable doubt." It is argued merely that reading the definition of the word "willful" removed the element of specific intent from the consideration of the jury, and that this conflicted with the other instruction "that a specific intent is necessary to constitute a crime." The criticism is without merit and, so far as we can see, the jury was properly instructed.

The judgments and orders denying a new trial, as to each of the appellants, are affirmed.

MARKS and GRIFFIN, JJ., concur.



62 Cal.App.2d 852

TULLER v. ATCHISON, T. & S. F. RY. CO. et al.

Civ. 3097.

District Court of Appeal, Fourth District, California.

Feb. 9, 1944.

Rehearing Denied March 6, 1944.

Hearing Denied April 7, 1944.

1. Master and servant ⇐286(30)

In action against railroad for death of its employee on switch engine which collided with truck and semi-trailer, railroad employees' negligence in failing to stop the engine sooner was for jury.

2. Automobiles ⇐246(2)

In action against owner and driver of truck which collided with switch engine on spur track on private property killing railroad's employee, instruction that, if ability to look or listen is obstructed, duty to stop before entering danger zone becomes absolute, should not have been given.

3. Trial ⇐296(4)

In action against owner and driver of truck which collided with switch engine on spur track on private property killing railroad's employee, improper instruction that, if ability to look or listen be obstructed, duty to stop before entering danger zone becomes absolute, was not prejudicial in view of other instructions.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Helen Tuller, administratrix of the estate of Claude P. Tuller, deceased against the Atchison, Topeka & Santa Fe Railway Company and others, to recover for death of the intestate, who was an employee of named defendant and who was killed in a collision between a switch engine and a truck and semi-trailer owned by the defendant General Transfer Company and

driven by the defendant Freitas. From a judgment for plaintiff, defendants appeal.

Affirmed.

Jonathan C. Gibson, Leo E. Sievert, and H. K. Lockwood, all of Los Angeles, for appellant Railroad Co.

Chester O. Hansen, of Fresno, for the other appellants.

Hildebrand & Bills, of Oakland, and Edmond A. Chevalier, of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action for damages on account of the death of Claude P. Tuller, an employee of the defendant railroad company, who was killed in a collision between a switch engine and a truck and semi-trailer owned by the defendant transfer company and driven by the defendant Freitas. The collision occurred at 11:50 o'clock A.M. on November 26, 1941, on premises owned by the Sun Maid Raisin Growers Association. A jury returned a verdict for $35,000 against all defendants. Motions for a new trial were denied and a judgment was entered from which the railroad company and the other defendants have separately appealed.

The accident occurred on the easterly of two parallel railway tracks extending through the Sun Maid property. It was stipulated that the tracks were also owned by Sun Maid. To the east of these tracks there was a row of sheds all filled with raisin boxes except for one, near the center, which was left open and used as a driveway. While there was no graded roadway, the surrounding ground was level, had an oiled surface and was about flush with the top of the railway tracks. For some years trucks had been driven through this shed, which was No. 69, across the railway tracks and on through the Sun Maid grounds. The easterly rail of the tracks was about 16½ feet westerly from the row of sheds. It was customary for switch engines to pass along these tracks and do daily switching for this industry.

On the occasion in question a switch engine was proceeding north on the easterly of these tracks for the purpose of bringing out certain cars. The switch engine was traveling backward and three men were standing on the footboard at the forward end of the moving engine. Engine foreman Stephens was standing on the westerly portion of the footboard, switchman Ridgeway was standing on the easterly portion and the deceased, Tuller, was standing near the center of the footboard. As the engine neared shed No. 69 the truck and semi-trailer, driven by Freitas, came out of that shed and proceeded across the railway tracks, moving toward the west. The truck and semi-trailer was about 40 feet long and as it was proceeding across the nearest railway track it was struck by the backing switch engine at a point near the center or slightly to the rear of the center of the semi-trailer. The engine foreman and the switchman jumped and escaped injury, but Tuller was crushed between the engine and the semi-trailer and received injuries which caused his death.

Freitas testified that he had been driving similar equipment through this shed for many years; that he came out from shed 69 at a speed of about 5 miles an hour; that at that speed he could stop in less than 5 feet; that he could not look to the south along the railroad tracks until he emerged from the shed; that his seat was about 9 feet behind the front bumper of the truck; that as he came out of the shed he looked to the right first because it was an open view; that he then looked to the south; that when he looked to the south he saw the switch engine coming about 60 feet away; that he thought the engine was going to stop; that he proceeded at about the same speed for about 40 feet; that he did not apply the brakes until "pretty near to the impact"; that he saw some men on the footboard of the engine; that two of them got off the footboard; and that he did not see any signals given. He also testified that for a good many years he had known that switching was done over these tracks; that he knew such switching was done after 12 o'clock but had not seen it before 12 o'clock; and that he had not known exactly what time it was when he crossed this track, although someone told him afterward it was 11:50 A.M.

A disinterested witness, who was in the best position to see the accident, testified that when the truck and semi-trailer emerged from shed 69 the switch engine was about 35 feet from the point of impact. At another time he testified that the distance the switch engine traveled during this interval was 50 feet. He also testified that the locomotive was moving about 7 or 8 miles an hour; that it did not slow down prior to the impact; that when the engine was about 20 feet from the point of impact he saw the man on the west side of the

footboard give a signal by moving his arm up and down; that he gave this signal more than once; that the engineer did not seem to heed this signal; and that the engine did not slacken its speed. The engine foreman, who gave this signal, testified that he first saw the truck when he was about 20 feet from the point of impact; that he then gave this signal to stop to the engineer; that after giving this signal he reached around and opened an angle-cock which opens the airline and sets the brake; that he then heard the air-brake take effect and jumped off; and that he was standing 5 feet from the point of impact when it was all over. At another time he testified that the engine traveled between 30 and 35 feet between the time he first saw the truck and the time of the impact; that he did not see the truck until Ridgeway yelled at him; that this was when they were 30 or 35 feet away and he then gave the signal and later turned on the air; and that there had been times previously when his signals had not been seen by this engineer.

Ridgeway, the switchman, testified that he saw the truck and semi-trailer as it came out of the shed; that he was approximately 30 feet away when he saw the front of the truck; that he "just hollered and jumped off" and gave the fireman the stop sign. The fireman testified that he saw the truck as it was coming out of shed 69, that the locomotive was then 15 feet from the truck, that he then called to the engineer to put on the emergency, and that he saw Ridgeway jump from the footboard but did not remember that he gave him any signal. The engineer testified that he first saw the truck when it "started to go out the left side, the west side"; that he had the signal from the foreman and had the brake on before he saw the truck, and that the engine was traveling 5 miles an hour. While he testified that he did not know in how many feet the engine could be stopped while traveling at that speed he admitted that he had testified at the coroner's inquest that at a speed of 5 miles an hour the engine could be stopped in approximately 6½ feet. He then explained, in effect, that it would take some additional time to get the signal and to act upon it, and that the 6½ feet applied after you got an effective brake.

The appellant railroad company's only contention is that the accident was caused by the negligence of the truck driver and that the evidence is not sufficient to establish negligence on its part. It is argued that the accident happened on private property and not at a public crossing; that it was engaged in ordinary switching movements; that the speed of the switch engine was reasonable; that its employees were on the alert; that the engine foreman had never before seen any traffic coming out of shed 69; that he had never been informed that this area was used as a roadway; that the engine was within 20 feet of the point of impact before its employees saw the truck coming out of the shed; that the engine foreman immediately gave a stop signal to the engineer and then himself opened the anglecock to turn on the air brakes; that the engineer acted promptly upon receiving the signal to stop; and that there is no evidence in the record which indicates that the switch engine could have been brought to a stop in time to avoid the accident.

[1] On the other hand, there is evidence that the engine was farther away at the time the truck emerged from the shed, the distance being variously estimated at from 30 to 60 feet. The engine foreman at one time gave the distance as 35 feet and the disinterested witness at one time gave it as 50 feet. The fact that the application of the air brakes was not heard until the engine was about 5 feet from the point of impact, and the further fact that the engine did not slow down until about the time of the impact indicate that an unnecessary interval elapsed between the time the truck could have been seen, according to a part of the evidence, and the time the brakes were actually applied. The evidence not only justifies the inference that the engine could have been stopped sooner than it was, but also justifies the inference that this appellant's employees, or some of them, were not as alert as they should have been. The evidence was conflicting and, under the circumstances, the question of negligence on the part of this appellant was one of fact for the jury and the evidence sustains its finding in that regard.

[2, 3] The only point raised by the other appellants is that the court committed prejudicial error in giving, at the request of the appellant railroad company, an instruction reading as follows: "You are instructed that a railway track is of itself a warning. It is a place of danger. It can never be assumed that cars or trains are not approaching on a railroad track or that there is no danger therefrom. It

is therefore the duty of every person who approached a railroad track to exercise proper vigilance to ascertain and to know whether any trains or cars are approaching thereon before attempting to cross thereover. Proper vigilance requires every such person to look and listen before going upon said tracks or so close thereto as to be in danger; and if, for any reason the view to any extent is obstructed, the person or persons, endeavoring to cross said track or going so close thereto as to be in danger either of their person or property, should exercise a degree of precaution which ordinary prudence would dictate in such an exigency; that is, in stopping and listening or even getting out of the vehicle in which they may be riding and going ahead in order to overcome the obstruction to vision, if necessary. The looking, listening and stopping thus required should be exercised at the last moment which ordinary prudence would dictate before passing from a place of safety to one of danger. *If the ability to look or listen be obstructed by natural or artificial objects then the duty to stop before entering into a zone of danger, in order that proper investigation may be made, becomes absolute.*" (Italics ours.) It is argued that the court thus, in effect, instructed the jury that there was an absolute duty on the part of the appellant Freitas to stop, look and listen before entering upon this spur track, that the instruction failed to distinguish between the absolute duty of stopping which might exist at a public grade crossing and the degree of care required before entering upon a spur track on private property, that it ignored other circumstances which here appear, and that it told the jury that Freitas was negligent because he did not stop on this occasion.

The part of this instruction complained of is the last sentence, which we have italicized. The instruction as a whole was intended as a general statement of the usual rules relating to the duty resting on one about to cross a railroad track. We agree with these appellants that the last sentence thereof should not have been given in this form. But it does not follow that it was sufficiently prejudicial to justify a reversal, in view of the other instructions which were given.

In a number of other instructions, the court told the jury that the duty of such a person to stop is not an absolute one; that this duty is one depending upon the particular conditions obtaining at the time; that the driver of a motor vehicle is not required under all circumstances to stop before crossing a railroad track; that it is not negligence per se not to stop, look and listen; and that "there is no absolute requirement that the operator of a motor vehicle must actually stop before crossing a railroad track, the question as to whether he should stop, as well as look and listen, being ordinarily a question of fact to be left to you for your determination." The court then specifically instructed the jury as follows: "You are instructed that though circumstances may appear in the evidence from which the duty may be cast upon a driver of a motor vehicle, as a man of ordinary prudence, in the exercise of ordinary care, to stop before attempting to cross a railroad track, yet there is no such rule of law applicable to all circumstances; and it is for you to say from the facts of this particular case whether defendant Joseph Leo Freitas should have stopped, either before he commenced to cross the railroad tracks, or before he crossed the particular track upon which the accident occurred."

The court not only fully and completely instructed the jury that there was not an absolute duty to stop under the circumstances of this case, but the jury was so informed at the outset of the trial. In his opening statement counsel for the railroad company stated that the driver of the truck in question "did not stop, look and listen, as required to do by law, before he crossed that railroad track." Counsel for these appellants objected to that remark as not being a correct statement of the law and asked the court to instruct the jury that the duty to stop was not an absolute one. In response to this request the court told the jury "You will disregard that part of the statement which states that the driver of the truck must stop, look and listen, as a matter of law; and you will disregard that in the consideration of the case."

The court also instructed the jury that it was not to single out any one sentence or any one instruction, but that it should consider the instructions altogether and as a whole. While the criticized portion of the instruction should not have been given, it cannot be held that reversible error resulted therefrom in the situation here appearing.

For the reasons given the judgment, as affecting all appellants, is affirmed.

MARKS and GRIFFIN, JJ., concur.

IRVINE CO. v. McCOLGAN.*

Civ. 3098.

District Court of Appeal, Fourth District, California.

Jan. 25, 1944.

Rehearing Denied Feb. 15, 1944.

Hearing Granted March 23, 1944.

1. Statutes ⇐181(1), 212

The legislative intention must be determined from Franchise Tax Act, and a presumption does not necessarily exist that Legislature intended tax base to be as broad as was constitutionally permissible. Gen.Laws 1937, Act 8488, § 10.

2. Taxation ⇐376(4), 397

Under Franchise Tax Act imposing tax measured by corporation's net income attributable to business done within state, a corporation is entitled to allocation if some portion of its net income is not attributable to business done within the state. Gen.Laws 1937, Act 8488, § 10.

3. Taxation ⇐376(4), 397

Under Franchise Tax Act imposing tax measured by corporation's net income attributable to business done within state, provisions making allocation of income depend upon sales, expenses, etc., indicate intention to exclude portion of income derived from business transacted partly within and partly without the state. Gen.Laws 1937, Act 8488, § 10.

4. Taxation ⇐376(4), 397

Business originating in the state does not necessarily constitute business "done within the state" within Corporation Franchise Tax Act providing that tax shall be measured by that portion of income derived from business done within the state. Gen.Laws 1937, Act 8488, § 10.

5. Taxation ⇐397

A foreign corporation engaged in raising horticultural and agricultural products, and in selling most of them through associations in interstate commerce was "doing business" within and without the state so as to be entitled to have part of its income allocated under the Corporation Franchise Tax Act. Gen.Laws 1937, Act 8488, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

6. Taxation ⇐397

A foreign corporation which sold its horticultural and agricultural products through associations in interstate commerce was not precluded from having part of its income allocated under Corporation Franchise Tax Act on theory that associations were independent contractors, where part of products were sold by brokers, and associations sold the products as corporation's agents. Gen.Laws 1937, Act 8488, § 10.

7. Taxation ⇐397

Where foreign corporation was entitled to have part of its income under Corporation Franchise Tax Act allocated as being attributable to business done without the state, trial court, under record, properly adopted formula allocating 50.08 per cent. of income to business done within state and the balance to business done outside the state. Gen.Laws 1937, Act 8488, § 10.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by the Irvine Company against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover a portion of the franchise tax paid on plaintiff's statutory net income for the fiscal year ending April 30, 1935. From a judgment for plaintiff, defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and H. H. Linney, Asst. Atty. Gen., for appellant.

Scarborough & Petty, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in two consolidated actions brought by the plaintiff to recover a portion of the franchise tax paid on its statutory net income for its fiscal year ending April 30, 1935, pursuant to the provisions of the Bank and Corporation Franchise Tax Act, Deering's Gen. Laws, Act 8488.

There is no dispute as to the facts. The plaintiff is a foreign corporation organized under the laws of West Virginia. Its only office and place of business is in Orange County, California. It owns a large tract of land there and is engaged in the business of raising horticultural and agricultural products and in harvesting, preparing for market, and selling the same. Most of its

* Subsequent opinion 157 P.2d 847.

products were sold outside the state of California. The larger part of these were sold through non-profit cooperative marketing associations of this state under marketing agreements whereby said associations cleaned, graded and packed the fruit and shipped it to markets outside of this state where it was sold through the facilities of the California Fruit Growers Exchange, or similar exchanges. The agents or representatives of these exchanges collected the proceeds of the sales and, after deducting freight, storage, insurance, taxes and other expenses, transmitted the balance to the respective exchanges which paid the plaintiff its pro rata share of the proceeds less its pro rata share of the expenses. In some instances at points where the exchange did not have representatives these sales were made through brokerage concerns on a commission basis. Avocados were handled in a slightly different manner in that when they arrived at their destination they were stored in warehouses and later withdrawn and sold at private sales. Beans were also handled in a different manner, being shipped directly by the plaintiff to points in other states where they were sold through brokers. During the year in question the plaintiff had a gross income of $2,246,803.94, of which $2,071,113.53 or 92.18% came from the sale of products and the balance of $175,690.41 or 7.82% came from other sources. Of the gross income from products sold, $1,697,272.08 or 81.95% came from sales outside the state and the balance of $373,841.44 or 18.05% came from sales within the state. Of plaintiff's selling expense amounting to $776,807.42, 96.69% or $751,058.63 was incurred out of this state and the balance of $25,748.79 or 3.31% was incurred in California. Of plaintiff's total costs in the production of its income, 49.82% was expended in connection with out of state transactions and 50.18% was expended in production and sales activities within this state.

The plaintiff had a net income for that year of $715,463.62, of which $104,000.26 was admittedly intrastate net income. The remaining $611,463.36, which was derived from products produced in this state and sold in other states, was claimed to be subject to allocation under the provisions of section 10 of the Franchise Tax Act. The court found in all respects in favor of the plaintiff and held that this amount, $611,463.36, was subject to allocation. It adopted and applied an allocation formula under which it allocated 56.08% thereof to this state and the balance to business done outside of this state. By adding this amount to the portion of the income which was admittedly taxable and not subject to allocation, 62.48% of the plaintiff's total net income was held to be taxable under the Franchise Tax Act. The total tax thus due was found to be $17,836.35. The plaintiff had paid, under protest, $25,761.28. The court accordingly entered judgment for the plaintiff for $7,884.93, from which the defendant has appealed.

The first question presented is whether the respondent, during the year in question, was engaged in the transaction of business both within and without this state within the meaning and intent of section 10 of the Franchise Tax Act, so as to be entitled to have some part of its income allocated as having been produced by and being reasonably attributable to business done without this state. Section 10 reads, in part, as follows: "If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

[1] The appellant argues, in general, that it is thoroughly established in cases which are cited that there is no constitutional provision which would prevent the state from including in this tax base all of the net income, as distinguished from gross income, from sales made in interstate commerce and that it must be presumed that in adopting section 10 of this act the legislature intended to follow "the basic principle followed by all legislatures that the tax base should be as broad as the constitution of the United States and the constitution of the State permit." Without further comment, and although there may

be a tendency in that direction in some quarters, we hold that such a presumption does not necessarily exist and that the intention of the legislature must be determined from an examination of the language it used.

While the appellant admits that under section 10 of the act the entire net income is not the measure of the tax unless that income is entirely attributable to business done in this state, it contends that the court erred in concluding that because some of respondent's income was a result of interstate sales it was transacting some of its business elsewhere than in this state. It is argued that the respondent has no property or employees out of this state; that it pays no salaries or wages outside of this state; that all of its corporate activities are carried on within this state; that it employs no labor and uses none of its capital outside of this state; that through its agreements with the nonprofit cooperative marketing associations it either sold its products to these associations or made the associations independent contractors for the purpose of selling its goods; and that it follows that the entire net income of the respondent was derived from business done within this state.

We think this theory is contrary to the clear meaning of the act in question. By section 10 it is provided that the tax shall be measured by the entire net income only where the entire business of the corporation is done within this state. It is then provided that where the entire business is not done within this state the tax shall be measured by the portion of the income which is derived from business which is done within this state. The statute then goes on to provide for a segregation of these two elements and for a corresponding allocation of the income for the purposes of this tax. It is then provided that this allocation shall be determined upon the basis of sales, purchases, expenses, pay roll, value and situs of tangible property or by these or other factors, or by such other method as will fairly assign to this state the portion of net income which is reasonably attributable to the business done within this state. What is meant by "business done" is further clearly set forth in section 5 of the act, which defines doing business as used in the act as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."

[2, 3] As thus defined, it seems clear that a large part of respondent's business was "not done within this State" within the meaning of this section of the act. Under the statute a corporation is entitled to an allocation if some portion of its net income arises from business done outside this state and the same is not reasonably attributable to business done within this state. Matson Navigation Co. v. State Board, 3 Cal.2d 1, 43 P.2d 805; Id., 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791. The statute not only makes a distinction between the income from business done in this state and that done without the state, but the specific provisions for making an allocation based upon a consideration of sales, expenses, pay roll, property used and other factors where necessary, in order to determine what part of the income is fairly attributable to business done in this state, rather clearly indicate an intention to exclude, in arriving at the taxable amount, not only the income from business done entirely outside the state but also a portion of the income which is derived from business transactions which occur partly within and partly without the state when it cannot be fairly said that the entire business is transacted within this state. Under any other view, these specific provisions for allocation would be largely meaningless and useless in so far as transactions in interstate commerce is concerned, which is the precise field in which such questions are most likely to arise and the one which most calls for a consideration of and an apportionment of sales, expenses, pay roll, property and the like, in accordance with where the respective transactions have occurred.

[4] Nor do we think, as appellant seems to argue, that it follows from the decision in Matson Navigation Co., Inc., v. State Board, supra [3 Cal.2d 1, 43 P.2d 810], that it must be held that in all cases business "originating in this state" is business "done within this state" within the meaning of section 10. While that factor was there used it neither appears from the decision in that case that the formula for allocation there employed was unfair or improper under the circumstances there appearing, nor that any attack was made upon the method of arriving at the allocation which was there approved. The court there considered and passed upon the contentions that the act in question should not be interpreted as

imposing any tax measured in part by the income from interstate business, even though the state has power to impose such a tax, and that if it was so interpreted the act and the resulting tax were in violation of the commerce and other clauses of the federal constitution. The court held that the act contemplated the inclusion in the tax basis of such income from interstate or foreign business as is reasonably attributable to business done within this state. In holding against the contention of unconstitutionality there made the court pointed out, with appropriate citation of authority, that the state may require a foreign corporation engaged in both intrastate business and interstate business originating here to pay a tax measured by its net income attributable to business done in this state regardless of from which source it was derived, and that while this state has the power to tax the entire net income of a domestic corporation, including its income from interstate commerce, whether originating in this state or not, it has not done so, preferring to treat foreign and domestic corporations alike. While that case is authority for the proposition that the act in question permits, in the case of a foreign corporation doing business here, a proper allocation with respect to income derived from interstate commerce, in fixing the tax basis, it goes no further, so far as material here, and it does not hold that in all cases the income from business originating in this state is attributable to business done in this state. To so hold would be to render the allocation provisions of the statute largely meaningless, and would subject all such interstate commerce to the tax, for all interstate commerce originates in one state and is completed in another.

[5] Not all of the income of the respondent derived from the sale of its products in other states can be fairly said to be attributable to business done by it in this state. While the respondent engaged in certain transactions in this state in raising its products and in preparing them for market it also engaged in very considerable transactions in other states in marketing those products. Not only is the marketing of large quantities of food products a separate transaction, as distinguished from the raising of those products, but the selling of them in other states certainly constituted transactions in those states, and those transactions were engaged in for the purpose of financial gain or profit, which is "doing business" under the plain provision of the statute. In carrying on these transactions in other states the respondent was doing business both as defined by the statute and as that term is commonly accepted and used throughout the business world. The carrying on of those transactions required the assistance of others in many fields, all of which was obtained at the expense of the respondent and paid for by it. It cannot be said that none of respondent's capital was used in these transactions. Both the crops themselves and the income therefrom were a part of respondent's capital and they were not only used in these transactions but enabled them to take place. Not only was a part of respondent's income derived from these transactions, which were business actually done in other states, but a considerable part of its net income or profit is directly attributable to the fact that a part of its transactions, the marketing of these products, was thus carried on in the other states. If the products of such farming operations were all sold in this state there would be little, if any, profit. The reason such transactions in other states are engaged in is because greater profits can thus be realized. In fairness and common honesty it must be recognized that a part, and a considerable part, of the net income of respondent was derived from its transactions in other states and we think that the legislature had such things in mind, among others, in providing for an allocation in arriving at the basis for this tax. The reasoning set forth in United States Glue Co. v. Oak Creek, 161 Wis. 211, 153 N.W. 241, Ann.Cas.1918A, 421, especially relied upon by the appellant, is not applicable or controlling here in view of the language and clearly expressed intention of our statute.

[6] There is no merit in appellant's argument to the effect that the respondent either sold its products to the cooperative marketing associations or made those associations independent contractors for the purpose of selling its goods and that, therefore, the respondent had no part in conducting the transactions in other states. A part of respondent's products were not shipped through these marketing associations but were shipped to eastern points by the respondent and there sold for its account by brokers employed by it and who were its agents, the goods being handled for the respondent and it paying the expenses. In the case of the products shipped through the cooperative marketing associations this

was all done under contracts which obligated the association to market and sell the produce as agents of and for the account of the respondent, and to pay the respondent its pro rata share of the proceeds, less his pro rata share of the costs and expenses. It cannot be questioned that these agreements were contracts of agency. Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 208 P. 93; California Bean Growers' Association v. Rindge Land & Navigation Co., 199 Cal. 168, 248 P. 658, 47 A.L.R. 904; Poultry Producers of Central California, Inc., v. Murphy, 64 Cal.App. 450, 221 P. 962. While the respondent acted through agents it carried on these marketing transactions in the other states and thus did business in those states as that term is defined in the statute in question.

[7] The only other point raised is that, in the event that some allocation was proper here, the formula adopted by the trial court was unfair to the state and deprived it of revenue to which it was justly entitled. The only arguments made are that the formula adopted by the court gave too much importance to the items of sales made in interstate commerce and that the court should have adopted a formula proposed by the appellant.

The formula adopted by the court was as follows:

"Total within and without State		Total within State	Percent within and allocable to State
(1) Property		All	100%
(2) Expenses—			
$1,507,672.62	(a)	$756,613.99	50.18
(3) Sales—			
$2,071,113.53	(b)	$373,841.44	18.05
		Total	168.23
		"Average percentum (1/3)	56.08"

The appellant's proposed formula applied to the admitted figures would result in an overassessment and overpayment amounting to $2747.14, while the court's formula resulted in an overpayment of $7884.93, for which judgment was given.

In both formulas the first item, "Property", is the same, all of respondent's property being in California and 100% being credited to this state. As the second item the court's formula used "Expenses", setting forth the total expenses incurred and the amount incurred in this state, including respondent's pay roll in producing its crops, as a result of which 50.18% of the expenses were credited to this state. The appellant, however, in its proposed formula, used "Wages" instead of expenses as item 2, and credited 100% to this state. If a proper allocation is to be made it would seem obvious that both pay roll and other expenses should be considered. The statute expressly provides for this and, with respect to this item, the court's formula appears to us to be reasonable and to be more in accord with the intent of the statute than that suggested by the appellant. With respect to the third item, "Sales", the court took the total sales made and credited to this state the amount of the sales actually made here, thus crediting 18.05% of the sales to this state. The appellant's proposed formula took the same figures but added to the part credited to this state the amounts realized from the sale of beans

The formula proposed by the appellant was as follows:

	"Total	Calif.	% in Calif.
Item 1 Property			100
Item 2 Wages			100
Item 3 Sales (per proposed findings)	2,071,113.53	373,841.44	
Bean sales thru brokers		211,507.79	
	2,071,113.53	585,349.23	28.2625
Total			228.2625
Average (÷ 3)			76.0875"

through eastern brokers, thus raising the percentage of sales credited to the state to 28.26%. The beans were sold outside of this state through the respondent's agents and no good reason appears why they should be in any way distinguished from the other sales made in interstate commerce. In each of the formulas the percentages credited to the state in the three items used were added together and divided by three to give the average percentum to be used in fixing the amount of net income allocable to business done in this state. Under the court's formula this resulted in 56.08% being allocated to this state while the appellant's proposed formula would allocate 76.08% to this state.

There is nothing in the record to indicate that the formula used and adopted by the trial court was unfair or unreasonable and no good reason for altering it has been pointed out. It appears to follow the provisions of the statute very closely and we can see no just criticism either of the method employed or of the result.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



In re TEEL'S ESTATE.*

Civ. 6844.

District Court of Appeal, Third District, California.

Jan. 31, 1944.

Hearing Granted March 30, 1944.

1. Wills ⇐166(12)

It is not sufficient for a contestant merely to prove circumstances consistent with exercise of undue influence, but before will can be overthrown the circumstances proved must be inconsistent with voluntary action on part of testator.

2. Wills ⇐163(1)

Where the due execution of a will was proved by testimony of subscribing witnesses thereto, burden of proof was upon contestant to establish undue influence.

* Subsequent opinion 154 P.2d 384.

3. Wills ⇐82

A will cannot be set aside on mere ground that it is unjust or unnatural.

4. Wills ⇐52(2), 163(6)

An unnatural, unfair or unjust will creates of itself no presumption of incompetency or undue influence.

5. Wills ⇐82

A will is not necessarily unnatural because it favors a spouse over an adult daughter, especially where daughter is self-supporting and is married with a husband living and is not dependent upon testatrix.

6. Wills ⇐166(7)

Opportunity coupled with a motive alone will not sustain a finding of undue influence in absence of evidence showing pressure operating directly upon testamentary act.

7. Wills ⇐163(8)

It cannot be presumed that a husband of testatrix has exerted undue influence over her merely because husband had opportunity and inducement to do so.

8. Wills ⇐165(2)

Statements by testatrix subsequent to execution of will and just prior to her death were not a part of the res gestae of the execution of the will and were incompetent as evidence of undue influence.

9. Wills ⇐166(1)

Mere proof that spouses entered into prenuptial contract to make reciprocal wills, each naming the other as sole beneficiary, without showing that contract was not the voluntary act of testatrix, and that testatrix executed her will pursuant to such contract did not show undue influence when will was executed.

10. Wills ⇐166(7)

Evidence showed opportunity of husband to unduly influence testatrix in the making of will, and perhaps motive, but was insufficient to show undue influence.

11. Wills ⇐53(2)

Evidence of mental condition before or after execution of will is important only so far as it tends to show mental condition when will was executed.

12. Wills ⇐37

The wills of admittedly insane persons are upheld where executed during lucid intervals.

13. Wills ⇐55(1)

Evidence showed that testatrix was of sound mind when she executed will.

14. Insane persons ⇐2
Wills ⇐55(8)

Suicide may be proved as tending to establish insanity, but there must be much more than mere suicide to show that insanity was so complete as to destroy testamentary capacity or that it was of such a nature as to exercise direct influence and bearing upon the testamentary act.

15. Evidence ⇐568(2)

The opinion of a lay witness on mental capacity of a testatrix has no greater probative value than the facts given by him as the basis of his conclusions.

16. Evidence ⇐568(2)

Facts testified to by lay witnesses showing mere peculiarities of testatrix were insufficient to support opinions of such witnesses that testatrix was insane.

17. Wills ⇐55(1)

Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies or mental departures from the normal unless they bear directly upon and have influenced the testamentary act.

18. Evidence ⇐570

Testimony in answer to a hypothetical question skillfully framed to call for an answer favorable to party asking it is the weakest testimony.

19. Wills ⇐52(1)

Testamentary capacity is presumed, and burden is upon contestant to show affirmatively and by preponderance of the evidence that testator was of unsound mind when will was executed.

20. Wills ⇐50

A testator is of "sound and disposing mind and memory" if when making his will he has sufficient mental capacity to understand the nature of the act and understand and recall the nature and situation of his property, and remember and understand his relation to persons who have claims on his bounty and whose interests are affected by the provisions of the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Sound and Disposing Mind and Memory".

21. Wills ⇐31, 38(2)

"Incompetency" or "unsoundness of mind" sufficient to avoid a testamentary act must be either insanity of such a broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which testator is victim of some hallucination or delusion, and as to the latter, the evidence must establish that the will was the creature or product of such hallucination or delusion and that it influenced the creation and terms of the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Incompetency" and "Unsoundness of Mind".

THOMPSON, J., dissenting.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

On rehearing.

Prior opinion adhered to.

Prior opinion, 139 P.2d 93.

Irwin T. Quinn, of Eureka, for appellant.

Hill & Hill, of Eureka, for respondent.

ADAMS, Presiding Justice.

This is an appeal from judgment refusing admission to probate of the proposed will of Irene L. Teel. After a decision by this court on June 30, 1943 (139 P.2d 93), a rehearing was granted, the case was reargued by counsel for both proponent and contestant, and thereafter was resubmitted for decision.

The testatrix, who was a widow about sixty years of age, and proponent, a widower aged sixty-nine, intermarried on June 29, 1940. On November 14, 1940, at the office of H. L. Ricks, decedent's attorney, they executed formal wills under the reciprocal provisions of which each was the sole beneficiary of the other. At the same time they executed deeds whereby they created a joint tenancy between themselves in certain of their properties. On December 2, 1940, Irene Teel committed suicide.

Proponent's petition for admission to probate of his wife's will was opposed by contestant, Rilma K. Gaskill, the only child of decedent by a former marriage, on the grounds of decedent's lack of testamentary capacity and undue influence exerted by proponent. At the trial proponent made a prima facie case by calling the witnesses

to the will, Attorney Ricks and his secretary, Mrs. Burgess. Evidence was then adduced by contestant at the conclusion of which proponent made a motion for a nonsuit, which was denied. Proponent then offered further evidence and at the conclusion of the trial moved the court for a directed verdict. This motion was also denied and the case was submitted to a jury upon special interrogatories. The jury found in favor of contestant on both grounds. Proponent then made a motion for judgment notwithstanding the verdict, but this motion also was denied and judgment was entered in accordance with the verdict. This appeal is presented on the sole ground of the insufficiency of the evidence.

Proponent's motions should have been granted. There is insufficient competent evidence in the record to show either undue influence or incompetency to make a will.

As to what constitutes undue influence sufficient to support a finding, the court said in Re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25, 27:

"In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [In re] Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re Estate of McDevitt, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not [brought] to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. [In re] Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [In re] Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.

"'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made."' [In re] Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876." Also see In re Estate of Hopkins, 136 Cal.App. 590, 602, 603, 29 P.2d 249; In re Calkins, 112 Cal. 296, 44 P. 577; In re Estate of Carithers, 156 Cal. 422, 105 P. 127; In re Estate of Clark, 170 Cal. 418, 149 P. 828; In re Estate of Anderson, 185 Cal. 700, 198 P. 407.

[1] It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances proved must be *inconsistent* with voluntary action on the part of the testator. In re Estate of Donovan, 114 Cal. App. 228, 233, 299 P. 816.

There was no evidence produced by contestant of any such influence upon the testator. Attorney Ricks, who prepared the wills, testified that Mrs. Teel's will was prepared at her request and in accordance with her wishes; that she first came to his office on November 7th with Mr. Teel and stated that she wanted to make her will in favor of her husband, leaving nothing to her daughter; that at that time he tried to discourage her from omitting the daughter and told her to think it over; that he, however, took information from both parties and prepared wills in accordance therewith, and that subsequently the two returned and the wills were executed by them; that he did not talk to Mrs. Teel alone and that both parties were present when both wills were signed. He testified, however, that there was no apparent domination by Mr. Teel, and that he saw no evidence of influence; that he kept Mrs. Teel's will after its execution and that she could have had it at any time, but never called for it. Mrs. Burgess testified also that Mrs. Teel was not acting under duress, menace, fraud or undue influence.

[2] The due execution of the will having been proved by the testimony of the subscribing witnesses thereto, the burden of proof was upon the contestant to establish undue influence. 26 Cal.Jur. 759; In re Estate of Black, 132 Cal. 392, 64 P. 695. There was no evidence produced by contestant bearing upon the testamentary act, or anything indicating coercion or lack of free agency on the part of decedent when she executed the will. Furthermore, one of contestant's own witnesses, Mrs. Hutchins, testified that decedent was a strong-willed woman.

The argument in respondent's brief in support of the finding of undue influence is that Teel and decedent entered into a prenuptial agreement to make reciprocal wills, each naming the other as sole beneciary, and that this shows that appellant married decedent for her money; that appellant "took decedent" to two other attorneys before their visit to Mr. Ricks; that he telephoned Mr. Ricks' office several times after the first visit to see if the papers were prepared; that he had in his possession necessary documents and made arrangements to furnish descriptions; that he discussed with Mr. Ricks and decedent the terms of the will and deeds; that he was present when the will was executed; that he took possession of the deeds after their execution; that there was a confidential relationship between Teel and decedent, and that Teel unduly profited under the will.

Even assuming the truth of the foregoing, it does no more than suggest motive and opportunity on the part of proponent, and completely fails to show pressure bearing directly upon the testamentary act or that testator's free agency was destroyed and proponent's will substituted for her own, and it is not inconsistent with voluntary action on the part of the testatrix. Also, the evidence does not show that proponent "took" his wife to the other attorneys, but merely that the parties went together. Mr. Mitchell, one of these attorneys, who had on at least two prior occasions transacted business for decedent, testified that in 1940 Mrs. Teel consulted him at least twice in reference to the disposition of her property; that Mr. Teel was probably present at one interview but that he did not participate in the conversation, and that on the other visit he talked to Mrs. Teel alone; that decedent told him that she had received a letter from her child demanding a share of the estate of the child's father, and that she asked if she was free to make such disposition of her property by will as she wished; and that he advised her that she was. Mr. Mitchell was apparently not asked to draw a will but merely to give advice as to what decedent could do. As to the visit to the office of Attorney Mace, there was no testimony that Teel took his wife to that office. Mr. Mace testified that she came there on November 1st with her husband and asked about making a will; that when he learned the nature of her business he took her into his private office, and that Teel did not participate in the conversation; that Mrs. Teel said she wanted to leave all to her husband, and that she was very emphatic that her daughter was to get nothing; that she said that she would think the matter over but did not return. These visits were prior to the visits to Attorney Ricks.

Respondent's argument that proponent unduly profited by decedent's will seems to be based upon a contention that decedent had more property than her husband and that, therefore, proponent, on her death, received more than decedent would have received had her husband predeceased her; but this does not make a case of unduly profiting under a will. Even had decedent left no will, proponent as her surviving husband would have taken one-half of her estate under the laws of succession (Probate Code, §§ 221, 222); and as they had also executed joint tenancy deeds of their real property which constituted a considerable portion of decedent's estate, the degree to which proponent benefited by the will is not large, even accepting contestant's valuation of her estate at the time the will was executed as approximately $24,000.

[3-7] A will cannot be set aside on the mere ground that it is unjust or unnatural. In re Estate of Martin, 170 Cal. 657, 663, 151 P. 138. An unnatural, unfair or unjust will creates of itself no presumption of incompetency or undue influence (In re Estate of Smith, 200 Cal. 152, 160, 252 P. 325; In re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148); nor is a will necessarily unnatural that favors a spouse over an adult daughter, especially where such child is self-supporting and is married with a husband living, and is not dependent upon her mother. In re Estate of Stone, 172 Cal. 215, 222, 155 P. 992. Opportunity even coupled with a motive alone will not sustain a finding of undue influence in the absence of evidence showing pressure operating directly upon the testamentary act (In re Estate of Kilborn, 162 Cal. 4, 11, 120 P. 762); and it cannot be presumed because a husband has opportunity and inducement to exert undue influence over his wife, that he has done so. In re Estate of Donovan, supra.

[8] As evidence of undue influence, contestant relies heavily upon the statements in notes which decedent wrote just prior to her death and some time subsequent to the execution of her will. But such statements of the testatrix were in-

competent as evidence of undue influence under the rule laid down in Re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, and were not a part of the res gestae of the execution of the will.

[9] Respondent also places much emphasis upon the alleged prenuptial contract entered into by decedent and proponent as showing undue influence. But there is no evidence that if such an agreement was made that it was not the voluntary act of decedent; and if she executed her will pursuant to such an agreement her action in so doing is not evidence of undue influence at the time the will was executed.

[10] Without unduly prolonging a discussion of this phase of the case we are of the opinion that the very most that can be said of contestant's evidence of undue influence is that it showed opportunity and perhaps motive. Taking it in its aspect most favorable to contestant, and disregarding conflicting evidence, it does not show even general influence over the testator by proponent; and there was no evidence that his influence was brought to bear upon her testamentary act amounting to coercion destroying free agency on her part.

[11, 12] Coming now to the evidence adduced on behalf of contestant relating to the mental capacity of the testatrix at the time the will was executed, "evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will." In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45, 46; In re Estate of Sexton, 199 Cal. 759, 765, 251 P. 778. The validity of wills of admittedly insane persons has been upheld where said wills were executed during lucid intervals. In re Estate of Fisher, 202 Cal. 205, 212, 259 P. 755; In re Estate of De Graaf, 34 Cal.App.2d 120, 93 P.2d 199; In re Estate of Young, 38 Cal.App.2d 588, 101 P.2d 770; In re Estate of Worrall, 53 Cal.App.2d 243, 246, 127 P.2d 593; 26 Cal.Jur. 634.

Taking the testimony adduced by contestant in its aspect most favorable to her, it is as follows:

Mrs. Hattie Hutchins (formerly Mrs. Colby), who from 1938 to 1939 lived on a portion of the property belonging to and next door to decedent, testified that decedent secured the execution of deeds that vested the title to the property occupied by the Colbys in Mr. and Mrs. Colby and herself as joint tenants, and that she put $2500 in a joint bank account in her name and that of Mrs. Colby, so that the Colbys might build a house upon the property; that after Mr. Colby died the relations between her and decedent were not very friendly; that the witness found four flat tires on her car, broken red lights, damaged padlocks with solder poured in them, and that decedent girdled walnut trees on the lot so they would die; that in July, 1939, witness quitclaimed the property back to decedent and received $500. That during the time she lived next to decedent at times she firmly believed that she was mentally unbalanced; that she based this opinion on her actions, her looks and the things she did; that at times she had a peculiar look; that at one time decedent told her she had planted a hedge so a neighbor could not see her, and later trimmed it off so she could see; that she would tell one neighbor he could have feed for his cows, and in a day or two let another neighbor have it; that decedent tried to run one's life and wanted you to do absolutely what she wanted; that probably eight times she mentioned suicide, giving no reason except that once she said she felt "ornery"; that in 1938 or 1939 decedent said she thought she would see a doctor and have the wheels taken out of her head; that she mentioned leaving her daughter a ranch around Fruitland; that she didn't seem to want to leave her daughter and granddaughter any property; that she did not show peculiarities at all times; that she was "a very peculiar woman"; that they were not good friends at the time the witness left.

George Baham, brother of Mrs. Colby, testified to receiving a postal card from decedent in December, 1939, requesting him to have a deed from Mrs. Colby recorded when it had already been recorded; also a letter dated January 2d in which decedent said she wanted Mrs. Colby to give her a quitclaim deed, though such a deed had already been given; that the letter meant "Just confusion; I don't know nothing else"; also a letter by testatrix dated February 19th regarding the same matter. (From this correspondence it appeared that decedent was worried because she had executed a deed of the same property to one Stevenson without getting a deed from Mrs. Colby, though the Colby deed had been executed.) This witness saw Mrs. Teel the day before she died, and testified

also to events after her death concerning Teel's actions and two notes left by decedent. He had known decedent three and one-half years. When asked regarding her mental condition he answered: "I would say she was most peculiar"; "she would do something and then wish she hadn't done it and things of that kind, confusion."

Mrs. Gertrude Lewis, clerk in a dry goods store, testified that Mrs. Teel, three or four days before her suicide, bought a nightgown saying she wanted a "real nice one" because "I won't use it but the once."

Mrs. Lola Lutman testified that after Mrs. Teel's death she found a letter from decedent in the mail box which they used jointly, which note read: "John is swell, don't think badly of him, he is a dear. Say nothing of this to John and use it just for yourself and Bud"; that the envelope contained $20, also a birthday card (witness was to have a birthday December 21st); that there was another envelope in the mail box addressed to Mrs. Carpenter containing about $65, which she saw Mr. Teel give to Carpenter that evening; that she found a note from decedent for Mr. Teel in a drawer in the kitchen where they kept writing material; that she did not read it but heard Teel read it; that in the letter testator spoke about money matters, said she was sorry they could not agree on money matters, but that nothing she could say would change his mind about money matters as he would say and always think he had to work; that there was something about how much she loved him and was sorry they couldn't be happy together. She also testified that Mrs. Teel had told her she wanted Teel to quit work, and that they could travel; that she had known Mrs. Teel for thirty years, lived near her for eighteen years, and the last eight years was with her a great deal.

Estelle Gaskill, contestant's daughter, fifteen years of age, said that Mrs. Teel, one day of a rodeo at Fortuna, offered her money to go to the rodeo, saying that she could not go as John was not able to go. Witness identified a card later received from Mrs. Teel saying they had her ticket and a new handkerchief for her but that she did not come to see them again before the rodeo. She also testified that she received a card from decedent on her birthday, November 27, 1940.

Mrs. Gaskill, Estelle's grandmother, testified that the day of the rodeo she had gone with Estelle to the Teel home and decedent had offered her [not Estelle] the money for Estelle's rodeo ticket.

Roy Brown, former business partner of Mr. Friend for six or seven years many years earlier, testified that in 1921 or 1922 he pulled Mrs. Friend out of the river; that he did not see her jump in; that he had previously heard her make remarks about committing suicide, but not since; that he saw her off and on after that. When asked as to her mental state, he said: "Why I consider she was badly unbalanced the first time I seen her and last act she did on earth"; that she once wanted him to go up and take a piece of their property, saying she would "fix up so I got it"; that she looked like she had "faded away in the last few years." On cross-examination he stated that he lived on the Gaskill place; that he once tried to sell decedent some fruit in 1940, after her marriage. Asked if in his opinion Mrs. Teel was insane he said: "Well she was not exactly insane, no, but she was daggone badly off balance * * * weak-minded * * * would only carry one friend at a time"; that she did Andy's (Friend's) business; that he considered her unbalanced because she once bought a cow for $150 (in 1920, 1921 or 1922) that "had wonderful papers tied to her, but she was old, real old and she was not worth 25¢"; that he sold the cow and when he and Friend quit Mrs. Friend "soaked" him $75; that she bought a heifer for $80 that was only good for the butcher as its teats were grown together; that he had had no transactions with her since that time and based his opinions on transactions during 1920–1922 and her suicide. He said: "I considered her very queer * * * as long as I could keep her friendship she was all right, but she would turn her back on you * * * as long as she was your friend she would give you anything she had"; that when friendship ceased "she would get your goat if she could." (A motion to strike this testimony as too remote was denied.)

George Friend, a brother of Andrew Friend, 85 years old, said he saw decedent quite often before his brother's death but that he did not see her very often after Andrew died; that his brother was blind for twenty years. As to what in his opinion decedent's mental condition was, he said: "Well it was rather bad"; "I would call her very peculiar." His reason was that "at times she would be

very friendly and treat me nicely and other times she would be very cool for no cause as I could see. Sometimes she would jump in and get me a nice cup of coffee as soon as I went and other times she wouldn't give me anything to eat all day. I would call that peculiarities, wouldn't you?" He said that after his brother died he saw decedent about once a year—half a dozen times; that when he saw her about three years ago she was very pleasant; that he saw her just before she married Teel and she was pleasant then.

Rilma Gaskill, contestant, testified that as a girl she always had old-fashioned clothes, a little hat, etc., and boy's shoes; that the kids made fun of her; that she married in 1923 at the age of twenty-three, then taught school for two years, living at the Gaskill Ranch; that she left Humboldt County in 1925 and went to Oakland; that she had worked the last few years and that her husband was employed all the time; that her parents gave her some land on the Klamath River (238 acres); also lots in the Santa Clara tract at Eureka, which she finally sold for $400 or $500; that she sent money to her parents to make up a sum loaned to her Uncle George, at which time she and her husband put up $915; that they got back $1,200; that since living in Oakland she had gone to Humboldt County every vacation and paid visits to her parents when they were there; that her mother corresponded with her and her daughter and sent them Christmas and birthday cards, gifts, etc. Asked as to her mother's mental competency about the time the will was executed, she said: "I know that her mental condition was bad." The reasons given by her for believing her mother's mind was not right were: "She married Mr. Teel and she committed suicide after she had been married to him for five months. Some time before she was married to him she had written to me and asked me if it was all right if she gave the property there at Hydesville, the entire property to my daughter and asked if it would be all right if she would give it to her instead of to me. * * * She committed suicide and took the dog with her. * * * I was on the property when she attempted, or made her suicide attempt that Mr. Brown spoke about the other day. I was there when he brought her back to the house from the river and heard her say at other times that she guessed she would commit suicide. She was always complaining about pains in her head; she couldn't think straight. She feared that she had some incurable disease. She told me the last time I saw her before she passed away that she was sure she had some kind of a growth and she suffered all the time. She had low blood pressure, she doctored for that; * * * she wrote me that she couldn't think straight; * * * that was in 1934." (Here witness exhibited letters and postal cards from mother to daughter and granddaughter, sending love, etc. Some of these were sent on birthdays or other holiday occasions—one was sent to the granddaughter on her graduation from junior high school in 1940.) She stated she had discussed with her mother her marriage to Teel but had not objected; that at that time she mentioned property that had been her father's individual property—the Fruitland property; that she just asked her mother about Dad's property and if she intended to do anything about Dad's individual part of the property before she married; that her mother replied that there wasn't anything. She did not definitely recall that she ever assisted in the care of her father's and mother's business after she left home. She said that her mother had been peculiar back to some of her earliest recollections; that when she was a small child her mother would insist upon her giving food that was in a spoiled condition to her uncle; that she would buy clothing, hang it up in the closet and perhaps never wear it and perhaps later tear it up for rags; that about 1927 or 1928 she took a fancy to being an equestrian, and bought a saddle horse but didn't keep it very long and disposed of it; that she was always melancholy and mournful and couldn't understand why she couldn't be like other people; that she was not always melancholy; that she would be cheerful in the morning and in the afternoon would be moody and complain of pains; that she doctored all the time and was not able to do her work all the time. Other reasons for believing that her mother's mind was not right were that the last thing she did was to commit suicide with the dog; that she made a will disposing of her property to some one that was apparently more or less of a stranger to the family, while at the same time her letters and cards indicated loving and wanting to do things for her own family.

Rex Musser, a mortician at Fortuna, testified for contestant that when Andrew Friend died Mrs. Friend made arrangements for the funeral; that she was to

bring Mr. Friend's clothing down, but instead she brought a dress.

Decedent's physician, Dr. Kramer, called by contestant, testified that he had known decedent about seven years; that she had consulted him after her marriage; that she had low blood pressure and a cancer phobia (fear of cancer), but that he found no organic disease; that he last saw her in August, 1940; that he saw no evidence of insanity and, with the possible exception of that phobia, her mind seemed to be perfectly clear at all times; that in his talks with her he found nothing to indicate insanity. He did testify that the commission of suicide is not a normal act; also he was asked a hypothetical question as follows: "What would your opinion of a person be who in 1922 threw herself into a river and attempted suicide—in an attempt to commit suicide and was pulled out and who thereafter at least six or seven times threatened to commit suicide, did commit suicide in December 2nd of 1940, that prior thereto, a month or two or two months, the time is a little indefinite, told her husband that she would or might commit suicide, a woman who at one time purchased a high priced animal for $175.00 and then disposed of it for a little or nothing, had to get rid of it, who at time three or four years, in 1937 or 1938 was in a business transaction, a transaction completely closed and the deeds had been drawn up and delivered and after all this was done she wrote a letter in which she stated that she wanted these quit-claim deeds to be made out and placed on record, when it already had been done; a woman that complained about her head, laid down a great deal, complained that she was not able to do her work; a woman that in drawing up her will left her property to a man she had been married four months to, cut out completely her only child, only daughter; who complained a great deal of headaches, she had low blood pressure, would you say a person that had such characteristics, whether or not * * * she was of sound or unsound mind?" and his answer was: "I would strongly suspect she was of unsound mind if all those facts were true."

However, some of the things upon which contestant's witnesses based their beliefs are explained.

The letter wherein testatrix told her daughter she couldn't think straight was introduced in evidence. It was as follows:

"Dearest kids—Just rec'd Stanleys very nice letter—many thanks—also yours, Rilma—and last & least—the check. The mtge is $3652.50. ¼ is 913.12. You sent $750. That leaves $163.12. Plus corset money, 1.35 is $164.47. So take what is over on your check of $165 out of the tax money. Better keep it ¼ on everything. Taxes were $13.44 on one piece & $82.15 on the other. Total $95.59. ¼ is $23.89. Just think, there is nearly $75 interest already. The mtge from Sept. 5th & taxes from Nov. 14th. Keep these dates. Now Rilma if I make any mistakes in the figures, tell me, *please,* for my old head hurts & does not think good nor quick & I can not see good and am *very* liable to get something wrong. I do not mean to, so if I do, you come right back, right then. Don't hesitate, hear?

"I had a little lamp for the radio—one from the 10¢ store—the green one is real small on the bottom & the shade large, so your dad would likely tip it over. I will have a wire run thru the ceiling—should have been done before—& put it in the living room. It is too tall to go on the sideboard under the cupboards.

"Did I tell you we have a big Belgian shepherd dog? His name is King. Not cross but a good watch dog. Tell Estelle he brings in wood, brings our slippers and does all sorts of tricks even to bringing his pan in when you tell him. He is an old dear & thinks the world of us—will not go outside the yard unless I do. He is such an old mutt for us that he frets whenever he can not be right with us, guess I'll have to stay at camp next summer, so he can be with us.

"No there has not been much snow in the hill & only a few *light* frost here.

"I'll go now so the stage will get this today. Lots of love to *all* of you. Write often, come again, Stanley.

"Ma F."

Plainly it refers to the loan made by Mr. and Mrs. Friend and Mrs. Gaskill to the latter's uncle, to which she referred in her testimony. This letter refutes any inference of unsound mind and shows, on the contrary, that Mrs. Friend was attending to the business of the loan, and that she wanted to be entirely fair with her daughter and have the transaction fully understood by her.

The testimony of Musser, the mortician, about decedent's bringing a dress instead

of her deceased husband's clothes was explained by Mrs. Lola Lutman, who, on that occasion, accompanied Mrs. Friend to the undertaker's. She testified that this incident occurred in connection with the funeral of Mr. Colby and not that of Mr. Friend; that Mrs. Colby asked Mrs. Friend to take clothes to the undertaker and gave them to her in a box; that Mrs. Friend had with her another box containing a dress she was taking to the cleaner, and by inadvertence gave the wrong box to Musser; that he immediately discovered the error and the boxes were exchanged.

Regarding the testimony of Mrs. Colby that she found her tires punctured, etc., it is to be noted that she did not testify that Mrs. Friend punctured her tires; she only intimated that she had done so.

[13] Much of the foregoing testimony of contestant's witnesses was remote in time, and little of it bore directly upon the time this will was executed or a period immediately before or after said date. None of it shows that testatrix, at the time she executed her will, did not understand the nature of her act, the situation and extent of her property, and her relation to her daughter as a person who had a natural claim upon her bounty. On the contrary, that she was well aware of her daughter's claims is evidenced by the fact that she told both Mr. Ricks and Mr. Mace that she was leaving nothing to her daughter. On the other hand proponent produced thirteen witnesses other than the subscribing witnesses, all of whom gave as their opinions that testatrix was of sound mind. These witnesses were all people who had known decedent for many years. Some were near neighbors who saw her frequently up to the time of her death. Others were business men who had had business dealings with her over a period of years. One was cashier of the bank with which she did business, another was a real estate man who had sold a piece of property for her in 1940, and three were lawyers, including Mr. Mace and Mr. Mitchell with whom she had consulted. Also one of these witnesses testified that decedent had told her that she was not going to leave any of her property to her daughter, and that contestant had "raised Cain with her" about her marriage, and had demanded a settlement of the property of her father's estate.

The evidence also shows that decedent's first husband had been blind for twenty years before his death, and that his wife had attended to their business affairs; and there is no evidence that any one had ever questioned decedent's mental capacity prior to her death.

[14-18] While it is true that testatrix committed suicide the court said in Matter of Estate of Chevallier, 159 Cal. 161, 113 P. 130, 134, where it was held that the evidence fell far short of showing unsoundness of mind of the testator, that "The fact that the testator is a suicide may be given in evidence as tending to establish insanity, but there must be much more than the mere fact of suicide to show that the insanity was so complete as to destroy testamentary capacity, or that it was of such a nature as to have exercised a direct influence and bearing upon the testamentary act." Also see In re Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; In re Estate of Muller, 14 Cal. App.2d 129, 57 P.2d 994; In re Estate of Little, 46 Cal.App. 776, 189 P. 818. The testimony of contestant's witnesses also furnishes little or no ground for holding that testatrix was of unsound mind. The opinion of a lay witness as to mental capacity of a testatrix has no greater probative value than the facts given by him as the basis of his conclusions (In re Estate of Short, 7 Cal.App.2d 512, 47 P.2d 555; In re Estate of Sexton, 199 Cal. 759, 251 P. 778; In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456), and the facts given by contestant's witnesses as the bases of their opinions are insufficient to show more than peculiarities of testatrix; and testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies or mental departures from the normal unless they bear directly upon and have influenced the testamentary act. In re Estate of Wright, 7 Cal.2d 348, 60 P. 2d 434. As to the answer of Dr. Kramer to the hypothetical question asked him, the court said in Re Estate of Collins, 174 Cal. 663, 164 P. 1110, 1113, that such testimony based on a question "skillfully framed to call for an answer favorable to the party in whose behalf it is asked," is testimony the weakest and most unsatisfactory. Citing In re Estate of Dolbeer, 149 Cal. 227, 243, 86 P. 695, 9 Ann.Cas. 795.

[19, 20] It is well established that testamentary capacity is always presumed and that the burden is always upon a contestant to show affirmatively and by a preponderance of the evidence that the testator was

of unsound mind at the time of the execution of the will. In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897; In re Estate of Short, 7 Cal.App.2d 512, 47 P.2d 555; In re Estate of McDonnell, 109 Cal.App. 577, 293 P. 651; In re Estate of Garvey, 38 Cal.App.2d 449, 101 P.2d 551; In re Estate of Little, 46 Cal.App. 776, 189 P. 818. And a testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing and to understand and recall the nature and situation of his property, and to remember and understand his relation to the persons who have claims on his bounty and whose interests are affected by the provisions of the instrument. In re Estate of Arnold, 16 Cal. 2d 573, 107 P.2d 25; In re Estate of Finkler, 3 Cal.2d 584, 46 P.2d 149; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P. 2d 897.

[21] Incompetency or unsoundness of mind sufficient to avoid a testamentary act must be either insanity of such a broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion, and as to the latter the evidence must establish that the will itself was the creature or product of such hallucination or delusion and that it influenced the creation and terms of the will. In re Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434; In re Estate of Collins, 174 Cal. 663, 164 P. 1110; In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897; Matter of Estate of Chevallier, 159 Cal. 161, 113 P. 130.

Here the evidence shows that at the time she made her will decedent understood the nature of her act, the nature and situation of her property and her relation to her daughter, and that the will was executed after several days of deliberation. Neither insanity of such a broad character as to establish mental incompetency generally, nor any delusions or hallucinations which influenced the creation and terms of her will were shown. As was said by the court in Field v. Shorb, 99 Cal. 661, 670, 34 P. 504, 507, "it is quite probable that the finding was a result of a notion frequently entertained by jurors (and sometimes by courts) that a man should dispose of his property in contemplation of death in such manner as to suit the tastes and ideas of propriety of the jurors. It was probably thought that deceased should not have given so much to one not of his blood, when he had collateral kin."

Cases in which evidence more abundant than in the case before us was held to be insufficient to show incompetency are: In re Estate of Little, 46 Cal.App. 776, 189 P. 818 (where the testator had often threatened suicide and did commit suicide about thirty days after executing his will); In re Estate of Collins, 174 Cal. 663, 164 P. 1110 (where testatrix had paralysis, and evidenced idiosyncrasies, peculiarities, and weakness); In re Estate of Hopkins, 136 Cal.App. 590, 29 P.2d 249 (where testator had a cancer phobia, was affected with melancholia, and may have committed suicide); In re Estate of Wright, 7 Cal.2d 348, 60 P.2d 434 (where testator drank to excess, picked up articles from garbage cans, pinned paper flowers on shrubs, and gave a friend a fish which he had soaked in kerosene); In re Estate of Peterkin, 23 Cal.App.2d 597, 73 P.2d 897 (where testator threatened suicide, had progressive senile dementia, was given to fits of rage, and exhibited peculiarities); In re Estate of Arnold, 16 Cal.2d 573, 107 P.2d 25 (where testator had chronic alcoholism, had suffered several attacks of delirium tremens, was irrational and suffered from several diseases); In re Redfield's Estate, 116 Cal. 637, 48 P. 794 (where testatrix had delusions and irrational fears, and there was insanity in the family); In re Estate of Sexton, 199 Cal. 759, 251 P. 778 (where testatrix suffered from arterio sclerosis, had had several paralytic strokes—cerebral hemorrhages); In re Estate of Perkins, 195 Cal. 699, 235 P. 45 (where decedent had hallucinations, loss of memory, and suffered from chronic Bright's disease); In re Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456 (where testator suffered lapses of memory, fainting spells, and had had a severe head injury); Matter of Estate of Chevallier, 159 Cal. 161, 113 P. 130 (where testatrix committed suicide); and In re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148 (where testator was about 80 years old, used liquor habitually, and had arterio sclerosis).

The judgment is reversed and the trial court is directed to admit the will to probate.

PEEK, J., concurs.

THOMPSON, Justice.

I dissent.

It is my opinion the record contains an abundance of evidence to sustain the verdict of the jury and the judgment of the court to the effect that the will of Irene L. Teel is void for lack of testamentary capacity and on account of the undue influence of John E. Teel. I am in accord with the principles of law announced in the majority opinion. But I believe they do not fit the facts of this case. It is not the province of a reviewing court to weigh the evidence or to pass upon the credibility of witnesses in a will contest. The findings of a jury are entitled to just as much credence in a will contest as in any other civil action. It is the uniform rule in this class of cases that when a reviewing court has ascertained that there is substantial evidence to support the essential findings of a jury, its province is exhausted and a judgment in accordance therewith must be affirmed, regardless of the presence of conflicting testimony. In re Estate of Barr, 69 Cal.App. 16, 230 P. 181; In re Estate of Hansen, 38 Cal.App. 2d 99, 100 P.2d 776; 26 Cal.Jur. 1101, sec. 356.

In the present case a unanimous verdict of the jury determined that the will was the product of an unsound mind and of the undue influence of Mr. Teel. The trial judge denied the proponent's motions for a directed verdict, a judgment notwithstanding the verdict and a motion for new trial. A careful reading of the record convinces me that the testatrix was of unsound mind; that she lacked testamentary capacity and that her will was the product of the undue influence of John E. Teel. To my mind the evidence in this case adequately meets the requirements of even a strained construction of the law with respect to the issues involved.

We are confronted with the fact that the testatrix actually took the lives of herself and her pet dog in a tragic suicide within eighteen days from the time when she executed her will. By the terms of that will she disinherited her only living child by a former husband. That tragedy was the fulfillment of a suicidal mania which she possessed for many years. Some seventeen years previously she attempted to commit suicide by jumping into a river. Several witnesses testified to numerous threats which she had previously made to take her own life. She appears to have had the symptoms of paranoia or dementia praecox which are fixed and progressive types of insanity. She had delusions, habitual melancholy, violent headaches and uncontrollable animosities against those who were her best friends; she had weird fancies, eccentricities in dress and in her conduct toward other persons, and she possessed a fixed suicidal mania.

Mrs. Teel was despondent and she often complained of severe headaches. She said she was unable to think or act reasonable. She implied that her mind was deranged when she once said she intended to go to a physician and have the wheels taken out of her head. She had a fixed delusion that she was afflicted with a cancer of the stomach. Her own physician testified that she possessed a "cancer phobia". After he examined her and took X-ray pictures and informed her that she had neither tumors nor a cancer and that she did not have any other stomach ailment, she did not appear to believe his statement. The delusion still remained. Her physician, Dr. Kramer, was the only medical expert who testified regarding her mental capacity. He had known her for about seven years. She consulted him four years before her death about her fancied stomach trouble. He was unable to disabuse her mind of that delusion of the presence of a cancer. He saw her in July prior to her death, and said she then appeared quite a bit older and emaciated. Although she was very slender she had lost considerable weight. He said she was generally melancholy. While he did say, "I saw no evidence of insanity", in response to the question as to whether her mind seemed clear he replied, "With the possible exception of that [cancer] phobia." When he was asked if he considered suicide to be a normal act, he replied, "It certainly is an abnormal act." Finally, in response to a very fair hypothetical question including the strange conduct and characteristics of Mrs. Teel and her final act of suicide, when asked if he would consider such a person to be of sound mind he replied, "I would strongly suspect she was of unsound mind."

Among a number of strange incidents which appear in evidence, a business transaction which Mrs. Teel had with a neighbor regarding the joint ownership of a home, indicates that she had no real appreciation of the transaction or the ownership of the property. When her first husband, Andrew

J. Friend, the father of Mrs. Teel's only living child, the contestant, died in 1936, and the proprietor of the mortuary where his body lay requested her to provide appropriate clothing for the burial she brought a box containing a dress.

It is not the province of the reviewing court to attempt to explain those numerous irrational and eccentric acts and statements of the testatrix on the theory that she must have been sane. That was the exclusive province of the jury. On appeal the tables are turned. If these acts and her conduct may reasonably be said to support the findings of the jury, then their conclusions should be upheld.

It is not a fixed rule of law that delusions which a testator may possess as symptoms of insanity shall necessarily be shown to have affected "*the very act* of executing a will", to render it invalid on the ground of unsound mind. The application of that rule depends upon the type of insanity disclosed by the evidence. It is true that one may be afflicted with temporary insanity caused by some physical ailment and become completely cured, or possess lucid intervals during which he may make a valid will. But when he is shown to be subject to fixed and permanent insanity, such as paranoia or dementia praecox, which are ordinarily progressive and incurable, there is no room for the application of the rule requiring proof that particular delusions or acts have actually affected the execution of the will. All acts of one who is afflicted with fixed and permanent insanity are deemed to be tainted and controlled by such incurable mental diseases. Such persons are incapable of making valid wills. In the present case the evidence strongly indicates that the testatrix was afflicted with fixed and permanent insanity. Numerous symptoms indicate that she was a victim of either paranoia or dementia praecox. She had delusions, habitual melancholic spirit and suicidal mania which had existed for years. She often threatened suicide. She tried to take her life once and failed. She finally succeeded in accomplishing that tragic purpose just a few days after the execution of her will. In response to a fair hypothetical question, the only medical expert who testified in the case, said that the circumstances related in the interrogatory, indicated that she was of unsound mind. One of the circumstances which supports that conclusion, in addition to her deliberate act of suicide within a few days after the execution of her will, was the disinheriting of her only child with whom she was on friendly terms, without any reasonable explanation therefor, and without even mentioning her name in the will. That evidence and numerous other circumstances disclosed by the record certainly warranted the jury in determining that the will was the product of a permanently unsound mind. It does not appear that she had lucid periods during which she might have made a valid will. If the proponent so contends, the burden was on him to show that fact. Having proved circumstances from which unsound mind may reasonably be inferred, it was the sole province of the jury to determine the question of insanity. Too strict a construction of the application of the rule requiring evidence which directly affects the very testamentary act, may overlook the reasonable inferences which may be drawn therefrom, and result in a tendency to abolish the cherished right of trial by jury in cases involving the issue of unsound mind.

On the subject of undue influence it appears that the proponent, John E. Teel, married the testatrix June 29, 1940, five months after the death of his first wife. April 20, 1939, the testatrix executed a declaration of trust, conveying to John E. Teel, as trustee, all of the property she possessed, including a $1,000 bond and real property valued at about $24,000, giving him absolute power to sell, lease, mortgage or hypothecate any and all of said property without her approval or consent. Prior to their marriage Mr. Teel and the testatrix agreed to execute mutual wills devising and bequeathing to each other all of their property. The value of his property was only about $1,000. After their marriage the spouses went together and consulted two different lawyers with the object of procuring the mutual wills and joint tenancy deeds to her real property. For some reason, these attorneys did not draw those instruments. November 7, 1940, they visited together the office of H. L. Ricks, an attorney at law in Eureka, for the same purpose of executing the mutual wills and the joint tenancy deeds. In several interviews with Ricks both of the spouses were present and both participated in the discussions. Mrs. Teel declared her intention to disinherit her daughter, but gave no satisfactory reason therefor. Mr. Teel was then present. Ricks tried to persuade her that was unjust and wrong They left but subsequently returned to his office and he

drew three joint tenancy deeds to all of her real property, and the mutual wills. The wills were executed November 14, 1940, and the deeds on November 19th. By the terms of her will the testatrix devised and bequeathed all of her property to her husband, and in the event of his death to his son Roy Teel, with whom she was only slightly acquainted. John E. Teel was named as executor without bond, and in case of his death his son Roy was to act as executor without bond. Her daughter, Rilma K. Gaskill, the contestant, is not mentioned in the will. There is evidence that the bulk of the estate of testatrix consisted of community property acquired while she lived with her first husband, who was the father of the contestant. There is also evidence that Mrs. Gaskill was always very considerate of her mother, and that no sufficient reason for her disinheritance existed. The wills were left in the possession of the attorney, but John E. Teel returned several times and took possession of the deeds and other instruments and recorded them.

This furnishes ample evidence of Mr. Teel's activity in procuring the execution of the will and the other documents. He unduly profited by the transaction. He was always present when they visited the lawyers to procure the execution of the documents. He took part in the conversations. A confidential relationship existed between the spouses.

Under the circumstances of this case the jury was warranted in assuming that the will was unnatural, since the testatrix disinherited her only living daughter by her first husband with whom she had been on good terms, without even mentioning her in the will. While it is true that one has a legal right to make an unnatural will, or even to disinherit those who would ordinarily be entitled to his bounty, where the question of testamentary capacity and undue influence are involved, such injustice and unnatural terms of the will may become persuasive evidence of the invalidity of the will. In re Estate of Johnson, 72 Cal.App. 663, 237 P. 816; 26 Cal.Jur. 633, sec. 7. In the text last cited it is said in that regard: "When accompanied by the fact that the provisions of the will are 'unnatural', evidence tending to show that the deceased was suffering from mental derangement or disorder will require a rejection of the propounded instrument."

It is not necessary to prove undue influence by positive and direct evidence. It may be shown by circumstances from which the jury may reasonably infer that it was exercised. The same rule is applicable to the required proof that the undue influence actually affected the very making of the will. That phase of the issue may also be shown by circumstantial evidence. I believe there is an abundance of such circumstances in this case to have warranted the jury in concluding that Mr. Teel did unduly influence the testatrix to disinherit her only daughter and to make her will in his favor, and that his undue influence actually procured and affected the very act of executing the will. Those were circumstances to be determined by the jury. This court has no right to invade the province of the jury when substantial evidence exists from which the conclusion of undue influence may reasonably be drawn. It is the rule that even if the evidence is of such nature that reasonable minds may differ regarding its effect upon the testamentary act, a reviewing court may not interfere with the determination of the jury.

Regarding the amount of evidence required to sustain a finding of undue influence the authorities are uniform to the effect that each case must depend upon the particular facts and circumstances disclosed by its record. It is only necessary to show facts and circumstances from which undue influence may be reasonably inferred. The text which is found in 1 Bancroft's Probate Practice, at page 380, sec. 209, says in that regard: "As to what is sufficient [to show undue influence] must depend upon the facts and circumstances of each particular case. These general rules have been stated and restated in many hundreds of different cases in the courts of every jurisdiction considered authority in this country. * * * The only positive and affirmative proof required is of facts and circumstances *from which the undue influence may be reasonably inferred.*" (Italics added.)

The rule is firmly established in California and in all other jurisdictions that the unnatural disposition of property by will, undue profit secured thereby and activity exercised by one who stands in confidential relationship to the testator, together with other evidence of unsound mind, is not only proof of a lack of testamentary capacity, but the burden then shifts to such person

who is then required to affirmatively show that the will was not induced by undue influence. In re Estate of Lances, 216 Cal. 397, 403, 14 P.2d 768; In re Estate of Yale, 214 Cal. 115, 123, 4 P.2d 153; In re Estate of Easton, 140 Cal.App. 367, 376, 35 P.2d 614; In re Estate of Ehle, 115 Cal.App. 656, 661, 2 P.2d 398; In re Estate of Gallo, 61 Cal.App. 163, 175, 214 P. 496. In Re Estate of Lances, supra, [216 Cal. 397, 14 P.2d 770], in which an order of court directing the jury to determine a will contest in favor of the proponent was reversed on appeal, it is said: "Here we have no sufficient showing that the decedent was mentally weak or incapable of performing the testamentary act, but we have the active participation on the part of the beneficiary in the execution of the will. Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, *the burden is upon him to show that the will was not induced by his undue influence.*" (Italics added.)

The language of the foregoing cases is peculiarly applicable to this proceeding. This case contains all the elements indicating unsound mind, unnatural will, confidential relationship, undue profit and activity in procuring the execution of the will. Under such convincing evidence it certainly may not be said, as a matter of law, that the proponent did not procure the execution of the will by his undue influence.

The testimony of the attorney who drew a will or of the witnesses to a will with respect to the mental capacity of the testatrix is entitled to weight, but it is not controlling on that issue. In re Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; In re Estate of Pessagno, 58 Cal.App.2d 390, 136 P.2d 644. In the last-mentioned cases judgments denying probate to the wills on the grounds of undue influence and unsound mind were affirmed on appeal. Hearings by the Supreme Court were denied. The present case appears to me to be much more conclusive than the previously cited cases of the fact that the testatrix was afflicted with settled insanity, and that she did not possess testamentary capacity. The case of In re Estate of Bucher, 48 Cal. App.2d 465, 120 P.2d 44, 48, involved the questions of unsound mind, as a result of habitual intoxication, and undue influence. After a verdict had been rendered in favor of the contestant the trial court rendered judgment notwithstanding the verdict, and admitted the will to probate. On appeal that judgment was reversed. The Supreme Court denied a hearing. That case is enlightening on the issues which are involved in this case on the subject of the province of a reviewing court to weigh the evidence and reverse the findings of a jury. It also announces the well-established rule that the contestant is entitled to the benefit of all evidence adduced and of "all inferences which may legitimately be derived by the jury from the facts as established. 28 R.C.L., sec. 97."

The numerous cases cited by the majority opinion, in support of the conclusion that the findings of the jury and the judgment are not supported by the evidence, are not convincing. In my opinion, the facts in none of those cases are comparable to those which appear in the present case. A multitude of cases in this and other jurisdictions may be cited which have affirmed verdicts and judgments refusing to admit wills to probate on the ground of unsound mind and undue influence. They only confirm the rule previously stated that each case must rest upon its own peculiar facts. In five of the cases cited in the majority opinion judgments of the trial courts were affirmed in accordance with the well-known rule that on appeal every intendment is in favor of the verdict and judgment. In none of the other cases cited is there such a convincing combination of circumstances indicating the existence of unsound mind and undue influence as there appears to be in this case.

I am persuaded there is an abundance of evidence in this record to support the findings of the jury and the judgment of the court. The judgment should be affirmed.

62 Cal.App.2d 601

LIBERTY MUT. INS. CO. et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14284.

District Court of Appeal, Second District, Division 3, California.

Jan. 28, 1944.

As Modified on Denial of Rehearing Feb. 25, 1944.

1. Workmen's compensation ⇐2084

Exclusive remedy of employee against employer, when both are subject to Workmen's Compensation Law, for injury arising out of and in course of employment and not caused by intoxication of employee or intentionally self-inflicted is under the Compensation Law, unless employer was not insured or was not permitted to act as self-insurer. St.1937, pp. 269, 270, 271, 291, §§ 3600, 3601, 3700, 3706, 5300.

2. Workmen's compensation ⇐1087

Exclusive jurisdiction to determine extent of injured employee's right to compensation under exclusive remedy provided by Workmen's Compensation Law is in the Industrial Accident Commission. St. 1937, pp. 269, 270, 271, 291, §§ 3600, 3601, 3700, 3706, 5300.

3. Workmen's compensation ⇐2088

Where conditions of compensation do not occur liability of employer to injured employee is same as if Workmen's Compensation Law had not been enacted. St. 1937, p. 269, § 3602.

4. Workmen's compensation ⇐2253

In employee's malpractice action against employer and others, complaint which did not disclose that employee was performing services growing out of and incidental to employment at time of injury, did not show that Industrial Accident Commission had exclusive jurisdiction as to employer. St.1937, p. 269, § 3602.

5. Evidence ⇐43(2, 3)

Generally, a court takes judicial notice only of proceedings in the same case, but in some circumstances judicial notice may be taken of proceedings in other cases in the same court in interests of justice.

6. Evidence ⇐48

Judicial notice will not be taken of findings and awards made by Industrial Accident Commission.

7. Workmen's compensation ⇐2253

In malpractice action by employee against employer, an insurer and others, answer alleging that findings and final award by Industrial Accident Commission were bar to action was in effect a plea of res judicata which presented issues of fact for determination of trial court in exercise of jurisdiction.

8. Prohibition ⇐28

In employee's malpractice action in superior court against employer, an insurer and others, where answer in effect presented plea of res judicata based on final award of Industrial Accident Commission, the issue could not be determined in prohibition proceeding against superior court.

9. Evidence ⇐48

Even if it were proper under some circumstances to take judicial notice of findings and award of Industrial Accident Commission, where it was not clear that injury referred to in findings and award and injury referred to in superior court complaint were the same, the circumstances were not such that judicial notice of the findings and award should be taken in prohibition proceedings against superior court.

Proceedings in prohibition by the Liberty Mutual Insurance Company and the California Shipbuilding Corporation against the Superior Court of the State of California in and for the County of Los Angeles, and Honorable Charles E. Haas, a judge thereof.

Alternative writ discharged, and petition for peremptory writ of prohibition denied.

Lyndol L. Young and L. R. Brigham, both of Los Angeles, for petitioners.

Arthur Garrett, of Los Angeles, for respondents.

Lasher B. Gallagher, of Los Angeles, amicus curiae.

PARKER WOOD, Justice.

This is a proceeding in prohibition. Kenneth Toft commenced an action in the superior court in Los Angeles County for damages for alleged malpractice against petitioner Liberty Mutual Insurance Company, a corporation, petitioner California Shipbuilding Corporation, a corporation, and three individuals. Said insurance company will be referred to herein as the insurance company, and the shipbuilding company will be referred to as the shipbuilding company.

It was alleged in the complaint therein that two of the individual defendants were physicians and surgeons (the status of the other individual defendant was not alleged); that the three individuals were employed by the other defendants therein and were acting within the scope of their employment at the time of the alleged injury; that defendants maintained, operated and controlled a first-aid station and office for medical treatment on premises belonging to defendant shipbuilding company; that defendants represented to plaintiff that they owned, operated and maintained said first-aid station and medical office; that "on or about November 19, 1941, and on many occasions thereafter, plaintiff herein as an employee of the defendant, California Shipbuilding Corporation, and upon instructions of the defendants and each of them, went to the first aid station and office as aforesaid, and submitted to treatment for an injury to his hand, relying upon the representations of the said defendants that they, and each of them, maintained, owned, operated and controlled said first aid station and medical office"; that at said times the defendants and their employees so carelessly and negligently X-rayed and treated the plaintiff's hand that it was severely burned, and that they negligently failed to diagnose said X-ray burns and to prescribe for said burns, causing plaintiff's hand to be permanently injured to plaintiff's damage in a designated sum of money.

Petitioners demurred to the complaint upon the grounds, among others, that no cause of action was stated; that the court had no jurisdiction of the subject matter of the complaint insofar as petitioners were concerned, in that, the Industrial Accident Commission had exclusive jurisdiction, so far as petitioners were concerned, over the cause of action set forth in the complaint; and that it could not be ascertained therefrom whether plaintiff "at the time he received the injury to his hand referred to in his complaint, was performing services growing out of and incidental to his employment by defendant California Shipbuilding Corporation and was then acting within the course and scope of his employment."

At the hearing of the demurrer petitioners argued (as shown by the petition) that, as to petitioners, the superior court was without jurisdiction because the matters involved in said action were within the sole and exclusive jurisdiction of the Industrial Accident Commission. At said hearing petitioners filed a certified copy of the findings and final award of the Industrial Accident Commission, presumably as a memorial to aid the judge as to matters of which the petitioners asserted the court should take judicial notice. The said findings showed that the commission found that plaintiff Toft "while employed as a rigger on November 19, 1941 * * * by California Shipbuilding Corporation, sustained injury arising out of and occurring in the course of his employment to his right hand," and that "at said time, said employer's compensation insurance carrier covering said injury was Liberty Mutual Insurance Company." The award showed that the commission awarded plaintiff Toft $3,475 as compensation. In overruling the demurrer, the court stated in its minute order that the judgment of the Industrial Accident Commission should be set up as a separate defense in the answers.

The petitioners thereupon filed their answer in said action, in which they denied: that the three individual defendants were employed by petitioners; that petitioners, or either of them were careless or negligent; that petitioners or either of them maintained, operated or controlled the first-aid station or the office for medical treatment referred to in the complaint; that they represented to plaintiff Toft that they or either of them owned, operated or maintained the first-aid station or medical office referred to in the complaint. The petitioners admitted in their answer that on or about November 19, 1941, plaintiff Toft was an employee of the shipbuilding company, and that he went to the first-aid station located in the yard of the ship-

building company "and provided and owned by the United States Government" for treatment of an injury sustained by him while he was performing services incidental to said employment and while he was acting within the scope of said employment. In an affirmative defense the petitioners alleged that, at the time plaintiff Toft was receiving treatment for injuries sustained by him, he was an employee of the shipbuilding company, and that the injuries were sustained while he was performing services incidental to said employment and while he was acting within the scope of said employment; that the Liberty Mutual Insurance Company was said employer's compensation insurance carrier covering said injury to plaintiff, and that said employer, insurance carrier, and plaintiff employee were all subject to the provisions of the Workmen's Compensation laws; that plaintiff filed his application for adjustment of his claim against the shipbuilding company and its insurance carrier with the Industrial Accident Commission; that the Industrial Accident Commission, pursuant to the filing of said application, conducted a hearing and made its findings of fact and award in favor of plaintiff, and against said insurance carrier; that a certified copy of said award was attached to said answer and made a part thereof; and that the amount of said award and the benefits thereof had been accepted by plaintiff, and that said award was a final judgment and constituted a bar to plaintiff's action; that the exclusive remedy of plaintiff against said defendants (the petitioners) was under the provisions of the Workmen's Compensation Act and that the superior court did not have jurisdiction of the subject matter of plaintiff's complaint, in that, the Industrial Accident Commission had exclusive jurisdiction over said subject matter. As a further affirmative defense it was alleged that defendant Stellar, a physician and surgeon, treated injured employees of the shipbuilding company pursuant to a contract between him and the insurance company, and that in so doing he acted as an independent contractor, and that plaintiff was treated by that physician and his employees; that the insurance company exercised due care in examining the professional qualifications of defendant Stellar as a physician and surgeon prior to entering into said contract with him.

The petition herein alleges the substance of the pleadings in said action and the proceedings had therein. The petition alleges further: "that said action shows on its face that, as to your petitioners, and each of them, it is an action by an employee against his employer on account of injuries received by said employee while he was performing services growing out of and incidental to his said employment, and the matters and things arising and growing out of said employment and said injuries." The petition alleges further: "that the official records of the Industrial Accident Commission of the State of California, of which said records the courts must take judicial notice, show that said action No. 481-266 [the present action] is barred by reason of an award made by said Industrial Accident Commission in favor of said plaintiff and against your petitioner, said defendant Liberty Mutual Insurance Company, a corporation, as the compensation insurance carrier for your petitioner, said defendant California Shipbuilding Corporation." Copies of documents attached to the petition as exhibits include the following: the complaint, demurrer, minute order ruling on demurrer, answer of petitioners in the action involved herein including the findings and award of the commission. Copies of other documents included as a part of the petition are: the transcript of the hearing including the testimony of Toft before the commission, and the complaint in an action in the superior court in Los Angeles County entitled R. W. Stellar, plaintiff, v. Liberty Mutual Insurance Company, defendant, wherein Mr. Lasher B. Gallagher, who appears as amicus curiae in this present proceeding, was attorney for the plaintiff.

Plaintiff Toft's return to the alternative writ of prohibition alleges that a settlement of his said action was agreed upon by plaintiff Toft, defendants shipbuilding company, insurance company, and Stellar, whereby defendants agreed to pay plaintiff $7,500, and whereby Toft agreed to dismiss said action with prejudice; that Toft does not traverse the allegations of the petition because it might be deemed a repudiation by him of said settlement, and that he wishes the court to be advised in the premises in order that the court may not make an order in a proceeding which Toft believes to be moot, and for the further reason that in not traversing such allegations that this court's order herein

will not be regarded as a precedent. The affidavit of the attorney for petitioners, in answer to the return of Toft to said writ, states that the offer of settlement was rejected by Toft. It is not necessary, however, to determine that issue of fact, since it does not appear that the alleged settlement has been carried into effect. The pending proceeding is not shown to be moot.

[1, 2] The exclusive remedy of an employee against his employer, when both are subject to the provisions of the workmen's compensation laws, for an injury sustained by the employee, who at the time of the injury was performing services arising and growing out of and incidental to his employment and was acting within the course of his employment, and which injury was proximately caused by the employment, and was not caused by intoxication of the employee and was not intentionally self-inflicted, is the right to recover compensation pursuant to the provisions of the workmen's compensation laws, Labor Code, sections 3600, 3601, St. 1937, p. 269 et seq., except in the event that, at the time of the injury, the employer was not insured under a policy of compensation insurance or was not permitted to act as a self-insurer. Labor Code, sections 3706, 3700. It was said in Alaska Packers' Ass'n v. Indus. Acc. Comm., 1927, 200 Cal. 579, at page 583, 253 P. 926, at page 928: "When the specified conditions exist, the remedy provided by the act [Workmen's Compensation Act] is exclusive of all other statutory or common-law remedies." Exclusive jurisdiction to determine the extent of an injured employee's right to recover compensation under said exclusive remedy is in the Industrial Accident Commission. Labor Code, section 5300; Freire v. Matson Navigation Co., 1941, 19 Cal.2d 8, 10, 118 P.2d 809.

[3, 4] As to petitioner shipbuilding company, the complaint does show that plaintiff Toft was its employee. The allegation is that "plaintiff herein, as an employee of defendant, California Shipbuilding Corporation, upon instructions of the defendants and each of them, went to the first aid station and office as aforesaid, and submitted to treatment for an injury to his hand." It does not show, however, the concurrence of the conditions of compensation, above referred to, requisite for jurisdiction in the commission. For example, as stated in petitioners' demurrer to the complaint, it cannot be ascertained from the complaint whether plaintiff "at the time he received the injury to his hand referred to in his complaint, was performing services growing out of and incidental to his employment by defendant California Shipbuilding Corporation and was then acting within the course and scope of his employment." It would have been consistent with the allegations of the complaint if plaintiff's hand had been injured at plaintiff's home or some other place having no relation to his employment by the shipbuilding company. "In all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division [Labor Code provisions relative to compensation] had not been enacted." Labor Code, section 3602. The complaint does not show that the commission has exclusive jurisdiction as to the shipbuilding company.

As to petitioner insurance company, the complaint does not show that said petitioner was an employer of plaintiff Toft. It does not show that said petitioner was a compensation insurance carrier for the petitioner shipbuilding company.

The case of Goodyear Tire & Rubber Co. v. Hanby, 1931, 111 Cal.App. 382, 295 P. 562, upon which petitioners rely, and wherein a writ of prohibition was issued upon the ground that the Industrial Accident Commission had exclusive jurisdic-

tion, is distinguishable from the present action in that the complaint therein showed on its face that an award had been made by the Industrial Accident Commission against the petitioner therein.

Petitioners contend, however, that judicial notice will be taken of the findings and final award of the Industrial Accident Commission which, they assert, show the facts omitted from the complaint that the insurance company was the insurance carrier of the shipbuilding company, and that an award covering the injury involved herein was made against the insurance company in favor of plaintiff Toft.

In support of that contention as to judicial notice, petitioners cite section 1875, subdivision 3, of the Code of Civil Procedure, and the following cases: Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987, Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175, and Leonard v. Lennox, 8 Cir., 181 F. 760, which hold that judicial notice will be taken of such matters as records and documents of the General Land Office; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333, which holds that the Supreme Court will take judicial notice of its judgment on a prior appeal between the same parties in certain instances; Campbell v. Fong Wan, —— Cal.App.2d ——, 136 P.2d 808, which holds that judicial notice will be taken of the general safety orders of the Industrial Accident Commission; Jones v. United States, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691, which holds that judicial notice will be taken of a letter of the State Department, and a circular of the Treasury Department; Mason v. Drug, Inc., 31 Cal. App.2d 697, 88 P.2d 929, which holds that the trial court has the right to take judicial notice of its own records in the same case; and MacKay v. Clark Rig Bldg. Co., 5 Cal.App.2d 44, 42 P.2d 341, which does not relate to judicial notice. The cases cited do not hold that judicial notice will be taken of findings or decisions of such commissions as the Industrial Accident Commission made in the exercise of judicial duties.

In Goodman Bros. v. Superior Court, 1942, 51 Cal.App.2d 297, at page 301, 124 P.2d 644, at page 646, it was said: "The law is settled that the Industrial Accident Commission proceeds judicially, and that its determinations, subject to the same limitations applicable to judgments of courts generally, are res judicata in all subsequent proceedings between the same parties or those privy to them." The Industrial Accident Commission and the Railroad Commission have similar judicial powers. In Mound W. Co. v. Southern Cal. Edison Co., 1921, 184 Cal. 602, 610, 194 P. 1014, it was argued that a decision of the Railroad Commission that a certain power company held certain water for public use was an adjudication as to the character of the power company and that when the power company conveyed its water system to the Edison Company the water remained subject to the public use. The court said at page 611 of 184 Cal., at page 1018 of 194 P.: "It is unnecessary here to determine the effect of that decision. The court does not take judicial notice of it, and the question can only be raised by an answer setting up the defense of former adjudication." It was stated in Johnston v. Ota, 1941, 43 Cal. App.2d 94, at page 96, 110 P.2d 507, at page 509: "The general rule is that the court will not take judicial notice of other actions, not even those pending or concluded in the same court. [Citing cases.] The authority of a court to take judicial notice of its own records is limited to proceedings in the same case. Sewell v. Price, 164 Cal. 265, 128 P. 407. * * * The only exception to the rule is where unreasonable hardship would result." It was said in Willson v. Security-First Nat. Bk., 1943, 21 Cal.2d 705, at page 711, 134 P.2d 800, at page 804: "Generally a court takes judicial notice only of proceedings in the same case. * * * But in some circumstances judicial notice will be taken of proceedings in other cases in the same court in the interests of justice. Hammell v. Britton, 19 Cal.2d 72, 119 P. 2d 333; Johnston v. Ota, 43 Cal.App.2d 94, 110 P.2d 507."

[5, 6] Inasmuch as the rule just referred to relates to proceedings in the same case in the same court, or other proceedings under certain circumstances in the same court, it is not reasonable to conclude that judicial notice should be taken of a matter such as the present one relating to a decision of another and different tribunal. Judicial notice will not be taken of the findings and award made by the Industrial Accident Commission.

[7, 8] The answer in the superior court action herein alleges that the findings and final award by the Industrial Accident

Commission are a bar to plaintiff Toft's action. Such allegation is in effect a plea of res judicata. In Goodman Bros. v. Superior Court, supra, wherein a writ of prohibition was sought, the petitioner, Goodman Bros., was named as a defendant in a superior court action for damages for personal injuries received by Aho, the plaintiff, in the scope of his employment as an employee of petitioner, Goodman Bros. The petitioner therein was included as a defendant on the theory that petitioner was uninsured. The answer of that defendant (Goodman Bros.) alleged that the Industrial Accident Commission had found, upon the application of the plaintiff (Aho) for compensation, that Goodman Bros. was insured, and had made an award against the insurance carrier. The plaintiff therein demurred to the answer and moved to strike out the portion of the answer referring to the finding of the commission that Goodman Bros. was insured. The demurrer was sustained and the motion was granted. Goodman Bros., as petitioner for a writ of prohibition, contended that the finding of the commission was res judicata as to a jurisdictional fact, that it conclusively determined that petitioner was insured, and that such adjudication deprived the superior court of jurisdiction. The court said at page 304 of 51 Cal.App.2d, at page 648 of 124 P.2d: "Although it is the law that the prior final decision of the commission is res judicata in the superior court action on the issue of insurance, that does not mean that the superior court can be restrained by a writ of prohibition from trying the case there pending against Goodman Bros., Inc. The law is settled in this state that the plea of res judicata does not oust a court of jurisdiction—at most, it is conclusive evidence on an issue presented to the trial court—and prohibition is, of course, a writ that only attacks the jurisdiction of the court." It was held therein that such plea "cannot be enforced by prohibition."

In Baird v. Superior Court, 1928, 204 Cal. 408, at page 412, 268 P. 640, at page 641, it was said: "Res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded either in bar or as an estoppel on some issue, there immediately arise questions as to identity of the parties, the validity of the [judgment as shown by the] judgment roll, the legal effect to be given it, and perhaps many other questions. Such matters are for the determination of the trial court, and, whether correctly or incorrectly determined, it is nevertheless the exercise of jurisdiction over the subject-matter and the parties."

The issues of fact raised by the answer as to the prior adjudication by the Industrial Accident Commission, which includes the questions as to identity of parties and identity of the injuries in the two proceedings, and the questions as to the validity and finality of the award, are for the determination of the trial court in the exercise of jurisdiction.

In Goodman Bros. v. Superior Court, supra, 51 Cal.App.2d at page 306, 124 P.2d at page 649, the court stated: "This rule imposes no great hardship on the parties. Under section 597, Code of Civil Procedure, when the answer pleads a prior judgment as a defense, the court may try that issue before the trial of the main case. This supplies a speedy and expeditious method of disposing of that question."

[9] Even if it were proper under some circumstances to take judicial notice of findings and award of the Industrial Accident Commission, the circumstances herein are not such that judicial notice should be taken in this case. Furthermore, it is not clear that the injury referred to in the findings and award and the injury referred to in the superior court complaint are the same. It is to be noted that the complaint alleges, in referring to the date of the injury, that "on or about November 19, 1941, and on many occasions thereafter, plaintiff * * * went to the first aid station * * *. That on said 19th day of November, 1941, and thereafter, as aforesaid, the defendants * * * negligently X-rayed the plaintiff's right hand * * * as to cause the same to be severely burned * * *." The findings stated, "Kenneth Toft * * * while employed as a rigger on November 19, 1941 * * * sustained injury * * * to his right hand." As noted the findings do not refer to the X-ray burns or an aggravation of an injury occurring on November 19th, and the complaint refers not only to No-

vember 19, 1941, but to "many occasions thereafter."

The alternative writ heretofore issued is discharged, and the petition for the peremptory writ of prohibition is denied.

SHINN, Acting P. J., and BISHOP, Justice pro tem., concur.



62 Cal.App.2d 628

LEPLAT v. RALEY WILES AUTO SALES et al.

Civ. 12449.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1944.

1. Dismissal and nonsuit ⇐7(3)

A cause of action could not be dismissed after jury retired to deliberate the issues.

2. Automobiles ⇐192(8)

A dealer who sold automobile under conditional sales contract and did not comply with statutory requirements relating to indorsement of certificate of ownership and giving of notice of transfer, would be deemed the owner of automobile at time of accident when driven by buyer, and subject to civil liability for resulting injuries. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

3. Sales ⇐467

A principal feature of conditional sales contract for sale of automobile is that buyer is entitled to possession thereof and to use it so long as he is not in default in payment.

4. Sales ⇐467

Where only restrictive clause in conditional sales contract was that automobile should not be used "illegally" or "improperly", conditional buyer was entitled to possession of automobile and to use it for all reasonable purposes.

5. New trial ⇐157

In action for injuries to pedestrian struck by automobile driven by conditional buyer in possession of instruction permit entitling him to drive only when accompanied by licensed operator, on motion for new trial, trial court could determine whether buyer drove alone with seller's implied permission so as to render seller liable. Vehicle Code, §§ 177, 178, St.1935, p. 115; § 402, St.1937, p. 2353.

6. Appeal and error ⇐1015(3)

Where substantial conflicting evidence supported trial court's view in granting new trial, appellate court could not interfere.

7. Appeal and error ⇐222

On appeal from order granting new trial, appellant could not for first time challenge sufficiency of affidavit of service by mail of notice of intention to move for new trial, especially where no claim was made that counsel for appellant did not receive copy of the notice. Code Civ.Proc. § 1012.

8. New trial ⇐140(1)

An affidavit of intention to move for new trial was sufficient to establish valid service by mail where copies of notice were properly mailed to the attorneys in San Francisco in sealed envelopes. Code Civ. Proc. § 1012.

9. Judgment ⇐199(3)
New trial ⇐70

Where evidence was conflicting on issue of permissive use of automobile by conditional seller sought to be held liable for injuries caused by conditional buyer who was driving alone when possessing only an instruction permit, trial court properly denied plaintiff's motion for judgment notwithstanding verdict and granted new trial. Vehicle Code, § 402, St.1937, p. 2353.

10. Appeal and error ⇐870(3)

In absence of valid appeal from order denying plaintiff's motion for judgment notwithstanding verdict, appellate court could not reverse the order even though it believed that evidence would so warrant. Code Civ.Proc. §§ 629, 963, subd. 2.

11. Appeal and error ⇐874(5)

The statute authorizing appellate court to review order denying motion for judgment notwithstanding verdict where adverse party appeals from order granting

movant a new trial must be construed in light of fixed rules governing appeals. Code Civ.Proc. § 629.

12. Appeal and error ⇐870(3)

When an order is made appealable by statute, a reviewing court may not reverse it for error unless its validity is presented by valid appeal. Code Civ.Proc. §§ 629, 963, subd. 2.

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Henrietta Leplat against Raley Wiles Auto Sales, a corporation, and others to recover for injuries sustained when plaintiff was struck by named defendant's automobile which was driven by the defendant Roberto Rosati. From an order granting the plaintiff a new trial as to Raley Wiles, he appeals. The plaintiff's appeal from the order denying her motion for judgment against Raley Wiles notwithstanding the verdict was dismissed.

Order granting motion for new trial affirmed.

John J. Taheny, of San Francisco, for defendant, appellant and respondent.

Philander B. Beadle and Samuel Vartan, both of San Francisco, for plaintiff, respondent and appellant.

KNIGHT, Justice.

The plaintiff, Henrietta Leplat, was struck and injured by an automobile as she was walking easterly across the northerly intersection of Post and Stockton Streets in San Francisco, about 2 o'clock in the afternoon. She was walking in the pedestrian lane with the open traffic signal, but when about half way across Stockton Street she was knocked down by an automobile driven by the defendant Rosati. He had driven down Post Street, easterly, and was making a left turn up Stockton Street when he collided with plaintiff. He was driving alone at the time. On account of the injuries plaintiff received she brought this action for damages against Rosati as the driver of the car, and against the defendant Wiles as the owner, alleging that the proximate cause of the accident was the negligent operation of the car by Rosati and that he was using and operating the car with the express and implied permission of Wiles. The trial took place before a jury, and it returned a verdict in favor of plaintiff and against the defendant Rosati for $2500, but found in favor of the defendant Wiles. Plaintiff moved for judgment against Wiles notwithstanding the verdict, and the motion was denied. Thereafter she moved for a new trial as to Wiles, and the motion was granted. Two appeals were taken. One was by plaintiff from the order denying her motion for judgment against Wiles notwithstanding the verdict; but on motion of Wiles the appeal was dismissed upon the ground that it had not been taken within the time allowed by statute. Leplat v. Wiles, 60 Cal.App.2d 83, 140 P.2d 43. The other appeal is the one now under consideration. It was taken by the defendant Wiles from the order granting a new trial as to him. The order specified insufficiency of the evidence as the ground therefor.

[1] The complaint set forth two causes of action, but the record shows that to all intents and purposes the second has been abandoned. It differed from the first only in that it contained the additional allegation that appellant negligently permitted Rosati to drive the car knowing him to be an incompetent driver. The particular issue raised thereby was submitted to the jury in the form of a special verdict, and after the jury retired to deliberate respondent sought to dismiss the second cause of action, but the trial court properly ruled that it could not be dismissed at that stage of the case. Thereafter the jury found adversely to respondent on that particular issue, and she makes no contention on this appeal that the evidence did not justify the jury in so finding.

The first cause of action as against appellant is based on section 402 of the Vehicle Code, St.1937, p. 2353, the pertinent provisions of which declare that "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner * * *"; that the negligence of such person shall be imputed to the owner for all purposes of civil damages, which in case of death or injury to one person in any one accident, shall be limited to $5000.

[2] The car involved was sold by appellant, a dealer, to Rosati, under a conditional sales contract only a few hours prior to the

accident; but up to the happening of the accident appellant had not complied with the requirements of sections 177 and 178 of the Vehicle Code, St.1935, p. 115, relating to the endorsement of the certificate of ownership and the giving of notice of transfer. It is undisputed, therefore, that for all purposes of this litigation he must be deemed to be the owner of the car at the time the accident occurred and as such subject to civil liability under section 402 for the permissive use of the car by another. Secs. 177, 178, Vehicle Code; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Schmidt v. C. I. T. Corp., 14 Cal.App. 2d 92, 57 P.2d 1016; Guillot v. Hagman, 30 Cal.App.2d 582, 86 P.2d 865; Helmuth v. Frame, 46 Cal.App.2d 372, 115 P.2d 846. Furthermore, appellant does not question the negligence of Rosati in operating the car. This leaves for consideration the question of the sufficiency of the evidence relating to the issue of the permissive use or operation of the car.

[3, 4] One of the principal features of a conditional sales contract is that the vendee is entitled to the possession of the car which is the subject of the sale, and to use the same so long as he is not in default in payment (Bunch v. Kin, supra), and here the only restrictive clause in the contract as to the use of the car was that it should not be used "illegally" or "improperly." Therefore under the terms of the contract Rosati as conditional vendee was not only entitled to the possession of the car, but to use the same in the way in which such property is customarily used and for all reasonable purposes. Bunch v. Kin, supra; Pacific States Finance Corp. v. Freitas, 113 Cal.App.Supp. 757, 295 P. 804. But neither at the time of the sales transaction nor at the time of the accident did Rosati hold an operator's license. On the morning he purchased the car there was issued to him by the motor vehicle department a so-called instruction permit, under the terms of which he was entitled to operate a motor vehicle but only "when accompanied by and under the immediate supervision of a licensed operator or chauffeur." As above stated, at the time of the accident he was driving alone, and it is the contention of appellant that the undisputed evidence shows that at no time did he give Rosati permission to drive the car alone in violation of the instruction permit. Section 402 provides, however, as will be noted, that an owner is liable whether the permission be *express or implied,* and while in the present case it would appear that there is an absence of testimony showing express permission to take and drive the car alone on the particular occasion that resulted in the accident, it is apparent that the state of the evidence is such that it cannot be held as a matter of law, contrary to the inference drawn therefrom by the trial court, that when on this particular occasion Rosati took the car and drove it alone he did so without the *implied* permission of appellant.

The following are the essential facts: On the morning that Rosati purchased the car and before the sales transaction was completed he told appellant he did not have an operator's license. Appellant asked him if he could drive, and he said he could, but that he had not driven for about 10 years; that some years back he held an operator's license, but it had expired. Thereupon appellant took Rosati in a car and let him drive around for an hour or more, to observe whether he was capable of handling a car, and appellant then drove him to the motor vehicle license bureau and left him there for the purpose of having him apply for a license. Appellant drove back to his sales room alone, and soon afterwards Rosati returned by street car and told appellant that he had been given a license. It appears from the record that although Rosati spoke broken English, he could read and write the English language; but he testified that he did not read the document that had been issued to him; that no one had informed him of the restriction therein about driving alone, and that he believed he had received an operator's license. He further testified, however, that he handed the document to appellant and that appellant read it. This was denied by appellant, but he stated that in view of what Rosati had previously told him he assumed that the document that had been issued to Rosati was only an instruction permit, whereunder the holder was not entitled to drive alone. Accordingly, upon the consummation of the sales transaction, appellant declined to let Rosati take the car alone. He kept him waiting for about half an hour, at which time a Mr. McLaren dropped in. He was a friend of appellant's, and held an operator's license, and after holding a short conversation with appellant, McLaren, at appellant's request, got in the car with Rosati and they drove away together, McLaren doing the driving. They drove out to the

beach where Rosati took over the operation of the car, drove around for about an hour, and then back down town and into a gasoline service station close to appellant's place of business. At the time they drove in appellant was standing in front of his place of business and saw them. McLaren then left Rosati at the station with the car, walked over to the place where appellant was standing, spoke to appellant and went away. Rosati waited at the service station until he had obtained a supply of gasoline, and then got in the car and drove away alone; but upon reaching Post and Stockton Streets he collided with respondent.

The testimony is conflicting, however, as to what was said and done following the signing of the contract. Rosati testified that at no time was he told by appellant or any one else that he should not drive alone, and that he did not know, nor was he told the reason he was required to wait for half an hour before he was permitted to take the car. Appellant admitted that at no time did he ever tell Rosati that he was not allowed to drive the car alone, but he claimed that upon completion of the contract he told him "that there should be a licensed driver with him, a licensed operator, some friend of his * * *." There is also a conflict in the testimony as to what was said when McLaren arrived at the sales room and before he started out with Rosati. Appellant testified, but somewhat equivocally, that he told McLaren that Rosati had a qualified license that would permit him to drive only when accompanied by a licensed operator and that he should not let him drive alone, and he claimed that when he made that statement to McLaren Rosati was standing nearby. Rosati denied ever having heard the statement, and McLaren's testimony is decidedly contradictory to that given by appellant. He testified that upon his arrival appellant asked him if he was doing anything for an hour or so, and if not would he "mind going out for an hour with this man in the car"; and that before consenting to do so he asked appellant whether the man had an operator's license, and appellant replied: "He has been all fixed up down at the motor vehicle department." Continuing, McLaren stated that he then got in the car with Rosati and they drove away; that after they had started out he asked Rosati if he "got the license and everything" and that Rosati said "yes", but that Rosati did not show him the paper and he assumed, therefore, that it was an operator's license.

[5, 6] Likewise there is a conflict in the testimony as to what happened after McLaren and Rosati drove into the gasoline station. McLaren testified that upon driving into the station he asked Rosati if he wanted him to accompany him home and that Rosati said "no, he thought he could get home by himself"; that at that time appellant was standing on the sidewalk in front of his place of business so he walked over there to speak to appellant, but that appellant was busy and the only thing he said to appellant was that Rosati "was doing all right"; that he, McLaren, then walked away, and had not gone far when he saw Rosati driving away alone. Rosati testified that after they had driven into the gasoline station appellant came over there and spoke to McLaren; that he asked McLaren "how it was going"; that McLaren replied "all right." Appellant denied having gone over to the gasoline station and McLaren testified that he "did not think" appellant had done so. Appellant admitted, however, that he had seen them drive into the station and that he afterwards asked McLaren how Rosati got along with his driving, and that McLaren replied he was doing "all right." Furthermore there is evidence showing that appellant saw Rosati take the car at the service station and drive away alone. Therefore it was clearly within the discretionary power of the trial court, on motion for new trial, to exercise its own judgment in determining whether the acts of Rosati in so doing were with the implied permission of appellant; and since it appears that the testimony is conflicting, and there is substantial evidence to support the trial court's view, it is beyond the authority of this court, on appeal, to interfere with the exercise of such discretionary power. In other words, the situation presented in the trial court was one of fact, wherein the law authorized the trial court to draw its own conclusion from the evidence, despite the inference drawn therefrom by the jury.

[7] Appellant makes the additional point that in any event the trial court was without jurisdiction to entertain or grant the motion for new trial. This point is based upon the contention that the form of affidavit of service by mail of the notice of intention to move for a new trial was insufficient in that it did not set forth the

residence address of the person mailing the notice. So far as the record shows, the sufficiency of the affidavit was in no way questioned in the trial court; moreover, no claim was ever made therein, nor is any made on this appeal, that counsel for appellant did not receive the copy of the notice in the due course of the mail. Quite to the contrary, it appears from the written order signed by the trial judge granting the new trial that the motion therefor came on "regularly for hearing." Assuming, however, that in that state of the record appellant may now for the first time challenge the sufficiency of the affidavit, there is no merit in the point.

[8] Section 1012 of the Code of Civil Procedure provides: "Service by mail may be made *where the person on whom it is to be made resides or has his office at a place where there is a delivery service by mail, or* where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail." (Italics added.) The clause above italicized was added in 1931 by way of legislative amendment. It definitely appears from the affidavit herein, among other things, that all of the attorneys representing all of the parties maintained offices in San Francisco, and their names and office addresses are specifically set forth in the affidavit. The affidavit further shows that at the request of one of the attorneys for respondent the affiant mailed copies of the notice to the attorneys representing Rosati and appellant by enclosing the same in sealed envelopes with proper postage prepaid, addressed to said attorneys, naming them, at their offices in San Francisco; that the envelopes were deposited in the post office in San Francisco, and that there is a regular mail delivery in the city and county of San Francisco. The affidavit was therefore legally sufficient, under the 1931 amendment, to establish a valid service by mail. Marsden v. Collins, 23 Cal. App.2d 148, 72 P.2d 247.

The case of Carlon v. Gray, 10 Cal.App. 2d 658, 52 P.2d 966, cited and relied on by appellant, is not in point. There an attempt was made to serve a notice by mail upon one of the parties to the action. The envelope containing the copy of the notice was deposited in the post office at Sacramento, and was addressed to the party upon whom service was to be made "c/o The Carl Inn, Groveland, California." But there was nothing in the affidavit of mailing from which it appeared that the place to which the envelope was addressed was the residence or the place of business or the post office address of the person to whom the envelope was thus mailed. Obviously, therefore, the affidavit was insufficient proof of service under either clause of section 1012, and such was the basis of the decision in the case. That portion of the opinion rendered therein which is devoted to a review of some of the early cases involving section 1012 as it existed prior to the 1931 amendment, is not pertinent here for the reason that under the section as it then stood there could be no valid constructive service by mail on a person at a known place of residence unless the person serving and the person served resided at different places; consequently, in order to establish proof of valid service by mail under the section as it was thus limited, it was essential that the affidavit of mailing show that fact. But since the enactment of the 1931 amendment, valid service by mail may be made where the person serving and the person served reside or have their offices in the same place, provided there is a delivery service by mail. Therefore, as pointed out in Marsden v. Collins, supra, situations arising under the 1931 amendment are not subject to the rule of those early cases reviewed in Carlon v. Gray, supra.

The remaining question involved relates to the form of judgment that shall be rendered by this court in the disposal of the appeal. Respondent takes the position that the liability of appellant under section 402 was established as a matter of law; hence that the trial court erroneously denied her motion for judgment as against appellant notwithstanding the verdict in his favor; and she contends that under the provision embodied in the last sentence of section 629 of the Code of Civil Procedure she is now entitled to a judgment on this appeal reversing the trial court's order denying her motion, with directions to the trial court to enter judgment on the merits, in her favor and against appellant for the amount of the verdict returned against Rosati.

In contending that the evidence established appellant's liability as a matter of law respondent seeks to invoke the doctrine that where an owner gives another permission to use his car but imposes restrictions on the permittee either as to who shall drive it or how it shall be driven, the

violation of those restrictions by the permittee does not destroy the effect of the permission, and accordingly does not relieve the owner of responsibility under section 402 for the permissive use of the car. In this connection respondent cites and relies particularly on the case of Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, to which may be added the more recent cases of Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, and Hobbs v. Transport Motor Co., 22 Cal.2d 773, 141 P.2d 738. On the other hand appellant, throughout this appeal, in support of his contention that the evidence established as a matter of law that he was not liable under section 402, seeks to invoke the doctrine that an owner is not liable where there has been a violation of restrictions imposed by him on the permittee as to the purpose for or the time within which the car was to be used, citing among other cases Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059; Henrietta v. Evans, supra; Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581. He also cites Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, but apparently there seems to be some doubt as to the soundness of the decision in that case. See Souza v. Corti, supra.

[9-12] It is our conclusion, however, that for two reasons respondent is not entitled to the form of judgment she is here seeking. First, as above shown, the evidence is conflicting on the issue of permissive use. It follows, therefore, that the trial court quite properly denied her motion for judgment notwithstanding the verdict, and availed itself of its discretionary power in granting a new trial. Secondly, in the absence of a valid appeal from the order denying respondent's motion, this court is without legal authority to grant a judgment reversing the order, even though it believed the state of the evidence would so warrant. In other words, the last sentence of section 629 of the Code of Civil Procedure must be construed in the light of the fixed rules governing appeals; and it is well settled that when a particular order is made appealable by express provision of the statute (and this was such an order; see subd. 2, sec. 963, Code Civ. Proc.) a reviewing court may not reverse it for error unless the question of its invalidity is presented by a valid appeal therefrom. Here, as we have said, respondent took an appeal from the order she now seeks to have reversed, but the appeal was dismissed; and that being so, in no event may this court reverse the order and direct the entry of judgment in respondent's favor.

The order granting the motion for new trial as to appellant is affirmed.

PETERS, P. J., and WARD, J., concur.



62 Cal.App.2d 559

GROVES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 14268.

District Court of Appeal, Second District, Division 3, California.

Jan. 26, 1944.

1. Contempt ⇐40

A proceeding in contempt is not a "civil action."

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action".

2. Contempt ⇐61(3)

A proceeding in contempt is not appropriate proceeding for trial of questions of title.

3. Injunction ⇐230(1)

In contempt proceeding charging violation of injunction enjoining defendant from selling automobile polishing compound except through plaintiff during life of contract entered into by parties, trial court did not have jurisdiction to determine conflicts and substantive rights of parties based upon alleged termination of the contract after judgment in the injunction action had been rendered.

4. Injunction ⇐230(2)

An affidavit which alleged only that accused had made sales of automobile polishing compound in forbidden manner "during life of the contract," as stated in judgment entered in prior injunction action, failed to sufficiently allege that acts were committed during life of the contract, so as to authorize conviction of contempt.

5. Contempt ⇐54(4)

If affidavit by which a constructive contempt is charged fails to state all of the facts constituting guilt of the offense, court is without jurisdiction.

6. Contempt ⇐66(7)

The affidavits, evidence and findings in contempt proceedings are to be strictly construed in favor of accused.

7. Contempt ⇐61(6)

There is no statutory requirement for findings in contempt proceedings which are initiated by affidavit.

8. Contempt ⇐66(6)

A conviction for contempt should not be allowed to stand unless it appears from record beyond question that trial court found all the facts to exist which constituted the offense.

Proceeding by Carl P. Groves against Superior Court of the State of California in and for Los Angeles County to review an order of the respondent court which according to its terms found the petitioner "guilty of contempt of the judgments of the court, heretofore made."

Order annulled.

William R. Law, of Los Angeles, for petitioner.

Samuel A. Rosenthal and Bertram S. Harris, both of Los Angeles, for respondent.

SHINN, Justice.

This is a proceeding to review an order of the superior court which according to its terms found petitioner Carl P. Groves "guilty of contempt of the judgments of the court, heretofore made," sentenced him to five days' imprisonment, and suspended execution of the sentence upon certain conditions.

The contempt proceeding was instituted by the filing of an affidavit of Bertram S. Harris, attorney for one Morvay, which set forth at length the history of litigation between Morvay and petitioner arising out of a contract for the manufacture and sale of an automobile polishing compound, and also alleged the commission of acts by petitioner which were claimed to have been in violation of two judgments theretofore rendered by the superior court, only one of which had granted injunctive relief. Petitioner filed an answering affidavit, in which he did not deny commission of the alleged acts but did deny that the injunction was operative at the time. These two affidavits presented the issue to be tried and they also constituted all of the evidence taken at the hearing.

The following statement of facts, including excerpts from the contract which gave rise to the litigation, is culled from the Harris affidavit. On May 24, 1940, petitioner and H. L. Groves, as licensors, entered into an agreement with Morvay, as licensee, by which the latter was licensed, for a term of ten years with an option of ten more, as exclusive distributor in the United States, to sell "Granitize," a product manufactured by the Groves under a secret formula which they owned. The Groves were to manufacture and supply Morvay with such quantities as his business should require and the latter agreed to use his best efforts to introduce, market and promote the sale of the product in the United States. Morvay was to have the exclusive right to the use of the name "Granitize," and the Groves were not to sell to others, for so long as the agreement remained in force and effect; in certain contingencies, including the failure of the Groves for a period of thirty days to manufacture, make up and compound the product and their breach of any of the terms or conditions of the contract, Morvay was to be given the secret formula, whereupon he was to have "the right, license and authority to manufacture, make up and compound 'Granitize' to fully supply licensee's demands, without paying to the licensor any compensation whatsoever for such right, license and authority"; the formula was placed with a depositary to be delivered to Morvay if the Groves "discontinued, abandoned or refused the further manufacture, making up or compounding of 'Granitize'" and in that event the formula was to "become the property of the licensee, his heirs or assigns for the term of this agreement or any extensions thereof, and upon the termination of this agreement or any extensions thereof, said formula is to be taken and retained by licensor, his heirs or assigns." According to the affidavit the Groves violated the terms of the agreement in selling directly to their own customers, whereupon Morvay brought suit and obtained judgment against them for money and other relief, which read in part as follows: "That the defendants H. L. Groves and C. P. Groves and each of them, and anyone

claiming under them or either of them, or acting by, through or for either of them, their associates, agents, servants and employees be and they are hereby permanently enjoined and restrained from in any manner or by any means, directly or indirectly through their agents, servants and employees, sell or distribute the product known as 'Granitize', receiving orders for the sale from any solicited business either directly or indirectly, through their agents, servants and employees, of Granitize, except to or through the plaintiff or with the knowledge and consent of the plaintiff, during the life of the contract dated May 24, 1940, and any renewals thereunder." (This judgment, although dated January 26, 1942, stated that it was signed, filed and entered as of June 4, 1941. In December, 1941, Morvay had execution issued on the judgment for money and at a sale thereunder purchased for $100 "All of the right, title and interest of the defendant, H. L. Groves and C. F. Groves, called the licensor in that certain written agreement made and entered into on the 24th day of May, 1940, with Zoltan Morvay, therein called the licensee for the sale and distribution of 'Granitize' in the United States." The fact of this sale under execution, so far as appears, was not before the court at the time the judgment was signed and filed.) In July, 1942, at another execution sale, Morvay purchased for $25 "A certain secret formula and process for the manufacture of 'Granitize' and more particularly that certain sheet of paper bearing the letter head of Granitize Products Company and setting forth in particular, the formular." In November, 1942, judgment was given in two consolidated actions which had been brought by the Groves, reading in part as follows: "III. That the said Zoltan Morvay, aka Sam Norvay, is entitled to the use of the name 'Granitize' for a period of twenty years and to manufacture the same under and by virtue of a purchase at a sheriff's execution sale of all of the right, title and interest of Harold L. Groves and Carl P. Groves in and to that certain contract dated May 24th, 1940, by and between Harold L. Groves and Carl P. Groves and Zoltan Morvay, aka Sam Norvay. IV. That the said Zoltan Morvay, aka Sam Morvay, is the owner of the secret formula for the manufacture of 'Granitize' by virtue of his purchase at a Sheriff's Execution Sale of said secret formula."

The order here under review found the facts as we have stated them and adjudged as follows: "Now Therefore, It Is Ordered, Adjudged, And Decreed, that the said Carl P. Groves, is Guilty of Contempt of the Judgments of the Court, heretofore made, and is sentenced to five (5) days in the County Jail, but the said Carl P. Groves will not be required to serve said jail sentence provided, he, his agents, servants, and employees refrain from violating the court Judgments, heretofore made, and more particularly the said Carl P. Groves, his agents, servants, and employees refrain from manufacturing and selling either directly or indirectly the product known as 'Granitize' or any other product he, his agents, servants, and employees manufactures or sells or distributes, and provided, further that he refrains from either directly or indirectly soliciting any person or persons to sell 'Granitize' or any other product, in which the formula now owned by the Plaintiff, Zoltan Morvay, is being used for the period of twenty years from May 24, 1940, the date of the original contract between the parties."

Through the imposition of conditions, compliance with which would enable petitioner to escape imprisonment, the order attempted to grant comprehensive injunctive relief. Petitioner was not enjoined in direct terms from committing any of the mentioned acts, but this was effectively accomplished by giving him a choice between agreeing with the court and lodging with the jailer.

By the judgment in the first case petitioner had been enjoined from selling or distributing his product, except through Morvay as his exclusive distributor, "during the life of the contract dated May 24, 1940, and any renewals thereunder." By the contempt order he was restrained not only from selling but also from manufacturing "Granitize" "or any other product he, his agents, servants or employees manufactures, sells or distributes." He was restrained until May 24, 1960, from soliciting the sale of "Granitize" or any other product which used the secret formula. No such relief as this had been granted by either of the mentioned decrees. It is true that by the terms of the second decree Morvay had been declared to have the right to use the name "Granitize" for 20 years after the date of the contract and also the right to manufacture and sell the product by virtue of his purchase of the Groves' rights under the contract at the first execution sale, and he was also declared to

be the owner of the formula by virtue of the second execution sale, but this judgment was purely declaratory. Morvay's rights to use the name "Granitize" or to manufacture or sell the product were not declared to be exclusive, nor was his ownership of the formula declared to entitle him to the exclusive use of it. The contempt order declared, in effect, that these rights were exclusive, and petitioner was ordered to recognize their exclusive nature under penalty of imprisonment. Instead of limiting the trial to a determination of the charge that an injunction had been violated, the court endeavored not only to render a new and different decree in equity but also to compel obedience thereto by prescribing punishment for its violation. And all this was attempted in the contempt proceeding, outside of the issues triable therein, and solely upon evidence furnished by affidavits.

In our state application to the court for the declaration, enforcement or protection of a right or the redress or prevention of a wrong is made by means of a civil action (Code of Civ.Proc. sec. 30); there is but one form of civil action, in which the party complaining is plaintiff and the adverse party is defendant (Code of Civ. Proc. secs. 307, 308). The issues made by the pleadings must be tried by the court, or jury, or may be referred to a referee (Code of Civ.Proc. sec. 592).

[1, 2] In a proceeding in contempt where violation of an injunction is charged, the court has only to determine whether the accused has committed the acts charged and to impose punishment if guilt is found. A proceeding in contempt is not a civil action. Hotaling v. Superior Court, 1923, 191 Cal. 501, 504, 217 P. 73, 29 A.L.R. 127; Gale v. Tuolumne County Water Co., 1914, 169 Cal. 46, 51, 145 P. 532. It is not an appropriate proceeding for the trial of questions of title. Batchelder v. Moore, 1871, 42 Cal. 412; Larrabee v. Selby, 1877, 52 Cal. 506; Ex parte Hollis, 1881, 59 Cal. 405, 413; Ex parte Casey, 1886, 71 Cal. 269, 12 P. 118; In re Ochoa, 1942, 50 Cal.App.2d 457, 123 P.2d 106.

[3] It is true that the contempt proceeding would have required a determination as to the life of the contract, and of the injunction, but as we shall point out that determination would have required the trial of new issues of fact. Petitioner was asserting rights which he claimed had accrued since the trial of the first action by reason of the alleged termination of the contract through the actions of the parties. His good faith in asserting these claims was not questioned and the claims appear to have been substantial. Under these circumstances the court should not have undertaken to determine conflicts as to the substantive rights of the parties based not upon matters that had been adjudicated, but upon the alleged termination of the contract after judgment had been rendered in the first action. Larrabee v. Selby, 1877, 52 Cal. 506; Havemeyer v. Superior Court, 1890, 87 Cal. 267, 270, 25 P. 433, 10 L.R.A. 650; McKinley Bros. v. McCauley, 1932, 215 Cal. 229, 235, 9 P.2d 298; State Board of Equalization v. Superior Court, 1942, 20 Cal.2d 467, 477, 127 P.2d 4, and cases cited supra.

Since petitioner did not deny having made the sales, the sole issue was whether they had been made "during the life of the contract." If the contract had expired before the sales in question were made, which was during and shortly prior to July, 1943, the injunction was no longer in effect. The first question, then, would be what was meant by the phrase "during the life of the contract" as used in the first judgment. It appears to us that if it had been the intention to extend the injunction over the longest possible life of the agreement, namely, 20 years, the judgment would have so provided, and the phrase "during the life of the contract" would not have been used at all. A contract is alive so long as it remains in force and effect or, in other words, until it has been terminated either according to its own stipulations for termination or through the acts of the parties evidencing a cancellation, rescission or abandonment. The sense in which the phrase was used could have been determined with greater assurance by the court if the pleadings and the findings in the first case had been placed in evidence in the contempt proceeding. They would have disclosed the facts that were in issue and how they had been decided by the court. A judgment that is not clear and explicit on its face frequently becomes clear when it is considered with the pleadings, the findings and the contentions of the parties. However, the court, in undertaking to decide whether the injunction had been violated in July, 1943, would have found it necessary to place some construction upon the questioned phrase in the decree which

limited the life of the injunction. It is clear that the purpose of the injunction suit, and of the decree, was to compel further performance on the part of the Groves, for the pressure of the decree was to force them to sell their product through Morvay. While they continued to do so they would be paid the prices stipulated in the contract. Morvay was seeking to protect his right as sole distributor. At the time the case was tried, so far as shown, he had not taken over the formula and was not claiming in that case the right to manufacture his own product without paying the Groves anything for the privilege. A reasonable construction of the decree upon the facts in evidence would have been that the phrase "during the life of the contract" meant while the Groves were manufacturing the product and selling it exclusively through Morvay in accordance with the agreement. This is true because the agreement gave Morvay the exclusive right to distribute the product only while it was being manufactured by the Groves. When he took over the formula he had the right to manufacture sufficient to meet the demands of his trade and he was to pay the Groves nothing for the privilege, but the agreement did not provide that his right to manufacture and sell under those circumstances would be exclusive. It is not to be supposed that the court intended to give him the exclusive right except upon the terms stated in the agreement, namely, so long as the main purpose of the contract was being accomplished through the manufacture of the product by the Groves and its distribution by Morvay. Under this construction of the first decree it would have been necessary for the court to determine whether the contract had been terminated by the acts of the parties before petitioner made the sales in question. Prior to that time, and after the trial of the first action, the execution sales had taken place and Morvay had asserted and established his rights as declared by the second judgment. Whether the court gave the proper effect to these execution sales is of no consequence, but it is important to consider the situation and actions of the parties in connection with that trial. It is quite apparent that neither party was rendering to or demanding from the other further performance under the agreement. Morvay was claiming that the Groves had been eliminated from the contract altogether and that he alone owned the formula, and these contentions were upheld by the court. It would appear from the judgment (the pleadings and findings are not in the record) that he was not claiming rights under the contract but independently of it, and the effect of the decree was that he was no longer required to purchase the product from the Groves or to pay anything for the privilege of himself manufacturing, or to otherwise render further performance.

The question whether the contract had been terminated was placed in issue by petitioner's affidavit but it was not one that could be tried in the contempt proceeding. If Morvay was dissatisfied with the failure of the court in the second case to declare his rights to be exclusive, he should have appealed from the judgment or instituted a civil action, if the second judgment left anything open as to the nature of his rights. Instead of doing that, he instituted contempt proceedings in the first action and, as we have seen, obtained an attempted adjudication which gave him rights far more extensive then those conferred by the former judgments. The court in the contempt proceeding, in order to reach its conclusion, had to determine (1) that Morvay had an exclusive right to manufacture and sell, although the second judgment, while declaring his rights, failed to make them exclusive; (2) that notwithstanding cessation of performance of the contract by the parties and the claims asserted by Morvay under the execution sales, there had been no abandonment or termination of the agreement through the action of the parties; (3) that the second judgment did not, in practical effect, supersede the first one because the rights declared to exist under the execution sales were inconsistent with rights claimed under the contract as established by the first judgment, and (4) that under the agreement, when Morvay took the formula and did his own manufacturing he had the exclusive right to manufacture and sell. (We have seen that there was no such provision in the agreement.) If these matters, which had not been previously adjudicated, had been submitted to the court for decision by means of a civil action, the equity powers of the court could have been exercised only after an orderly trial of the new issues. The question here is not whether the court decided any or all of them correctly; they should not have been decided at all. For the foregoing reasons the relief attempted to be granted by the order was clearly be-

yond the jurisdiction of the court in the contempt proceeding.

[4] Another reason why the order must be annulled is that the affidavit upon which the order to show cause was based was insufficient. In an attempt to allege that petitioner had made sales in a forbidden manner "during the life of the contract," as stated in the first judgment, the affidavit stated as follows: "That the contract dated May 24, 1940, annexed hereto and made a part hereof as Exhibit 'A' is still in full force and effect as shown in this Affidavit by the Bill of Sale being Exhibit 'C' and made a part hereof and as set forth in Paragraph III, Page 2 of Exhibit 'E' being a part of this affidavit." The Exhibit "C" referred to is the sheriff's certificate purporting to sell to Morvay the Groves' rights under the contract; "paragraph III, page 2, of Exhibit 'E'" is the paragraph III which we have quoted from the second judgment, which declares Morvay's rights under that execution sale. The conclusion stated in the affidavit that the contract was still in full force and effect, qualified by references which strongly indicated that it was no longer in force or effect, coupled with many other statements of the affidavit which indicated that the parties had long since ceased to render performance under the contract, was wholly insufficient as an allegation that the contract was still alive.

[5] If the affidavit by which a constructive contempt is charged fails to state all of the facts constituting guilt of the offense, the court is without jurisdiction in the proceeding. Frowley v. Superior Court, 1910, 158 Cal. 220, 110 P. 817; Otis v. Superior Court, 1905, 148 Cal. 129, 82 P. 853; Wilde v. Superior Court, 1942, 53 Cal.App.2d 168, 177, 127 P.2d 560; and cases listed in 5 Cal.Jur., p. 939.

[6] The affidavit, the evidence and the findings are to be strictly construed in favor of the accused. The presumption in favor of the regularity of the proceedings and the order or judgment does not apply in contempt matters. Batchelder v. Moore, supra, 42 Cal. 412, 414; Frowley v. Superior Court, supra, and cases cited above. The court was therefore without jurisdiction to convict petitioner of contempt because of the failure of the affidavit to sufficiently allege that the acts were committed during the life of the contract.

[7] The court made lengthy findings of fact, incorporating in the order the substance of the Harris affidavit, including the excerpts from the two judgments which we have heretofore quoted, but made no finding to the effect that the contract was still alive or in force and effect. There is no statutory requirement for findings in contempt proceedings which are initiated by affidavit. In re Selowsky, 1918, 38 Cal. App. 569, 576, 177 P. 301. It is necessary that the order recite the facts of a contempt committed in the immediate view and presence of the court (Code of Civ. Proc. sec. 1211; and cases listed in 5 Cal. Jur., p. 938), and it is the practice to make findings in cases of constructive contempt. However, the failure of the court to find that the contract was still in force and effect, or "alive," which mean the same thing, is quite significant, and leaves us in doubt whether the court understood that to be a material fact.

[8] We do not think that any conviction of contempt should be allowed to stand unless it appears from the record beyond question that the trial court found all the facts to exist which constituted the offense. Merritt v. Superior Court, 1928, 93 Cal.App. 177, 269 P. 547; In re Meyer, 1933, 131 Cal.App. 41, 45, 20 P.2d 732; In re Cardella, 1941, 47 Cal.App.2d 329, 117 P.2d 908. We cannot say that the court would not have been justified upon the evidence before it in holding that the contract was no longer in force or effect, nor can we say that the court, even inferentially, found the contract to be still in force and effect. The order imposed a restraint upon petitioner for 20 years after May 24, 1940, and not "during the life of the contract," which leads us to believe that the court drew no distinction between the two terms. However, the invalidity of the order does not rest upon this omission alone, for if the court had made a finding that the contract was still alive, it would not have remedied the failure of the affidavit to allege that fact. See cases heretofore cited. The merits of the conflicting claims of the parties are not before us in this proceeding and we are deciding only that the court was without jurisdiction to make the order under review.

The order is annulled.

DESMOND, P. J., and SHAW, Justice pro tem.

62 Cal.App.2d 781

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 12605.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1944.

1. Courts ⇐486

Under statute, the municipal court has the mandatory duty to transfer cases improperly in that court to a superior court whenever it appears either from the pleadings or at the trial that the cause was not within the municipal court's jurisdiction. Code Civ.Proc. § 396.

2. Courts ⇐188(2)

Where complaint of Employment Stabilization Commission was framed on theory that defendants were employers and had not paid the tax for which recovery was sought and the amount sued for was within the monetary jurisdiction of the municipal court, the complaint did not disclose that "legality of any tax" was involved and so far as the complaint was concerned the action was within the jurisdiction of the municipal court. Code Civ. Proc. § 89.

See Words and Phrases, Permanent Edition, for all other definitions of "Legality of Any Tax".

3. Courts ⇐188(2)

The "legality of any tax" is involved within statute depriving a municipal court of jurisdiction in a case involving legality of any tax, where taxpayer contends that the tax is illegally assessed or levied against him. Code Civ.Proc. § 89.

4. Courts ⇐188(2)

The purpose of statute depriving municipal courts of jurisdiction over controversies involving legality of any tax and constitutional provision giving Supreme Court appellate jurisdiction over such controversies was to secure decisions in such controversies which would be binding authority. Code Civ.Proc. § 89; Const. art. 6, § 4.

5. Constitutional law ⇐12
Statutes ⇐174

The Constitution or a statute should receive a practical rather than a technical construction.

6. Courts ⇐92

Where two independent reasons are given for a decision, neither one is to be considered mere "dictum", but the ruling on both grounds is the judgment of the court, and each is of equal validity.

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

7. Courts ⇐188(2)

Where complaint of Employment Stabilization Commission was framed on theory that defendants were employers and had not paid the tax for which recovery was sought, and answer directly denied that defendants were employers within the taxing statute and averred that alleged employees were in fact independent contractors, "legality of any tax" was in issue and under jurisdictional statute municipal court was without jurisdiction to try the controversy. Code Civ.Proc. § 89.

8. Mandamus ⇐44
Prohibition ⇐10(2)

Where municipal court had not and superior court had jurisdiction to try action pending before municipal court, a peremptory writ of prohibition would issue to prevent municipal court from continuing to exercise jurisdiction and a peremptory writ of mandamus would issue to compel that court to transfer the cause to the superior court. Code Civ.Proc. § 396.

Petition by the California Employment Stabilization Commission, successor to California Employment Commission, formerly known as Unemployment Reserves Commission, against the Municipal Court of the City and County of San Francisco, State of California, and the Honorable Judge Herbert C. Kaufman, as judge thereof, for a writ of prohibition to restrain further proceeding in the Municipal Court of the City and County of San Francisco, State of California, in an action by the California Employment Stabilization Commission against one Waters and another, copartners. An alternative writ of prohibi-

tion and an alternative writ of mandamus were issued. On demurrer to the petition.

Peremptory writs of prohibition and mandamus issued.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen. (Forrest M. Hill, of Sacramento, and Charles P. Scully, of San Francisco, of counsel), for petitioner.

William E. Kidd and S. L. Clark, both of San Francisco, for respondent Waters & Ross.

PETERS, Presiding Justice.

Petitioner, the California Employment Stabilization Commission, brought an action in the municipal court of the City and County of San Francisco to recover unemployment insurance taxes in the sum of $251.27 alleged to be due from Waters and Ross, copartners. Defendants filed an answer in which they denied that they "have been employers within the meaning of the Act mentioned, at the time mentioned, or at any other time"; denied that they "ever have been or are now subject to the said statute"; and denied "that any employments with which these defendants were concerned were subject to the said Act." As a separate defense, defendants alleged that the payments made by them, and referred to in the complaint, were made to certain persons as independent contractors and not as employees of defendant. Thus, the controversy, as disclosed by the pleadings, is over whether certain persons, to whom Waters and Ross admittedly made payments, were employees subject to the taxing act, or were independent contractors not subject to the act.

After the filing of the answer the petitioner moved the municipal court to transfer the action to the superior court on the grounds that it involved the legality of a tax, and that the superior court has exclusive jurisdiction over such a controversy. The motion was denied and the cause set for trial. Petitioner thereupon petitioned this court for a writ of prohibition to restrain further proceedings in the municipal court. This court issued an alternative writ of prohibition and also, in order to grant full relief, an alternative writ of mandamus to compel, if the facts should warrant such relief, the transfer of the cause to the proper court.

The technical respondents and the real parties in interest have filed a demurrer to the petition unsupported by points and authorities, and have filed no other opposition to the issuance of the writs.

[1] Section 89 of the Code of Civil Procedure denies to the municipal court and confers upon the superior court exclusive jurisdiction over cases involving "the legality of any tax, impost, assessment, toll or municipal fine." Under the provisions of § 396 of the Code of Civil Procedure it is made the mandatory duty of the municipal court to transfer cases improperly in that court to the superior court whenever it shall appear—either from the pleadings or at the trial—that the cause is not within the jurisdiction of the municipal court.

[2] The complaint here involved was framed on the theory that the defendants named were employers within the meaning of the act and had not paid the tax imposed by the statute. The complaint, therefore, did not disclose that "the legality of any tax" was involved, and since the amount sued for was within the monetary jurisdiction of the municipal court, so far as the complaint is concerned, the action was within the jurisdiction of the municipal court. But the answer directly denies that Waters and Ross are employers within the meaning of the taxing statute, and avers that the alleged employees are in fact independent contractors.

[3-5] That such a controversy involves "the legality of any tax," as those terms are used in § 89 of the Code of Civil Procedure is no longer open to question. The precise question as to whether a controversy over the validity of a tax levy, where the employer denies that he is subject to the very tax statute here under discussion, involves "the legality of any tax" within the meaning of § 89 was recently passed upon by this court in the case of Unemployment Reserves Comm. v. St. Francis Homes Ass'n, 58 Cal.App.2d 271, 137 P.2d 64. In that case, as in the instant one, the defendants, by answer, denied that they were employers within the meaning of the act. It was urged that the phrase "legality of any tax" as used in § 89 of the Code of Civil Procedure had no application to controversies over the validity of a tax assessment where the validity of the taxing statute was not challenged. The majority of this court held that the phrase in question applied to controversies involving the validity of the tax assessment. The discussion is so directly applicable to the pre-

sent controversy that we quote therefrom at some length. At page 280 of 58 Cal. App.2d, at page 69 of 137 P.2d, it is stated:

"The question thus presented is whether such a controversy involves the 'legality of any tax' as those words are used in sec. 89 of the Code of Civil Procedure denying jurisdiction over such a controversy to the municipal court. The attorney general argues that the phrase applies only to cases involving the 'legality' of the taxing statute, and does not apply to cases involving the validity of the levy of the tax as applied to a particular taxpayer—that is, does not apply to a case where the question is whether a particular taxpayer, or a particular tax, comes within the taxing statute.

"To reach the construction contended for by the attorney general, it is necessary to read into the phrase 'legality of any tax' the word 'statute', so that the phrase would read 'legality of any tax statute.' The phrase under consideration is 'the legality of any tax'; not 'the legality of any tax statute.' The 'legality' of a 'tax' is involved when the taxpayer contends that the tax is illegally assessed or levied against him. It is the essence of the contention of the taxpayer in such a situation that the tax is illegal. To say that such a case does not involve the 'legality' of a 'tax,' is to fail to give effect to the language used in the statute.

"Practical considerations lead to the same conclusion. The provision was inserted in the Municipal Court Act for the same reason that the Supreme Court is given, by art. VI, sec. 4, of the Constitution, appellate jurisdiction of such cases. The intent was that municipal courts should not decide such cases because there would then be no appeal to the higher appellate courts. Most tax cases are test cases. Few involve the validity of the statute. Most tax cases involve the interpretation of the taxing statute and the legality of a levy against a particular taxpayer. It is in the public interest that the Supreme Court should decide such cases in order that such questions can be finally determined for the entire state. If it should be held that municipal courts have jurisdiction of such cases with appeal to the appellate department of the superior court there would be no way of securing a decision that would be binding authority in the state. On close questions there would always be the possibility of conflicting decisions with consequent confusion in the enforcement of tax statutes. It was undoubtedly for these reasons that the Legislature saw fit to deny jurisdiction of such cases to municipal courts. The provisions of the Constitution, or of a statute, should receive a practical, rather than a technical, construction (Reuter v. Board of Supervisors, 220 Cal. 314, 30 P.2d 417); one leading to a wise policy rather than of 'mischief or absurdity.' (Bakkenson v. Superior Court, 197 Cal. 504, 510, 241 P. 874; see, also McMillan v. Siemon, 36 Cal.App. 2d 721, 98 P.2d 790.)

"As was said in City of Madera v. Black, supra, 181 Cal. [306], page 311, 184 P. [397], in referring to the very phrase in question: 'The general purpose of that provision [imposing a tax or impost] obviously is to give to the sovereign power of the state, whether exercised generally or locally, the protection of having the legality of any exaction of money for public uses or needs cognizable in the first instance in the superior courts alone. In view of this purpose, it is apparent that the words used should be applied in their broadest sense with respect to moneys raised for public purposes or needs. The conclusion necessarily follows that the particular charge here involved comes within the constitutional provision and that any case in which the legality of such a charge is involved is within the exclusive original jurisdiction of the superior court. Upon the filing of the answer it fully appeared that the legality of the charge was involved in the action. The recorder should thereupon have certified the papers and transferred the cause to the superior court.' The phrase appears in the constitutions and statutes of several of the states. There are a few states that have followed the lead of Arizona (State v. Downen, 17 Ariz. 365, 152 P. 857; Fee v. Arizona State Tax Commission, 55 Ariz. 67, 98 P.2d 467) and hold that the phrase 'legality of any tax' limits jurisdiction to cases involving the legality of the taxing statute, and does not extend jurisdiction to cases involving the legality of the levy or assessment. Other states have followed the well reasoned cases in Louisiana (State ex rel. Grosjean v. Standard Oil Co. of La., 182 La. 577, 162 So. 185; State v. Whitehead Motor Co., 179 La. 710, 154 So. 912; State v. Armbruster, 174 La. 41, 139 So. 753; State v. Rosenstream, 52 La.Ann. 2126, 28 So. 294), and hold that while the phrase in question does not extend jurisdiction over

cases involving merely the computation of the tax, it does extend jurisdiction over cases involving the validity of the levy and the interpretation of the taxing statute. See, generally, Unemployment Compensation Commission v. Harvey, 179 Va. 202, 18 S.E.2d 390; City of Independence v. Hindenach, 144 Kan. 414, 61 P.2d 124, 107 A.L.R. 645; Bank [of Bramwell] v. County Court, 36 W.Va. 341, 15 S.E. 78. For reasons already stated, we believe that, if the language involved be given its ordinary meaning, there can be no doubt but that cases involving the legality of a particular levy fall within the phrase.

"From the foregoing it follows that the municipal court had no jurisdiction to try the issue presented. Exclusive trial jurisdiction of the controversy rests in the superior court."

[6] At the oral argument counsel for Waters and Ross, while not denying that the above reasoning, if sound, compels the conclusion that the superior court has exclusive jurisdiction over the controversy in question, contended that the above reasoning was not sound, and that what was said in the St. Francis Homes Association case, supra, was merely dicta, and should not be followed. It is our opinion that the above holding was not dicta, but constituted an alternative ground of the decision. "It is well settled that, where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity." Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 650, 20 P.2d 940, 942; see, also, People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; East Bay Municipal Utility Dist. v. Kieffer, 99 Cal.App. 240, 278 P. 476, 279 P. 178; Union Pac. Ry. Co. v. Mason City & Ft. D. R. Co., 199 U.S. 160, 26 S.Ct. 19, 50 L.Ed. 134; 7 Cal.Jur. 641, § 45.

However, even if it be conceded that the holding in the St. Francis Homes Association case, supra, was dicta, we are convinced that, treating the problem involved as a new problem, such holding was correct. We therefore adopt the portions of the opinion in the St. Francis Homes Association case above quoted as the opinion of the court in the instant case.

[7, 8] It follows that the municipal court has no jurisdiction to try the controversy here involved, and for that reason a peremptory writ of prohibition should issue to prevent that court from continuing to exercise jurisdiction over the controversy. A peremptory writ of mandamus should also issue to compel the municipal court to transfer the cause to the superior court pursuant to the mandatory provisions of § 396 of the Code of Civil Procedure.

It is so ordered.

WARD, J., and DOOLING, J., pro tem., concur.



62 Cal.App.2d 770

INTEGRAL LAND CORPORATION v. ANDERSON et al.

Civ. 12420.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1944.

1. Appeal and error ⇐134(1)

Under statute relating to summary judgments, only a judgment entered in the judgment book kept by the clerk of the superior court is appealable. Code Civ.Proc. §§ 437c, 668.

2. Appeal and error ⇐134(1)

Where order granted defendants' motion for summary judgment but no judgment was entered in judgment book, order was not appealable. Code Civ.Proc. §§ 437c, 581 to 581b, 583, 668.

3. Appeal and error ⇐134(1)

Where order granting defendants' motion to dismiss complaint, if made under section 408 relating to penalties on foreign corporations failing to comply with requirements for doing business in California, did not fall within any of special exceptions of section 581, and no judgment on the order had been entered in the judgment book, order was not appealable. Civ.Code, § 408; Code Civ.Proc. § 581.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Integral Land Corporation against George R. Anderson and others. From an adverse order, plaintiff appeals and moves to dismiss the appeal without prejudice and defendants move to dismiss the appeal.

Appeal dismissed without prejudice.

Landels & Weigel, of San Francisco (Sidney L. Weinstock, of San Francisco, of counsel), for appellant.

Bryce Swartfager, of Santa Rosa, for respondents.

DOOLING, Justice pro tem.

Two motions to dismiss this appeal were presented together, one by appellant to dismiss its appeal without prejudice on the ground that no appealable order or judgment has been entered in the trial court and the other by respondents for the failure of appellant to file its opening brief within the time required by the rules. Since we are satisfied that the ground of appellant's motion is sound, respondents' motion need not be further considered.

After the cause was at issue defendants moved the trial court, as recited in their notice of motion, "for an Order dismissing the complaint of plaintiff and that said defendants have judgment accordingly and for costs." The notice stated as grounds of the motion "that said action has no merit" for a number of reasons specified, and further recited that "Said motion will be made under the provisions of section 437c of the Code of Civil Procedure and as otherwise provided by law."

Section 437c, Code of Civil Procedure, provides in certain enumerated classes of cases that "if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party * * * the answer may be stricken out or the complaint may be dismissed and judgment may be entered * * *. A judgment so entered is an appealable judgment as in other cases." This is the so-called summary judgment procedure.

The transcript shows an order signed by the trial judge and filed with the clerk reading: "The motion to dismiss heretofore argued and submitted is granted."

Section 437c, Code of Civil Procedure, above quoted, contemplates two steps to be taken by the trial court in granting a defendant's motion for summary judgment: 1, "The complaint may be dismissed" and 2, "judgment may be entered."

[1] Entry of judgment is made by entering the judgment in the "judgment book" kept by the clerk of the superior court. Sec. 668, Code of Civil Procedure. It is conceded that no judgment has been entered in the judgment book in the manner provided in that section and only "a judgment so entered" is made appealable by section 437c. This has been expressly held in Bank of America, etc., v. Oil Well S. Co., 12 Cal.App.2d 265, 271, 55 P.2d 885, and Gardenswartz v. Equitable, etc., Soc., 23 Cal.App.2d Supp. 745, 754, 68 P.2d 322; and follows necessarily from the clear language of section 437c.

[2] Respondents suggested on the oral argument and analogy to orders of dismissal under sections 581, 581a, 581b and 583 Code of Civil Procedure, which orders have been held to be final judgments and hence appealable. Southern Pacific R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526. Those sections are not analogous to section 437c, because they do not, as does section 437c, provide for the entry of a formal judgment nor provide as does section 437c that "a judgment so entered is an appealable judgment."

[3] Respondents also argue that the order may be considered as having been made under section 408, Civil Code, since a ground of respondents' motion to dismiss in the trial court was that the original plaintiff was a foreign corporation doing business in this state without complying with the requirements of our law therefor. Section 408, Civil Code, provides no method for its enforcement and if it be conceded that a motion to dismiss is a proper means of enforcing it, a matter which seems open to some doubt (Maryland C. Co. v. Superior Court, 91 Cal.App. 356, 360, 267 P. 169), the dismissal, since it does not fall within any of the special exceptions provided for in section 581, Code of Civil Procedure, would have to be by judgment regularly entered. Ross v. O'Brien, 1 Cal.App.2d 496, 499, 36 P.2d 1108; Egan v. McCray, 220 Cal. 546, 31 P.2d 1041.

The appeal is dismissed without prejudice on the ground that the order appealed from it not an appealable order.

PETERS, P. J., and WARD, J., concur.

PEOPLE v. WILLIAMS.*

Cr. 3721.

District Court of Appeal, Second District, Division 3, California.

Feb. 1, 1944.

Hearing Granted March 2, 1944.

1. Criminal law ⇐982

The word "sentence", as used in statute relating to suspension of sentence, is equivalent to "judgment", and hence the provision authorizes a suspension of pronouncement of judgment. Pen.Code, § 1203.1.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Sentence".

2. Criminal law ⇐977(3)

Where suspension of pronouncement of judgment is made under section 1203.1, the limitations of time within which court must pronounce judgment as provided in section 1191 has no further application. Pen.Code, §§ 1191, 1203.1.

3. Criminal law ⇐982

Under statute, the power of court to revoke probation previously granted is limited to a time within period of probation. Pen.Code, §§ 1203.1 to 1203.3.

4. Criminal law ⇐982

The word "upon", as used in statute providing that upon revocation of probation the court may, if sentence has been suspended, pronounce judgment after such suspension, means "after", but does not carry with it the idea of immediate action. Pen.Code, § 1203.2.

"Upon" may mean before, after or simultaneously with, according to its context and the purpose of the provision in which it is used.

See Words and Phrases, Permanent Edition, for all other definitions of "After" and "Upon".

5. Statutes ⇐227

The word "shall" in statutory provisions is usually mandatory.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

6. Criminal law ⇐982

The statute providing that, if court has not seen fit to revoke order of probation and impose sentence or pronounce judgment, defendant shall at end of probation or any extension thereof be discharged, is mandatory, and puts a limit on the time during which action may be kept alive and a judgment may be rendered therein. Pen. Code, § 1203.3.

7. Criminal law ⇐982

Where original order revoking probation was made before probationary period had expired, but judgment was not pronounced until thereafter, the judgment was beyond jurisdiction of the court. Pen. Code, §§ 1203.1 to 1203.3.

8. Criminal law ⇐977(3)

The statute fixing time within which court must pronounce judgment provides for a mere matter of procedure not going to jurisdiction of the court, and hence a delay beyond the time fixed will not result in a reversal unless a miscarriage of justice appears. Pen.Code, § 1191.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lester Williams was convicted of petty theft committed after a prior conviction of petty theft and service of a term of imprisonment therefor, and he appeals.

Reversed with direction to discharge the defendant from custody.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

The defendant appeals from a judgment which was entered against him under unusual circumstances. By an information filed April 13, 1937, he was charged in two counts with separate offenses of petty theft committed after a prior conviction of petty theft and service of a term of imprisonment therefor. He pleaded guilty to Count I of the information on April 16, 1937, and applied for probation. On April 30, 1937, the court made an order "that proceedings as to Count I of the information be suspended and defendant is granted probation for a period of two years" on conditions not important here. Count II of the information was at the same time dismissed. Under date of June 14, 1938, the

* Subsequent opinion 151 P.2d 244.

minutes of the trial court show the following proceedings against defendant in this case: "In the following cases violation of probation is filed. Bench warrant is issued. Probation is revoked and matters are placed off calendar." The next event affecting defendant is chronicled in the minutes of May 3, 1943, which show defendant with his counsel present and "hearing on violation of probation" continued to May 10, 1943. On the last mentioned date the minutes show that, defendant and his counsel being present, "the former order revoking probation is affirmed, and no legal cause appearing why judgment should not be pronounced, the Court pronounces judgment and sentence as follows * * *." The judgment thus pronounced is the subject of this appeal and since no objection is made to its form or substance we do not copy it.

Section 666 of the Penal Code provided, at the time of the offense charged and until its amendment in 1939, that the punishment for that offense was imprisonment in the state prison not exceeding five years. The judgment appealed from here was pronounced more than five years after the order granting probation and defendant's point on appeal is that after the expiration of that time the court had no jurisdiction to pronounce judgment against him.

[1, 2] Section 1191 of the Penal Code, as it read at the date of the order granting probation, provided that the court must pronounce judgment not more than five days after the verdict or plea of guilty, but might extend this time, where probation was being considered, for twenty days, and on defendant's request for not more than 90 days additional. Here the order of probation was made 14 days after the plea, but no judgment was then pronounced. Instead, the court ordered that "proceedings" —which included the pronouncing of judgment—be suspended for two years. This was in accordance with section 1203.1 of the Penal Code which provided that the court "in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, and upon such terms and conditions as it shall determine." The exception set forth does not affect this case. The word "sentence" in this provision is equivalent to "judgment" (People v. Lopez, (1941) 43 Cal.App.2d Supp. 854, 864, 110 P.2d 140) and the provision therefore authorizes a suspension of the pronouncement of judgment. Where such a suspension is made under section 1203.1 the limitations of section 1191 have no further application to the case, but the power of the court to pronounce judgment is governed by sections 1203.2 and 1203.3 of the Penal Code.

[3] Section 1203.2 provides, in part, as follows: "At any time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, re-arrest any person so placed on probation under the care of a probation officer, and bring him before the court, or the court may in its discretion issue a warrant for the re-arrest of any such person and may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life. Upon such revocation and termination the court may, if the sentence has been suspended, pronounce judgment after said suspension of the sentence for any time within the longest period for which the defendant might have been sentenced * * *." The power of the court to revoke probation is limited by this section and also by section 1203.3 of the Penal Code to a time within the period of probation. Here the original order revoking probation was made within this time limit, but judgment was not pronounced until after the probationary period had expired.

[4-7] The provision of section 1203.2 that "Upon such revocation and termination the court may, if the sentence has been suspended, pronounce judgment after said suspension * * *" fixes no exact time for pronouncement of judgment and must be construed with other provisions of law on the same subject. "Upon" may mean before, after, or simultaneously with, according to its context and the purpose of the provision in which it is used. (46 C.J. 1096.) Here it undoubtedly means "after," but does not carry with it the idea of immediate action. In section 1203.3, however,

we find a provision which clearly fixes a limit of time after which, in probation cases, judgment cannot be pronounced. That section, after authorizing a revocation, modification or change of a probationary order "during the term of probation," and a termination of probation at any time when "the good conduct and reform" of the probationer warrant it, goes on to provide that "in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections." The provision last quoted is very much like the provision of section 583 of the Code of Civil Procedure that an action not brought to trial within five years "shall be dismissed." Both provisions contain the word "shall," which is usually mandatory (57 C.J. 548). The provision of the Code of Civil Procedure has been uniformly held to be mandatory, depriving the court of jurisdiction to act otherwise than by dismissing the action, in cases to which it applies. (Wells Fargo & Co. v. City & County of San Francisco, (1944) —— Cal.App.2d ——, 144 P.2d 415; Andersen v. Superior Court, (1921) 187 Cal. 95, 97, 200 P. 963; Superior Oil Co. v. Superior Court, (1936) 6 Cal.2d 113, 116, 56 P.2d 950). The provision of section 1203.3 of the Penal Code, here in question, is manifestly intended to effect a similar purpose, that of putting a limit on the time during which an action may be kept alive and a judgment may be rendered therein. It should receive a like construction, and must be regarded as mandatory. It must be noted that the provision of section 1203.3 refers to both the revocation of probation *and* the pronouncement of judgment, requiring both to happen during the term of probation or its extension, in order to prevent the discharge of the defendant. Here no judgment was pronounced during the time thus limited. The judgment pronounced later was therefore beyond the jurisdiction of the court.

[8] The jurisdictional nature of the limitation declared by section 1203.3 prevents the application here of the rule applied to judgments pronounced after the expiration of the time fixed by section 1191, that since that section provides for a mere matter of procedure not going to the jurisdiction of the court, a delay beyond the time fixed will not result in a reversal unless a miscarriage of justice appears. (For the rule under section 1191, see People v. Chan Chaun, (1940) 41 Cal.App.2d 586, 594, 107 P.2d 455.)

The judgment is reversed and the trial court is directed to discharge the defendant from custody.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



62 Cal.App.2d 788

KONNOFF et al. v. FRASER.

No. 12572.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1944.

1. Venue ⇐72

A defendant is entitled to change of venue to county of his residence if no cause of action is stated against codefendants residing in county where complaint is filed. Code Civ.Proc. § 395.

2. Physicians and surgeons ⇐4, 6(1)

A corporation or unlicensed person may not practice, directly or indirectly, certain learned professions such as medicine, dentistry, and the like.

3. Hospitals ⇐8
Venue ⇐72

In action for wrongful death allegedly caused by negligent delay of operation, complaint affirmatively alleging that deceased employed defendant physician to render medical services failed to state a cause of action against corporate owners of hospital, and hence physician was entitled to change of venue from county of principal place of business of owners to county of physician's residence. Code Civ.Proc. § 395.

4. Venue ⇐72

The right to a change of venue depends upon conditions revealed by pleadings existing when party claiming the right first appears. Code Civ.Proc. § 395.

Appeal from Superior Court, San Francisco County; Theresa Meikle, Judge.

Action by Anna Konnoff and others against L. H. Fraser and others for wrongful death of plaintiffs' husband and father allegedly resulting from malpractice. From an order denying his motion for change of venue, the named defendant appeals.

Order reversed with directions to grant motion.

Cooley, Crowley & Supple, of San Francisco, for appellant.

Vincent W. Hallinan and James Martin MacInnis, both of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by defendant L. H. Fraser from an order denying his motion for a change of venue from the City and County of San Francisco to the County of Contra Costa.

Plaintiffs, who are the surviving wife and children of David Konnoff, deceased, sought to recover damages for the death of said deceased which was alleged to have resulted from the malpractice of defendant Fraser. It was alleged in the complaint that defendant Fraser was a physician and surgeon and that "On the 10th day of February 1942, at about the hour of 10:30 a. m., said David Konnoff suffered a rupture of a gastric ulcer of the stomach, and thereupon employed the said L. H. Fraser as a physician, and the services and facilities of the said Richmond Hospital as a hospital, for the treatment and cure of his said condition." It was alleged that the negligence which caused death consisted of the delay in operating when "defendant L. H. Fraser at said time should have operated forthwith upon decedent and closed the aforesaid opening and thereby prevented the further escape of said stomach contents into the abdominal cavity."

[1] It is conceded that the liability, if any, arose in Contra Costa County and that defendant Fraser and defendant Richmond Hospital were residents of that county. The claim of plaintiffs that the action was properly commenced in San Francisco is based upon the fact that two corporations, which were also made defendants, namely Todd-California Shipbuilding Corporation and Industrial Indemnity Exchange (hereinafter called the resident defendants), had their principal places of business in San Francisco. It is the claim of defendant Fraser that the resident defendants were improperly joined as no cause of action was stated against either of them and that therefore his motion for change of venue to Contra Costa County should have been granted. Code of Civil Procedure, section 395. It is settled that a defendant is entitled to a change of venue to the county of his residence if no cause of action is stated against the codefendants residing in the county where the complaint is filed (Donohoe v. Wooster, 163 Cal. 114, 124 P. 730; Sayward v. Houghton, 82 Cal. 628, 23 P. 120; Rowland v. Bruton, 125 Cal.App. 697, 14 P.2d 116), and the question presented here is whether the complaint stated a cause of action against either of the resident defendants.

The complaint alleged that "all of the defendants above named were the owners" of the Richmond Hospital; that "the defendant L. H. Fraser was the servant, agent and employee of the other defendants" that "defendants and each of them carelessly and negligently, and without good or proper cause, delayed the performance of said operation for a period of about 12 hours"; and that "in failing to operate forthwith and to suture the opening caused by the same and prevent the escape of the stomach contents into the abdominal cavity, defendants were guilty of carelessness and negligence and failed to accord to decedent the care and diligence customarily exercised by members of the medical profession practicing their profession at said time in the said County of Contra Costa and of persons operating hospitals in said place."

[2] It thus appears that plaintiffs were seeking to recover for the alleged malpractice of defendant Fraser and were attempting to state a cause of action against the resident defendants under the doctrine of respondeat superior. In support of the claim that no cause of action was stated against the resident defendants, defendant Fraser relies upon the authorities holding generally that neither a corporation nor any unlicensed person may practice, directly or indirectly, certain of the learned professions such as medicine, dentistry and the like (Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d

67; People v. Merchants' Protective Corp., 189 Cal. 531, 209 P. 363; Pacific Employers Ins. Co. v. Carpenter, 10 Cal. App.2d 592, 52 P.2d 992; People v. California Protective Corp., 76 Cal.App. 354, 244 P. 1089), and upon the authorities indicating that the members of said learned professions have the status of independent contractors rather than the status of employees and therefore neither a corporation nor any unlicensed person may be held liable under the doctrine of respondeat superior for the malpractice of the members of such learned professions. Pilger v. City of Paris, 86 Cal.App. 277, 261 P. 328; Ware v. Culp, 24 Cal.App.2d 22, 74 P.2d 283. In reply to these authorities, plaintiffs refer to the Pilger case as an "obsolete case" and they cite and rely upon Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905; Hedlund v. Sutter Medical Service, 51 Cal.App.2d 327, 124 P.2d 878; and Criss v. Angelus Hospital Ass'n, 13 Cal.App.2d 412, 56 P.2d 1274. It is true that some of the language in the opinion, if not the decision, in the Pilger case has been expressly disapproved in certain recent cases upon which plaintiffs rely, but in each of the cited cases, the corporation had contracted with the patient to furnish the professional services and had furnished such professional services through members of the profession employed by the corporation for the purpose of complying with the terms of its contract with the patient. In other words, the contract for professional services had been made by the patient with the corporation rather than with the member of the profession who performed the services and it was that point upon which said decisions turned.

[3] The facts alleged in the complaint in the present case do not bring it within the rule of the cases cited by plaintiffs. There is no allegation in the complaint to show that prior to February 10, 1942, there was any contract with any person or corporation to furnish medical services to the deceased. The affirmative allegation with respect to the contract for the furnishing of the medical services in question is that "On the 10th day of February 1942, at about the hour of 10:30 a. m., said David Konnoff suffered a rupture of a gastric ulcer of the stomach, and thereupon employed the said L. H. Fraser as a physician." This affirmative allegation shows that the deceased employed defendant Fraser, a member of the medical profession, to furnish the medical services in question and we find nothing in the remaining allegations of the complaint sufficient to impose liability upon the resident defendants for the alleged malpractice of defendant Fraser. The discussion in Hedlund v. Sutter Medical Service Co., 51 Cal.App.2d 327, 124 P.2d 878, and in Giusti v. C. H. Weston Co., 165 Or. 525, 108 P.2d 1010, which is cited with approval in the Hedlund case, shows that the facts upon which such liability may be imposed are not alleged in the complaint here. See also note in 29 A.L.R. 742.

[4] Plaintiffs argue, however, that the real question involved is whether a cause of action "can be stated" against the resident defendants rather than whether a cause of action has been stated against said defendants. While it does not appear either from the allegations of the complaint or from the allegations of the affidavit offered by plaintiffs in opposition to the motion for change of venue that a cause of action can be stated against said corporations, it appears settled that upon a motion for change of venue, the right to the change "will be determined by the conditions revealed by the pleadings existing at the time the party claiming the right first appears". 25 Cal.Juris. 907; see also McClung v. Watt, 190 Cal. 155, 159, 211 P. 17; Donohoe v. Wooster, 163 Cal. 114, 124 P. 730; Kallen v. Serretto, 126 Cal. App. 548, 549, 14 P.2d 917; Bartley v. Fraser, 16 Cal.App. 560, 117 P. 683. It was said in Sheeley v. Jones, 192 Cal. 256, at page 257, 219 P. 744: "A pleader is required to frame his complaint in such a way as to make it clear that he is entitled to retain the * * * cause in the county in which the action is commenced." Plaintiffs rely upon their interpretation of certain language found in the decision in McClung v. Watt, 190 Cal. 155, 211 P. 17, but it appears that the court was of the view in that case that despite ambiguity in the allegations of the complaint, such allegations were not so "radically insufficient" as to fail to state a cause of action against the resident defendant. 190 Cal. at page 160, 211 P. 17. As the allegations of the complaint in the present case were wholly insufficient to state a cause of action against either of the resident defendants, we are of the opinion that the motion of defendant Fraser for a change of venue should have been granted.

The order denying the motion for change of venue is reversed with directions to the trial court to grant said motion.

NOURSE, P. J., and STURTEVANT, J., concur.



62 Cal.App.2d 645

PETROLEUM MIDWAY CO. v. ZAHN et al.

ZAHN v. PETROLEUM MIDWAY CO. et al.

Civ. 13995.

District Court of Appeal, Second District, Division 3, California.

Jan. 31, 1944.

Hearing Denied March 30, 1944.

1. Trial ⇐388(1)

Where fact issue was submitted to trial judge for determination and finding on such issue was not waived, entry of judgment without written finding was unauthorized.

2. Stipulations ⇐11

A stipulation may lawfully limit issues to be tried.

3. Stipulations ⇐14(11)

Where parties to action for balance due under contract to purchase oil well property entered stipulation providing, in one paragraph, for court's appointment of appraiser and that judgment should be entered for plaintiff vendor for difference between fair market value "as determined by court upon said appraisal" and sum previously paid on contract, and, in subsequent paragraph, providing that if fair market value was less than amount previously paid, judgment should be that plaintiff take nothing, it was for court to determine market value in either case, though latter paragraph did not specifically so provide.

4. Stipulations ⇐14(11)

In action for balance due under contract to purchase oil well property, stipulation that court should appoint appraiser and enter judgment for plaintiff only for any difference between fair market value as determined by court on the appraisal and amount previously paid by defendants, did not provide for a reference, in absence of provision that appraiser was to hear witnesses and make findings of fact, but appraiser was merely to give his opinion as expert witness, which would not be binding on court. Code Civ.Proc. §§ 638, subd. 2, 643.

5. Evidence ⇐570

The opinion of an expert witness, unless it commends itself to mind of trier of fact, may be rejected by him.

6. Reference ⇐99(4)

A referee's finding on a single question of fact submitted to him is not binding on court. Code Civ.Proc. §§ 638, 643.

7. Stipulations ⇐14(11)

Where, in action for balance due on contract for purchase of oil well property, stipulation of parties, on issue of failure of consideration, that appraiser should be appointed, if construed as providing that court should base its determination as to market value on appraiser's appraisal, would not authorize substitution of appraiser's report as to market value for court's finding thereon as a basis for judgment.

8. Stipulations ⇐19

Where parties stipulated for appointment of appraiser of property purchased and that judgment should be entered for plaintiff only for difference between fair market value as determined by court on the appraisal and amount previously paid by defendants, remarks of trial judge that judgment would be entered in accordance with stipulation, even if construable as disclosing trial judge's understanding that findings were unnecessary to entry of judgment, did not estop either party from insisting that stipulation be understood according to its terms.

9. Appeal and error ⇐1071(1)

The entry of a judgment without findings of fact, where findings are required and not waived, is not an immaterial error in procedure, and such judgment must be reversed.

10. Trial ⇐389

Where an issue of fact is submitted to trial judge for determination and a finding of the issue is waived, a judgment entered without a written finding would be valid and immune from attack.

11. Appeal and error ⇐112

A void order or judgment is appealable.

12. Appeal and error ⇐1071(1)

A judgment entered without written finding was reversed where issue of fact was submitted to trial judge for determination and finding on the issue was not waived, as against claim that appellate court had no jurisdiction to reverse judgment because judgment had not yet been rendered because finding had not been filed.

13. Stipulations ⇐14(11)

Where parties, in action for balance due on contract to purchase oil well properties involving defense of failure of consideration, stipulated that court should appoint appraiser for properties and that court should make order forbidding purchasers' employees to contact appraiser, action of purchasers' employee in conversing with appraiser was violation of stipulation though letter of stipulation was observed by mere making of the order.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by Petroleum Midway Company against Fred E. Zahn and others to recover balance due on purchase price of two producing oil wells, an oil lease, and equipment, in which named defendant filed a cross-complaint. From an adverse judgment, plaintiff and defendant A. M. Kupfer appeal.

Reversed.

Owen E. Kupfer, of Los Angeles, for appellants.

Raphael Dechter, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

[1] Judgment was entered in favor of defendant, Petroleum Production Company, without the filing of findings of fact. As there was an issue of fact submitted to the trial judge for his determination and a finding on the issue was not waived, the entry of a judgment without a written finding was unauthorized.

According to plaintiff's amended complaint, the defendants had agreed to buy from the plaintiff two producing oil wells, with accompanying lease and equipment, for the price of $40,000. Of this sum, to be paid half in cash and half by the transfer of stock, only the sum of $11,000 had been received. At the trial the plaintiff proved its case, against all but one of the defendants, sufficiently to survive the motions for nonsuits, and the defendants were engaged in the examination of one of their number as a witness, when permission was given them to put on some witnesses out of order. These proved to be four in number, and each one was permitted to give his opinion of the value of the oil property in question, apparently on the theory that that value was material to a defense of failure of consideration. Without being too meticulous in the matter, it suffices to say that the value of the property, in the opinions given by these four witnesses, was somewhere near $13,000.

The midday recess was taken, following the testimony of these four expert witnesses, and at its conclusion the trial judge announced that counsel had been working on a stipulation in chambers. It was then read in open court: "It is stipulated by and between the plaintiff and the appearing defendants that an order may be made by the Court appointing a disinterested person as the Court's appraiser for the purpose of appraising and giving the fair market value of leasehold, the two wells and the equipment in the bill of sale described as of July 18, 1941.

"That in determining the value of such leasehold, wells and equipment, the appraiser shall take into consideration that the entire leasehold, including well No. 2, is subject to landowners' and overriding royalties of 22-2/3 per cent and that well No. 1 is subject to an additional 3 per cent.

"That the Court shall instruct such appraiser as to the definition of fair market value as announced by the decisions of the Supreme Court of the State of California;

"That judgment shall be entered in favor of the plaintiff and against the defendant Petroleum Production Corporation only for any difference that may exist, if any, between the fair market value as determined by the Court upon said appraisal and the sum of $11,000.00 heretofore received by the plaintiff, without interest to date of judgment;

"That in the event that the fair market value of said property shall be determined to be the sum of $11,000.00 or less as of July 18, 1941, then judgment shall be entered in favor of the defendant Petroleum

Production Corporation, that plaintiff takes nothing;

"That each party shall bear its own costs in this proceeding, including the cost of the appraisal, in which latter connection the plaintiff shall advance one-half thereof and the defendant Petroleum Production Company the other one-half thereof;

"That the action shall be dismissed as to all defendants with the exception of the Petroleum Production Corporation but such dismissed defendant shall not be entitled to any costs;

"That all attachments heretofore levied against the property of the Petroleum Production Corporation continues to remain in full force and effect until either: (1) Any judgment that may be rendered in favor of the plaintiff is paid and satisfied or (2) Judgment is rendered in favor of the defendant and against the plaintiff as hereinabove set forth; that the attachments levied on property of the other defendants be released; that any judgment entered in favor of the plaintiff herein shall provide for a stay of execution for a period of 90 days and during such stay of execution the defendant Petroleum Production Corporation shall be restrained from disposing of said leasehold, wells and equipment; provided, however, that such restraining order shall not prevent or preclude said Petroleum Production Company from selling oil and gas and carrying on the usual and normal business of maintaining and operating producing oil wells.

"The cross complaint of the defendant and cross-complainant Zahn against the plaintiff as cross-defendant shall be dismissed with prejudice and, as a condition to the dismissal by plaintiff against such defendant Zahn, such defendant Zahn will execute a release of any claim of damages by reason of the attachment heretofore levied in this action against property of the defendant Zahn.

"It is further stipulated that an order may be made forthwith by the Court directing that neither any parties to this action now any of its attorneys, agents, employees or representatives contact either directly or indirectly said appraiser; that no communications shall be had by any of the parties to this action, their attorneys, agents, or representatives with said appraiser except in the presence of the Court and both parties being represented." The parties and their counsel thereupon agreed to its terms and the trial judge stated: "It will be so ordered and judgment will be entered in accordance with the stipulation * * * I want to thank you gentlemen for working this matter out. I assume it is worked out. At least, there will be a judgment entered."

Without any written orders or any further court proceedings the several steps recited in the stipulation were taken, and a judgment, denying the plaintiff all relief, was entered. Its recitals are as follows: "The above entitled matter came on regularly for trial in Department 'B', Long Beach, of the above entitled court, the Honorable Leslie E. Still, Judge Presiding, on May 27th, May 28th, ~~May 29th,~~ and June 2nd, ~~and June 3rd,~~ 1942; the plaintiff and cross-defendants appearing by their attorneys, Baldwin Robertson and Owen E. Kupfer, the defendants and cross-complainant appearing by their attorneys James E. Pawson and Raphael Dechter, and evidence having been introduced by plaintiff and defendants, and it appearing that before said parties had introduced all of their evidence that a stipulation was made in open court, a copy of which is attached hereto and made a part hereof, and marked Exhibit 'A', and such stipulation having been approved in open court by all of the parties, and likewise approved in open court by the Court; that thereafter, pursuant to said stipulation, this Court appointed F. A. Graser, a petroleum engineer and appraiser, for the purpose of making the appraisal of the fair market value of the leasehold, the two wells and the equipment, as set forth in said stipulation, and the Court having duly instructed said appraiser as to the definition of the fair market value in accordance with said stipulation and said appraiser having filed herein his report and appraisal fixing the value of the property involved in this action and set forth in said stipulation at the sum of Four Thousand Nine Hundred Twenty-three ($4,923.00) Dollars as of July 18, 1941; * * *." Following these recitals the judgment contained the provision called for by the stipulation in the event that the value of the property was determined to be the sum of $11,000 or less.

[2, 3] The stipulation is ambiguous in some particulars but its general effect is clear. A stipulation may lawfully limit the issues to be tried (Corbett v. Benioff, 1932, 126 Cal.App. 772, 776, 14 P.2d 1028; Morrow v. Morrow, 1940, 40 Cal.App.2d 474,

485, 105 P.2d 129), and this one had that effect; the only issue of fact that was left for determination was the market value of the property involved. The stipulation did not leave the final determination of that issue to the appraiser, however, for in its fourth paragraph we find the expression: "the fair market value as determined by the Court upon said appraisal." There may be a dispute as to what the parties meant by "upon said appraisal" (they may have meant "upon said appraisal being made" or they may have meant, "based upon said appraisal") but there can be no doubt that they meant that the court was to make the determination. The absence of the words "by the court" following the word "determined" in the succeeding (fifth) paragraph results in no embarrassing ambiguity. In each paragraph the matter to be determined is the same; that is, the fair market value of the property which defendants bought. It would be unreasonable to conclude that the determination contemplated in the fifth paragraph was to be made by an agency different from the agency (the court) specifically required to pass upon the same question by the fourth paragraph.

[4-6] The position that the stipulation in effect provided for a reference, under subdivision 2 of section 638, Code of Civil Procedure, we find untenable. There is no suggestion that he who was to be appointed "as the Court's appraiser for the purpose of appraising and giving the fair market value" of the property, was to hear witnesses and make findings of fact as a referee would be expected to do. Section 643, Code Civ.Proc. Rather, he was to prepare himself to give his opinion as an expert witness on the fair market value of the property. But whatever his role, his conclusion would not be binding upon the court. The opinion of an expert witness, of course, unless it commends itself to the mind of the trier of fact, may be rejected by him. Rose v. State of California, 1942, 19 Cal.2d 713, 733, 123 P.2d 505. Nor is the finding of a referee upon a single question of fact submitted to him binding upon the court. Schefski v. Anker, 1932, 216 Cal. 624, 628, 15 P.2d 744; Chiarodit v. Chiarodit, 1933, 218 Cal. 147, 150, 21 P.2d 562.

[7] We have recognized the possibility that the stipulation was meant to be understood as providing that the court was to base its determination upon the appraisal of the court's appraiser. This interpretation, however, would not serve to substitute the appraiser's report for the court's finding. In McKeever v. Locke-Paddon Co., 1920, 49 Cal.App. 350, 351, 193 P. 258, the parties had stipulated that the issues might be submitted to a jury for an advisory verdict, but in general form, and that the court was to accept it as the basis of its judgment. Even so, it was held, it was necessary for the court to make findings, and the judgment which was based on the jury's general verdict without findings was reversed.

[8] The remarks of the trial judge at the conclusion of the trial may be interpreted as revealing his understanding at that time that findings had been rendered unnecessary; that a judgment was authorized without them. His words were not inconsistent with the true effect of the stipulation, however, and so do not give rise to what would amount to an estoppel on the part of either party to insist that the stipulation be understood according to its terms and not according to the trial judge's possible interpretation of it.

Having determined that this was a case where a valid judgment could not be entered without the making and filing of a finding of fact, we come to the question of what action on our part is appropriate. The question is raised in our minds by the action taken by the Supreme Court in Supple v. Luckenbach, 1938, 12 Cal.2d 319, 84 P.2d 52, where, in a situation similar to but not exactly like ours, instead of reversing the invalid judgment, the appeal from the judgment was dismissed. In the Supple case findings, which were required, were, by clerical inadvertence, filed without having been signed. Almost two months later the trial judge, not a resident of the county where the case had been tried, acting under the impression that he had signed the findings, signed a judgment and it was filed with the clerk. After an appeal had been taken from this judgment, new findings were prepared, signed and filed and thereupon a new judgment was entered. A motion to dismiss the appeal was made and in determining that it should be granted the Supreme Court referred to the "practically identical" case of Easterly v. Cook, 1934, 140 Cal.App. 115, 35 P.2d 164, where the trial court had on motion set aside a judgment which had been entered after the filing of unsigned findings. The Supreme Court then pointed out that the trial court in the action before it, while not striking

the first judgment from the records, did sign findings and a judgment, thus treating the former one as a nullity, with the result that there was a valid judgment of record, as to which the appeal was premature. The appeal was then dismissed, not on the ground that the first judgment was a nullity, but because the "appeal was prematurely taken." [12 Cal.2d 319, 84 P.2d 54.]

The Supple case did not evidence any disaffection with the principles and practice established by the decided cases, and we do not regard it as requiring an exception to be made to them in cases that differ from it. Our case does differ. Our judgment was not entered inadvertently, nor was it set aside by the direct or indirect action of the trial court. No subsequent judgment was entered, so that it cannot be said that the appeal was prematurely taken. "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from." Code Civ. Proc. § 955. The only judgment in this case should be reversed, not affirmed by the dismissal of the appeal.

[9-12] The principles and practice of the decided cases warrants our reversal of the judgment. The entry of a judgment without findings, where findings are required and not waived, is not an immaterial error in procedure. Holland v. Kelly, 1917, 177 Cal. 43, 45, 169 P. 1000; In re Estate of Pendell, 1932, 216 Cal. 384, 385, 14 P.2d 506; McKeever v. Locke-Paddon Co., supra, 49 Cal.App. 350, 351, 193 P. 258; In re Estate of Ingram, 1929, 99 Cal.App. 660, 662, 279 P. 208. In each of the cases just cited the complication created by entering a judgment without the filing of prerequisite findings was cured by reversing the judgment on appeal. An appeal should be an appropriate remedy. The judgment appealed from would be a valid judgment, if findings had been waived, and as the judgment roll need not, and does not, reveal whether findings were or were not waived, the judgment, under many circumstances, would be immune from attack. Carpenter v. Pacific Mut. Life Ins. Co., 1937, 10 Cal.2d 307, 326, 74 P.2d 761. It is true that such judgments may be characterized as nullities. Vallejo, etc., R. Co. v. Reed Orchard Co., 1915, 169 Cal. 545, 579, 147 P. 238; Supple v. Luckenbach, supra, 12 Cal.2d 319, 323, 84 P.2d 52. However, "It has been repeatedly held that an appeal may be taken from an order or judgment notwithstanding the fact that it is void." 2 Cal.Jur. 184; and see Ewing v. Richvale Land Co., 1917, 176 Cal. 152, 153, 167 P. 876; In re Estate of Smead, 1938, 12 Cal.2d 20, 26, 82 P.2d 182; Ivory v. Superior Court, 1938, 12 Cal.2d 455, 460, 85 P.2d 894. To conclude that we have no jurisdiction on this appeal to reverse the judgment which was entered in book 1274, page 264, on August 20, 1942, because it has not yet been rendered, in that findings have not been filed, would be to give words precedence over the ideas they are meant to convey, and to give to a form of procedure greater obeisance than to the object sought to be attained.

[13] In reversing this judgment we have no thought that the only possible result will be the reentry of the same judgment over again. As we have noted, the trial judge is not bound by the report of his appraiser, and it may be that when he comes to make his own finding on the issue before him he will find unacceptable the opinion of his witness, who arrived at a value considerably less than half of that determined by defendants' four expert witnesses. He may, too, desire to take steps to avoid the effect of the conversation which admittedly took place between his appraiser and Mr. Cole, an employee of the defendant Petroleum Production Company. Conversing with Mr. Cole was a plain violation of the spirit of that provision of the stipulation which agreed that the court was to make an order forbidding the employees to "contact either directly or indirectly said appraiser," although the letter of the stipulation was observed by the mere making of the order.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

62 Cal.App.2d 772

In re OWENS' ESTATE.

OWENS et al. v. NEAL.

Civ. No. 12493.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1944.

1. Wills ⇐440

Testatrix' intent must be gathered from words used in will itself, if they are clear and unambiguous. Probate Code, § 106.

2. Wills ⇐827

The words "my debts" in holographic will leaving one-third of testatrix' money "after my debts are paid" to named person were equivalent to "debts which I owe," and hence included only testatrix' liabilities, not those of her estate, such as funeral and administration expenses.

See Words and Phrases, Permanent Edition, for all other definitions of "My Debts".

3. Wills ⇐488

In determining extent of benefits bestowed on testatrix' niece, who was testatrix' closest blood relative, by ambiguous will bequeathing one-third of testatrix' money after payment of her debts to named person and one-third of money left to such niece, probate judge was entitled to consider extrinsic evidence of affectionate relationship between testatrix and niece and testatrix' expressed intention to assist niece financially.

4. Wills ⇐452

That construction of ambiguous will which passes testatrix' property to person of her blood must be favored.

5. Wills ⇐827

Under will bequeathing one-third of testatrix' money after payment of her debts to named person and one-third of money left to testatrix' niece, who was testatrix' nearest blood relative, such niece took third of money left after payment of testatrix' debts, not third of money left after payment to first-named legatee.

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

In the matter of the estate of Mabel Maud Owens, deceased. From an order construing certain provisions of deceased's will in favor of Hazel Kirke Neal, a legatee, Alonzo James Owens and others appeal.

Affirmed.

A. D. Schaffer, of San Francisco, for appellants.

Jacob S. Meyer, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This appeal is taken from an order of the probate court construing certain provisions of the holographic will of Mabel Maud Owens, deceased. The will in its entirety is copied herein:

"~~May~~ June 10–39
My last will,
What money I have at my death, after my debts are paid one-third to Elizabeth Lyons for her wonder help in time of need, her choise of my two rings, choise of paintings Hazel Neal one third of money left & what clothing she wants One hundred dollars to Lou Farnsworth—choise of china & glass ware & painting Lyons does not want
silverware
One hundred dollars to Jean Merguire and anything else she wants.
Geneve Brown 100 & anything else she wants
Signed Mabel Maud Owens
June 10 1939"

The portion of the order appealed from reads as follows: "Out of the actual money, as distinguished from property or assets of any other kind or character, included in the estate of the testatrix at the time of her death, including all moneys on deposit in banks, the said Elizabeth Lyons and Hazel Kirke Neal, and each of them shall receive one-third (1/3) of said moneys left by said testatrix, after debts of testatrix are paid."

Hazel Kirke Neal is a niece of the testatrix. Appellants are the sons of testatrix' predeceased husband and take the undisposed residue of her estate under Probate Code, secs. 228 and 229.

The order appealed from is attacked on two grounds: 1. That the trial court erred in not construing the words of the will "after my debts are paid" to include the payment of funeral expenses and expenses of administration; and 2. That the

trial court erred in determining that Hazel Kirke Neal was entitled under the will to receive the same amount as Elizabeth Lyons, appellants claiming that she was entitled to take only one-third of the money remaining after the payment of Elizabeth Lyons' bequest.

[1, 2] In construing the bequests of money "after my debts are paid" to mean that only liabilities of the testatrix should be deducted in calculating the amounts, and not liabilities of the estate, the court gave to the language of the will its plain and natural meaning. The intent of the testatrix must be gathered from the words used in the will itself if those words are clear and unambiguous. Probate Code, sec. 106; In re Estate of Blake, 157 Cal. 448, 459, 108 P. 289; In re Estate of Chamberlain, 46 Cal.App.2d 16, 115 P.2d 235; Gore v. Bingaman, 29 Cal.App.2d 460, 469, 470, 85 P.2d 172; In re Estate of Bourn, 25 Cal. App.2d 590, 602, 78 P.2d 193.

The ordinary and grammatical meaning of "my debts" is clear. The expression is equivalent to "debts which I owe", and only by a strained interpretation could it be extended to include liabilities of the estate arising after the testatrix' death.

Appellants argue that at least funeral expenses should be included in the amount to be deducted from the cash legacies. They cite Golden Gate Undertaking Co. v. Taylor, 168 Cal. 94, 141 P. 922, 52 L.R.A.,N.S., 1152, Ann.Cas.1915D, 742, and In re Estate of Magorty, 169 Cal. 163, 146 P. 430, holding that funeral expenses are a highly preferred "debt of the estate". The distinction between a debt of the estate and a debt of the decedent is clearly recognized in the Golden Gate Undertaking Co. case, the court saying at page 98 of 168 Cal., 141 P. at page 924, 52 L.R.A.,N.S., 1152, Ann.Cas.1915D, 742: "The claim for funeral services is not, to be sure, a claim on a contract or debt of the decedent, existing before his death."

No extrinsic evidence was introduced (if such would be admissible) to show that the testatrix used the words "my debts" in any but their natural sense, and we are satisfied that the construction given them by the probate court is the correct one.

The second ground of appeal turns on the construction to be given the words of the will: "Hazel Neal one third of money left". The words considering their position in the will are not free from ambiguity. They might mean one-third of the money left "after my debts are paid". This is the construction placed on them by the probate court. Or they might mean one-third of the money left after the payment of one-third to Elizabeth Lyons. This is the construction for which appellants contend.

Extrinsic evidence was introduced showing that Hazel Kirke Neal is a niece of the testatrix and her closest blood relative, that the testatrix' relations with her niece and her niece's children was a cordial and affectionate one, and that she had frequently expressed her affection for them and her interest in their welfare and her intention to assist them financially.

[3, 4] In determining under the ambiguous language of the will the extent of the benefits intended to be bestowed upon her niece by the testatrix the probate judge was entitled to consider the affectionate relationship existing between the two and the testatrix' expressed intention to assist her niece in a financial way. 26 Cal.Jur. 893. The probate judge was likewise entitled to take into account the settled rule that in case of ambiguity that construction of a will is to be favored which passes the property to a person of the blood of the testator. In re Estate of Hartson, 218 Cal. 536, 539, 540, 24 P. 171; In re Estate of Boyd, 24 Cal.App.2d 287, 74 P.2d 1049; In re Estate of Wilson, 65 Cal.App. 680, 689, 225 P. 283.

[5] Under the will a considerable portion of the testatrix' estate was not disposed of and passes in any event by intestate succession to appellants. We cannot say that under all the circumstances the probate court did not correctly construe the ambiguity in the will in favor of the nearest blood relative of the testatrix, particularly in view of their cordial relationship and the frequently expressed intention of the testatrix to make her niece an object of her bounty.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

PENNIX v. WINTON.

Civ. 12467.

Supreme Court of California.

Feb. 10, 1944.

1. Evidence ⇐43(4)

The Supreme Court takes judicial notice of minutes of District Court of Appeal. Code Civ.Proc. § 1875.

2. Courts ⇐101

Where appeal was argued before duly constituted District Court of Appeal at which were present the presiding justice, a justice and a justice pro tempore, and at close of argument cause was submitted for decision, upon order of submission jurisdiction to decide the case attached to the court as so constituted, all three of whose members were entitled to participate in decision, and any two of whom could pronounce a judgment. Rules on Appeal, rule 29, sub. (a) (3).

In Bank.

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Maurice C. Ryan, of San Francisco, for appellant.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for respondent.

On petition for hearing.

Prior opinion, 143 P.2d 940.

Petition denied.

PER CURIAM.

One of the contentions made by the defendant in his petition for a hearing and requiring special mention is that the judgment of the District Court of Appeal was not pronounced by a majority vote of that court. The judgment was rendered by Justice Spence and Justice pro tem Dooling. Presiding Justice Nourse does not appear on the face of the judgment to have participated.

[1, 2] However, the minutes of the District Court of Appeal, of which judicial notice is taken (Code Civ.Proc. § 1875), disclose that the appeal in the case came on for argument, and was argued, on September 14, 1943, before a duly constituted court at which were present Presiding Justice Nourse, Justice Spence and Justice Dooling, sitting under regular assignment as a justice pro tempore. At the close of the argument the cause was submitted for decision. Upon the order of submission jurisdiction to decide the case attached to the court as so constituted, all three of whose members were entitled to participate in the decision, and any two of whom had the power to pronounce a judgment. No disqualification or other valid reason (Rule 29, sub. (a) (3), Rules on Appeal) is advanced which would deprive the court of the power to render a judgment with the concurrence of a majority of the justices so constituting the court at the time the cause was so submitted for decision.

The petition for hearing is denied.



23 Cal.2d 632

GRAY v. SOUTHERN PAC. CO.

Sac. 5620.

Supreme Court of California.

Feb. 1, 1944.

1. Master and servant ⇐276(8, 10), 278(18)

In action for death of brakeman, evidence authorized inference that, at time of death, brakeman was performing his duties on train and that sudden stopping of train was negligence and proximate cause of death. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

2. Master and servant ⇐284(3), 285(11), 289 (39)

In action for death of brakeman, conflicting evidence as to whether brakeman met death while performing his duties and as result of railroad's negligence or as exclusive result of his own negligence was for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

3. Master and servant ⇐276(8)

In action for death of brakeman, evidence as to good weather conditions, brakeman's experience and ability, and good condition of cars and tracks carried inference rebutting assumption that brakeman fell when going from top of one car to another without intervention of any unusual occurrence. Federal Employers' Liability Act, 45 U.S.C.A. § 51–60.

4. Evidence ⇐590

A defendant's employees are not "disinterested witnesses" and jury is author-

ized to disbelieve such employees as witnesses for defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Disinterested Witness".

5. Trial ⇐140(1)

A vigorous attack upon credibility of an adversary's witness does not destroy testimony of such witness but leaves matter for jury.

6. Appeal and error ⇐878(3)

Generally, respondent may not be heard on appeal to complain of improper admission of evidence.

7. Master and servant ⇐267(1)

In action for death of head brakeman, testimony of an experienced brakeman, who, as a former employee of defendant, had worked same run four years before accident, as to duties of head brakeman on such run, was admissible and relevant. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

8. Master and servant ⇐289(39)

In action for death of brakeman, where location and position of brakeman's arm under train was material to determination of whether death was caused by brakeman's or railroad's negligence, testimony for railroad pertaining thereto merely created a conflict which was for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

9. Master and servant ⇐289(39)

In action for death of brakeman, on issue of whether brakeman was killed after making rolling inspection of first half of train or in fall from fifth car caused by brakeman's own negligence, testimony of conductor as to finding blood spots on wheels of fifth car was for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

10. Evidence ⇐586(3), 587, 588

In determining disputed questions of fact, jury could disbelieve any testimony which appeared to jury to lack verity and could reject positive testimony in favor of circumstantial evidence.

11. Evidence ⇐539½(1)

Brakeman of many years' experience, who had worked run on which accident occurred four years previous to accident, was qualified to testify as an expert as to management and operation of train.

12. Evidence ⇐527

The effect of application of air brakes on a car in the middle of a 62-car train with locomotives at each end was a proper subject for expert testimony.

13. Evidence ⇐553(4)

Hypothetical question put to former brakeman, as an expert in management and operation of trains, concerning effect of application of air brakes on a car in middle of long train under specified circumstances, included sufficient established facts upon which to base opinion.

14. Appeal and error ⇐882(11)

Where competent testimony for plaintiff was stricken on defendant's motion, defendant could not complain that testimony was insufficient to support a verdict for plaintiff.

15. Master and servant ⇐265(2, 3)

To recover under Federal Employers' Liability Act for death of railroad employee, petitioner has burden of proving that railroad was negligent and that such negligence was proximate cause in whole or in part of fatal accident. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

16. Master and servant ⇐285(1), 286(1)

In action to recover for death of railroad employee, upon presentation of probative facts from which negligence of railroad and causal relation between negligence and death can reasonably be inferred, whether railroad was negligent and such negligence was proximate cause of death is for jury. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

17. Master and servant ⇐265(13, 14)

In action for death of railroad employee in operation of train at night, there is no presumption of a disobedience of duty by employee or of assumption of risk or of contributory negligence to negate an inference that death was due to railroad's negligence. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

18. Appeal and error ⇐999(1)

The focal point of judicial review of a jury finding is reasonableness of particular inference or conclusion drawn by jury.

19. Master and servant ⇐284(1)

In actions under Federal Employers' Liability Act, it is function of jury to weigh contradictory evidence and inferences,

judge credibility of witnesses, receive expert instructions, and draw ultimate conclusion as to facts. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

20. New trial ⇐68

In actions under Federal Employers' Liability Act, courts cannot reweigh evidence and set aside verdict merely because jury could have drawn different inferences or conclusions or because courts feel that other results are more reasonable. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

21. Jury ⇐37

Where inference drawn by jury that railroad's negligence caused fatal accident to employee had support in evidence, an order for judgment for railroad notwithstanding verdict would be improper as depriving plaintiff of right to a jury trial. Federal Employers' Liability Act, 45 U.S.C A. §§ 51–60.

TRAYNOR, J., dissenting.

In Bank.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge Assigned.

Action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., by Mary Ellen Gray, as administratrix, etc., against the Southern Pacific Company to recover for the death of plaintiff's husband, allegedly caused by defendant's negligence. From a judgment for defendant notwithstanding a verdict for plaintiff, plaintiff appeals.

Reversed with directions.

Former opinion 135 P.2d 593.

M. Mitchell Bourquin and Patrick J. Murphy, both of San Francisco, and K. D. Robinson, of Auburn, for appellant.

T. L. Chamberlain, of Auburn, and Jones & Quinn, of Stockton, for respondent.

CARTER, Justice.

Plaintiff appeals from a judgment for defendant notwithstanding the verdict of a jury awarding her damages in the sum of $15,000 in an action under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60, based upon the alleged negligence of defendant in the operation of its train resulting in the death of Pierce L. Gray.

The main issue presented is whether or not the evidence is sufficient to support the implied finding of the jury that the deceased met his death in the course of his employment as the result of defendant's negligence. Plaintiff's theory is that the deceased was knocked from the top of a box car while in the performance of his duties as a brakeman by the negligent stopping of the train without warning.

[1] Defendant operates a railroad through Colfax, California. On the evening of April 10, 1934, the time of the accident, defendant was operating in interstate commerce a freight train consisting of two engines, sixty-two cars, and a caboose, en route easterly from Roseville, California, through Colfax to Sparks, Nevada. One engine was at the head of the train, and the other, a helper, four cars ahead of the caboose. The first thirty-five cars following the head locomotive were box cars. At Colfax the facilities for supplying the engines with water are located on the south side of the main track about 20 feet east of an express company shed which in turn is about 100 feet east of the depot. The train arrived at Colfax at 9:45 at night; the weather was clear, the night was dark and it was dry and warm. In stopping to take on water, the lead engine was uncoupled and proceeded about 100 feet to the water column. The watering operations were completed, and at 10 p. m. the train pulled out of Colfax. After it had proceeded 40 to 50 car lengths and attained a speed of about eight miles per hour, it was brought to a stop by the engineer in the lead engine by the application of air throughout the train. The train traveled about 250 feet or about five car lengths from the time the air brakes were applied before it stopped. Following the stop, deceased was found dead, his head and left forearm having been severed from his body. His body was found at about the fortieth car from the head of the train; his forearm was found leaning against the inside of the south rail of the tracks under the thirty-fifth car. There thus were five cars between his body and arm, or the same distance that the train traveled from the time of the application of the brakes to the stop. From the leaning position of the forearm it is reasonable to infer that no wheel of the train passed over the place where the arm was lying after it reached that position inasmuch as the flange on the

wheel would have moved it. From these circumstances it may be deduced that the deceased was at the thirty-fifth car from the head of the train at the time of the occurrence of the event that caused his death and it is probable that the deceased's arm had been dragged along by the thirty-fifth car until the train came to a full stop. Moreover, other circumstances place him at that point and also indicate that he had boarded the train. There were four brakemen on the train, one of whom, the head brakeman, was the deceased. At and before the time of the accident it was the deceased's duty to go upon and walk along and over moving freight cars. There is evidence that the custom or practice was for the head brakeman, under the circumstances presented, to inspect the first half, or the first thirty-four to thirty-five cars of the train from the ground as it rolled out of the station, giving special attention to whether the brakes were sticking on the wheels of any of the cars or whether any wheels were sliding. After the portion of the train subject to his inspection had rolled past, he would board the train, going on top of the cars to give or receive signals. It is wholly reasonable to conclude that on the occasion in question the decedent was performing those duties, had inspected his portion of the train and boarded the thirty-fifth car. That conclusion is consistent with evidence which is susceptible of the interpretation that the maximum speed of eight miles per hour for a train pulling out of a station is designed to enable trainmen who are making a rolling inspection from the ground to board the train after completion of that duty. Also, the evidence shows that deceased was characterized as an excellent brakeman, always willing to do his part and was active and competent, hence, likely to be performing his duties. The foregoing circumstances are sufficient to place decedent on the thirty-fifth car and sustain the inference that he fell from that car. With reference to the presence of deceased on the train, without regard to the particular portion thereof, defendant admits in its answer that at the time of the accident deceased was on the top of one of the freight cars of the train in the course of his employment and that he was run over by the train. Thus, if the defendant was negligent in stopping the train and that negligence was the proximate cause of his death, there is sufficient evidence to support the verdict. The foregoing circumstances clearly furnish a basis for concluding that the stopping of the train was the cause of the accident, particularly the location of the body and the location and position of the forearm. They reasonably establish as a fact that the accident occurred while the train was in the process of stopping.

Defendant contends that the only substantial evidence supports its version of the accident, that is, that deceased fell before the stop from the top of the second or fourth car behind the lead engine while crossing without a lantern from one car to another en route to the engine and hence no asserted negligence of defendant in making the stop could have caused the accident. It points to evidence that when the train arrived in Colfax to take on water the deceased assisted in that operation by uncoupling and later coupling the lead engine; that he left a restaurant near the tracks when the train was starting and the engine crew testified that he boarded and moved to the top of the second or fourth car from the lead engine, having no lantern with him; that blood was found on the wheels of the sceond to fifth cars; that all the witnesses who qualifiedly testified on the subject established that the deceased's duties as head brakeman did not include a rolling inspection of the train and that he was supposed to board and ride the lead engine when it left Colfax.

[2, 3] The most that can be said of such evidence is that it created a conflict in the evidence or involved the credibility of the witnesses or the weight of the evidence, all matters which were resolved against defendant by the jury and with which we are not concerned on appeal. In addition to the circumstances heretofore related as supporting the jury's verdict, there are other circumstances which mitigate against defendant's version of the accident. Although it was a dark night the weather was warm and dry and as far as appears the cars were in good condition. Deceased was a brakeman of many years' experience, was an alert, agile and able workman, and the tracks traversed were in good condition and decedent was familiar with them and the character of the train involved. All of these circumstances carry inferences which rebut the assumption that deceased fell when going from the top of one car to another without the intervention of any unusual occurrence.

[4-7] It must be remembered that practically all of the witnesses were employees

of the defendant and thus cannot be said to be disinterested witnesses. With reference to the duty of decedent to make a rolling inspection of the fore part of the train, it is true that several of defendant's employees testified that the head brakeman had no such duties at the time of the accident with respect to any part of the train. The jury could have disbelieved those witnesses. One of them testified that there was no rule prohibiting a head brakeman from riding on top of the train, that is, that it was not mandatory that he ride in the cab of the engine. Another stated it was up to the brakeman whether he rode on top of the train rather than in the engine cab. The conductor on the train testified that he observed a brakeman near the head of the train when it was moving out and a rolling inspection was made. He stated that it was Hatch, another brakeman, not Gray. But although Hatch stated on direct examination that he had made a rolling inspection of the whole train, his testimony in this regard was substantially impeached by inferences which may be drawn from other evidence. From his testimony on direct examination it may be inferred that he stood or squatted in one spot near the rails and watched the wheels of every car of the entire train as it passed him. But it is established that the train comprised two engines, 62 cars and the caboose, that it had rolled only 40 to 50 car lengths when the airbrakes were suddenly applied for the irregular stop, and that it rolled only about five car lengths more before its complete stop. Therefore, from 45 to 55 car lengths was as far as the train moved at the time in question. It did not move its entire length. At least seven cars plus the helper engine plus the caboose had not yet passed Hatch when the train had come to a full stop if he started his inspection at the first car. But he said he boarded the caboose and that this was done while the train was still in motion. If that part of his testimony is true then it seems to be a reasonable inference that he was not the brakeman who inspected the front part of the train. It is therefore reasonable to conclude that the brakeman making the rolling inspection of the fore part of the train was deceased, not Hatch, the other members of the crew being otherwise engaged. Plaintiff produced a witness Wait, whose credibility is vigorously attacked by defendant, who testified with regard to the duties of a head brakeman such as deceased to make a rolling inspection under the given circumstances. His testimony cannot be said to have been destroyed. He was a former railroad man of many years' experience as a brakeman and otherwise, and had experience prior to the date of the accident on the run here in question, having been an employee of defendant. He testified that it was the practice and custom for the head brakeman to make a rolling inspection under the circumstances here presented prior to 1930, four years before the accident. Defendant's fireman on the lead engine testified that the practice had remained the same during many years prior to 1930 and thereafter. However, his view of the practice was contrary to Wait's. The question of credibility was for the jury and it is unnecessary to discuss in detail the various attacks upon it made by defendant. It is contended, however, that it was improperly admitted because there was no foundation laid establishing that the practice was the same in 1930 as in 1934, the date of the accident; that the fireman's testimony was insufficient in that respect because he testified to a contrary custom. Generally, the respondent may not be heard on appeal to complain of the improper admission of evidence. See 2 Cal. Jur. 839-840. Nevertheless, we believe that the evidence was admissible and relevant under the circumstances in the instant case. Wait had many years' railroad experience and had experience as a brakeman in the operation of trains at the place involved in the instant action. Although the fireman testified that the practice imposed no duty of rolling inspection on the head brakeman, he also testified: "Q. Then you may be understood to say that the practice in 1934 was the same as '33, '32, '29, right on back through your experience? A. Yes, sir. Q. *Whatever it was,* it was the same? A. Yes sir." (Emphasis added.) The jury could have disregarded the fireman's testimony as to the exact practice, and accepted the part that it was the same prior to 1930 as it was at the time of the accident. Moreover, the written rules of the company may be interpreted as consistent with the requirement that brakemen generally, not referring to any particular one, are required to make a rolling inspection and pass signals. The rules limit the speed of trains to eight miles per hour for a distance to permit a rolling inspection and each trainman is responsible for the wheels of the portion of the train under his charge. Trainmen must be so distributed over the

train "as to control it most effectively." The fireman testified that it is a brakeman's duty to be in a position to pass signals while a train is in motion.

[8] In regard to the location and position of decedent's arm in relation to the thirty-fifth car and the presence of decedent's body at the fortieth car from the head of the train, the evidence referred to by defendant does nothing more than create a conflict. Although there may be some conflict in the fireman's testimony or uncertainty in its meaning, he testified that he walked back from the lead engine along the south side of the train 15 to 20 cars, then seeing a lantern on the north side crossed over and continued to the Standard Oil crossing, where he found the arm. He then stated, which in the light of his foregoing testimony may be said to mean, that the arm and the Standard Oil crossing were at the thirty-fifth car from the engine: "Q. Did you then walk back to the Standard Oil Crossing? A. Yes. Q. It was then that you found the arm of Pierce Gray? A. Yes sir. Q. How many cars was that back from the Standard Oil Crossing? A. I should judge about 35." That interpretation is further fortified by the fireman's testimony that he did not proceed beyond the Standard Oil crossing, but returned to the lead engine after finding the arm. Moreover, there is evidence that the helper engine, when the train was stopped, was on the Grass Valley grade crossing, and with it in that position, considering the make-up of the train and the distance between the Standard Oil crossing, where the arm was found, and the Grass Valley crossing, the thirty-fifth car would be resting at the former crossing. The position of the arm with respect to the south rail of the track, that position being such that no wheel of the car could have passed by it without moving it is clearly shown by the evidence. The conductor testified at the trial that the "arm was laying up on the, on this fill, up against the right rail of the number two track, that is the main line track. Q. Which rail was that, the right rail? A. The right rail, yes sir." He was called as plaintiff's witness and was impeached because of surprise by plaintiff by his testimony at the coroner's inquest. Nevertheless, he admitted he testified at the inquest: "'Do you recall which arm and hand was found at the crossing? A. I believe it was the left. Q. That was found in between the rails, was it? A. Yes, leaning up against the right rail.' Did you so testify at the coroner's inquest? A. I believe I did, yes. * * * Mr. Bourquin: Q. Will you answer, Mr. Lytle, was that true, when you gave that testimony at the inquest? A. I told it for the truth, yes sir." The fireman testified: "Q. Whereabouts was the arm that you saw with respect to the rails upon which you were travelling? A. It was on the south rail, just inside where the flange tread, laying up against the rail where the flange tread was." That testimony was clearly susceptible of the interpretation by the jury that the arm was in the position heretofore described. There is conflicting evidence by the same witness on the subject, but its credibility and the conclusion to be drawn therefrom was for the jury.

[9] The evidence of blood spots on the wheels heretofore referred to is asserted as substantiating defendant's theory and completely refuting plaintiff's version. The spots claimed to have been discovered by the conductor on his first inspection of the fifth car were very small and a later inspection was not made until after the train reached Nevada. Defendant also calls attention to the fact that Gray's lantern was not found, but this was another circumstance for the jury to consider in the determination of the issues of fact.

[10] In determining the disputed questions of fact presented at the trial of the case it was the province of the jury to disbelieve any testimony which appeared to them to lack verity. They were the exclusive judges of the credibility of the witnesses and the weight to be given their testimony. They could reject positive testimony and accept circumstantial evidence as proof of the facts, as it is elementary that direct evidence may be disbelieved and contrary circumstantial evidence relied upon to support a verdict or finding. Barham v. Widing, 210 Cal. 206, 291 P. 173; Parsons v. Easton, 184 Cal. 764, 195 P. 419.

The foregoing discussion has to do with the manner, and place in which the deceased met his death. There is evidence from which an inference may be drawn that he was on the thirty-fifth car, and that he fell therefrom some time between the application of the brakes and the stop, and that there was a definite link of causation between the stop and the fall. It remains then to determine whether or not defendant was negligent in making the

stop, and hence liable. There is considerable discussion in regard to whether the stop was unusual. It is defendant's claim that the stop was made to ascertain the whereabouts of the deceased. There is evidence that such a stop was not a common occurrence and certainly it was not to be expected at least as far as the deceased was concerned. There is nothing to indicate that he was aware that a stop was going to be made. The stop was not for any emergency. The block signal showed a clear track ahead. The engineer testified that: "Q. Gave you a clear signal, and you got a clear signal from the block signal? A. Yes. Q. In other words from the time you passed the block signal, you had no reason to expect any necessity to stop, is that the idea? A. Yes." Hatch, a brakeman, testified: "Q. Mr. Hatch, you boarded the train leaving Colfax on the caboose, is that right? A. What is that? Q. When the train started up at Colfax, did you board on the caboose? A. Yes. * * * Q. Mr. Hatch, after the train had stopped at Colfax and taken water and made preparations to leave, you, as brakeman, didn't expect that any stop would be made pulling out of there, did you? A. No, not ordinarily. * * * Q. Mr. Hatch, the fact that a train did stop at the place this was brought to a stop, leaving Colfax that night after the train had stopped at Colfax and taken water and prepared to move on, was an unusual thing, wasn't it? A. Yes, ordinarily, it was." No notice or warning of the stop was given. A rule of the defendant referring to the various whistle signals indicates a short blast "apply brakes, stop." One of the crew testified that that meant: "Long, short blast of the whistle sounded by the engineer, signifying to the trainmen that he wants help to stop the train with, that for some reason that the air brakes on the train have come partially or wholly in-operative, and that he is not able to control the speed of the train, or to stop the train as he wants to, and needs help." While the reference is to assistance in stopping the train, nevertheless it would also serve as a warning that a stop was to be made. The engineer on the helper engine stated that one short blast of the whistle on the lead engine means a stop and indicates the intention of the engineer to stop the train. Wait testified that he was familiar with the above mentioned rule and that upon a short blast of the whistle the train crew prepared for a stop. Defendant admitted in its answer that decedent was in the course of his duties on top of the train at the time of the accident, and as we have seen according to its version he was on the fourth car when the train started. In view of the custom and practice requiring the deceased to make a rolling inspection of the train and board about the thirty-fifth car, the engineer in the lead engine should have known that the deceased in the course of his duties was on top of the train at the time it was stopped. Those circumstances also negative the reason advanced by the engineer for the stop, that is, that it was due to the absence of deceased from the cab of the lead engine. While there is evidence by several witnesses that the stop was gradual and easy and without a jerk in the cars there are circumstances from which the jury could have inferred that the stop would probably have caused some jolting. Before the stop practically all of the slack between the cars had been taken up. Although there is evidence that the proper application of the air brakes throughout the train results in a uniform braking to avoid jerking, the element of the slack resulting from stopping is an element to be considered. An application of air at a slow speed creates a greater shock than at high speed. The train was traveling about eight miles per hour. The helper engine four cars ahead of the caboose was pushing forward to some extent. There is evidence that a slight rather than a proper application of air throughout the train as well as an independent application in the lead engine alone would cause a jolting and jerking. The flagman in the caboose testified that the stop was smooth without any jerking, but he also stated that the brakes were set up lightly and gently. Deceased was an able and active brakeman not likely to fall from the top of the car unless something unusual happened. Wait, a brakeman and conductor of many years' experience, including experience on the run here involved, testified as an expert: "Q. Mr. Wait, what would be the action upon a car in the middle of a 62 car train moving out from the stop at Colfax not faster than eight miles an hour, with the slack stretched out for a considerable distance behind the leading engine, and with the helper engine pushing slightly, working steam, if that train were brought to a stop within five car lengths, or 250 feet, by *any* application or use of the automatic air throughout the train? * * * A. It

would be an awful jar. I'll tell you. It would be enough to throw a man from a box car, knock his feet out from under him. Mr. Jones: We move to strike out everything after the words 'it would be an awful jar'; the rest of it is going into the realm of speculation and conclusion again. The Court: Very well, it may go out." (Emphasis added.) From the foregoing evidence it is clear that it could be concluded that defendant was negligent in the process of making the stop and that that negligence caused the death of decedent.

[11-13] Defendant asserts, however, that the foregoing testimony of Wait cannot be considered by this court. Clearly Wait was qualified to testify as an expert from his many years' experience. The matter concerning which he testified was a proper subject for expert testimony. It is said in Peters v. Southern Pacific Co., 160 Cal. 48, 66, 116 P. 400, 408: "The management and operation of trains is a matter outside the experience and knowledge of ordinary jurors, and it is therefore a proper subject for expert testimony." This court held in the recent case of Newkirk v. Los Angeles Junction R. Co., 21 Cal.2d 308, 131 P.2d 535, that the effect a loose condition would have upon the operation of a brake on a train was the proper subject of expert testimony. The question put to Wait included sufficient facts which were established upon which to base his opinion. It does not appear that the brakes on the train in 1934, the date of the accident, were any different than those in use during Wait's experience prior to 1930.

[14] Upon defendant's motion the foregoing testimony of Wait was stricken from the record. Nevertheless, defendant is not now in a position to complain of its consideration on this appeal in support of the verdict. A party may not object to a judgment against him because of insufficient evidentiary support where such lack arose as the result of the improper exclusion of evidence at his instance. It is so held where one party appeals from a judgment urging insufficiency of the evidence to support it. If the evidence necessary to support the judgment was erroneously excluded at the instance of appellant the judgment will be nevertheless affirmed. Kelso v. Slosburg, 120 Cal.App. 479, 8 P.2d 158; Crinella v. Northwestern Pac. R. Co., 85 Cal.App. 440, 259 P. 774; Truschel v. Rex Amusement Co., 102 W. Va. 215, 136 S.E. 30; Missouri, K. & T. R. Co. v. Elliott, 8 Cir., 102 F. 96, 42 C. C.A. 188; see 3 Am.Jur., Appeal & Error, sec. 879; 5 C.J.S., Appeal and Error, § 1506; 2 Cal.Jur. 846–847; Chamberlain Co. v. Allis-Chalmers Mfg. Co., 51 Cal. App.2d 520, 125 P.2d 113; Martin v. Postal Union Life Ins. Co., 16 Cal.App.2d 570, 61 P.2d 333; Hansen v. California Bank, 17 Cal.App.2d 80, 61 P.2d 794; Ralph v. Anderson, 187 Cal. 45, 200 P. 940; Wells v. Zenz, 83 Cal.App. 137, 256 P. 484; Credit C. Bureau v. Guaranty L. Co., 61 Cal.App. 528, 215 P. 104; Harp v. Harp, 136 Cal. 421, 69 P. 28. Under the circumstances we think it is clear that the jury was justified in concluding that defendant was negligent and that its negligence was the proximate cause of the accident.

[15-21] On January 17, 1944, the Supreme Court of the United States rendered its decision in the case of Tennant v. Peoria & Pekin Union Railway Co., 64 S.Ct. 409, 411, in which decision the function of the court and jury in the trial of a case arising under the Federal Employers' Liability Act is discussed. The court said:

"In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 67, 63 S.Ct. 444, 87 L.Ed. 610, 143 A.L.R. 967. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 U.S. 372, 395, 63 S.Ct. 1077, 87 L.Ed. 1458; Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U.S. 351, 50 S.Ct. 281, 74 L.Ed. 896. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors. * * *

"The court below erred, however, in holding that there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was

the proximate cause of Tennant's death. The absence of eyewitnesses was not decisive. There was testimony that his duties included staying near the north or rear end of the engine as it made its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. Looney v. Metropolitan R. Co., 200 U.S. 480, 488, 26 S.Ct. 303, 50 L.Ed. 564; Atchison, Topeka & Santa Fe R. Co. v. Toops, supra, 281 U.S. 356, 50 S.Ct. 283, 74 L.Ed. 896; New Aetna Portland Cement Co. v. Hatt, 6 Cir., 231 F. 611, 617 [145 C.C.A. 497]. In addition, the evidence relating to the rule and custom of ringing a bell 'when an engine is about to move' warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'

"In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence.

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572, 10 S.Ct. 1044, 34 L.Ed. 235; Tiller v. Atlantic Coast Line R. Co., supra, 318 U.S. 68, 63 S.Ct. 451, 87 L.Ed. 610, 143 A.L.R. 967; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, 63 S.Ct. 1062, 87 L.Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion."

The judgment is reversed and the court below is instructed to enter judgment on the verdict.

GIBSON, C. J., and SHENK, CURTIS, and SCHAUER, JJ., concurred.

TRAYNOR, Justice (dissenting).

It is my opinion that the evidence is insufficient to warrant a finding by a rea-

sonable jury that it is more probable than not that the deceased met his death in the course of his employment as the result of defendant's negligence.



23 Cal.2d 624

FARRELL et al. v. PLACER COUNTY et al.

Sac. No. 5628.

Supreme Court of California.

Jan. 31, 1944.

Rehearing Denied Feb. 28, 1944.

1. Counties ⇐213

Compliance with statute requiring persons filing claims against counties to file claims within 90 days, specify name and address of claimant, date and place of accident, and extent of damages, is mandatory. Gen.Laws 1937, Act 5149.

2. Estoppel ⇐62(1)

Generally, a governmental agency may not be estopped by the conduct of its officers or employees, but an equitable estoppel in fact will run against the government where justice and right require it.

3. Counties ⇐213

Where, before time for filing claim against counties for injuries had expired, counties obtained a full statement from claimant concerning accident, and counties advised her not to employ counsel, that it would be satisfactory with counties for claimant to wait until she knew the full extent of her injuries, counties were estopped to complain of late filing of claim. Gen.Laws 1937, Acts 5149, 5619.

4. Equity ⇐1

Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself where right and justice would be defeated but for its intervention.

5. Counties ⇐200

Since a county has general power to pay claims arising from liability imposed by the public liability act, filing a claim against such county within 90 days is a procedural requirement as to the county, which, as to the claimant, may be excused by estoppel, and is analogous to a limitation statute and is not a measure of the county's power in paying tort claims. Gen.Laws 1937, Acts 5149, 5619.

6. Bridges ⇐23
Highways ⇐208(1)

In action against two counties for injuries caused by defective condition of highway and bridge, complaint charging joint control and maintenance of a public place where the injury occurred and showing a lawful basis of such joint control sufficiently alleged joint liability of the counties. Gen.Laws 1937, Act 5619.

7. Bridges ⇐23
Highways ⇐207

In action against two counties for injuries caused by defective condition of highway and bridge, complaint was not demurrable for misjoinder of parties defendant. Gen.Laws 1937, Act 5619.

8. Parties ⇐27
Torts ⇐22

Where two or more persons jointly engage in the commission of a tort they are jointly and severally liable and may be sued jointly.

In Bank.

Appeal from Superior Court, Placer County; A. L. Pierovich, Judge.

Action by James P. Farrell and his wife, Lena Farrell, against the County of Placer and the County of Sutter for personal injuries sustained by plaintiff's wife because of defective and dangerous condition of a highway and bridge situated partly in each county. From a judgment of dismissal, plaintiffs appeal.

Reversed.

Prior opinion, 138 P.2d 382.

Morris, Jaffa & Sumski and Barnett Sumski, all of San Francisco, for appellants.

Lowell L. Sparks, Dist. Atty., of Auburn, Loyd E. Hewitt, Dist. Atty., of Yuba City, Charles V. Barfield, of San Francisco, Thomas F. Sargent, of Auburn, and John J. Healy, Jr., of San Francisco, for respondents.

CARTER, Justice.

Plaintiffs commenced this action against defendants county of Placer and county of Sutter to recover damages arising out of

an automobile accident allegedly caused by the dangerous and defective condition of a bridge and the approaches thereto maintained by defendants. A judgment of dismissal was entered after defendants' demurrers were sustained.

[1] The action is based upon the public liability statute imposing liability upon counties for injury to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, works and property. Stats. 1923, p. 675, Deering's Gen.Laws, 1937, Act 5619. Defendants invoke a claim statute (Stats.1931, p. 2475, Deering's Gen.Laws, 1937, Act 5149); which provides that when any person has been injured or property damaged as the result of the dangerous or defective condition of any of the above mentioned public property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the board of supervisors "within ninety days" after the accident has occurred. The claim must specify the name and address of the claimant, the date and place of the accident and the extent of the damages or injuries. Compliance with that claim statute is mandatory. 9 Cal.Jur. Ten-year Supp., Pub.Off., sec. 190.

Although it is alleged in the complaint that plaintiffs filed a claim with the defendant counties in the manner required by law, it is conceded that no formal verified claim was presented until after the expiration of the ninety-day period but before the commencement of the action. The claim was rejected expressly by one defendant and by the other by lapse of time coupled with a failure to act.

In asserting that their action is not barred by the claim statute plaintiffs rely upon the following circumstances: The accident occurred on May 31, 1938. As a result of the personal injuries received by plaintiff Lena Farrell in the accident, she was confined to the hospital until the middle of September, 1938, and had not recovered from the injuries at the time the action was commenced on May 27, 1939. On June 13, 1938, thirteen days after the accident, "an agent of defendants," accompanied by a stenographer, called upon Mrs. Farrell at the hospital and, at the request of the defendants through their agent, Mrs. Farrell made "plaintiffs' claim against defendants * * * for damages resulting from her injuries received * * * and said claim, including the place where the accident occurred, how it occurred, when it occurred, and the nature of the injuries of said plaintiff Lena Farrell and all other matters required and requested by defendants was then and there reported in shorthand by said stenographer. That thereafter, at the same time and place, and after the said stenographer had left the room, said defendants, through their said agent, asked said plaintiff Lena Farrell if she desired to settle the case, and defendants were then advised by said plaintiff that she desired to settle but did not then know what her damages would amount to; that said defendants, through their said agent, then and there advised said plaintiff Lena Farrell not to employ an attorney and represented to said plaintiff that it would be best for her to settle the case with and through said agent directly and that she would in that manner receive a larger net sum herself That about ten days thereafter [after June 13, 1938], said agent of defendants again called to see said plaintiff Lena Farrell at said Highland Hospital at Auburn, California, and asked said plaintiff if she was then willing to make a settlement. Said plaintiff was at said time in great pain and under opiates, and informed defendants, through their said agent, that she was not then in condition to discuss the matter of the extent of her damages and desired to recover her health before determining and specifying the extent of plaintiffs' damages; that defendants, through their said agent, then and there represented that it would be satisfactory to defendants for plaintiffs to so do; * * * Plaintiffs believed the said representations of defendants made through their agent, * * * and relied thereon and by reason thereof did not for several months after the making thereof, as aforesaid, employ an attorney to recover their damages for injuries against defendants, suffered as aforesaid, and did not take any steps or proceedings whatsover relating thereto."

[2] It has been said generally that a governmental agency may not be estopped by the conduct of its officers or employees (10 Cal.Jur. 650, 651), but there are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. City of

Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002; Fresno v. Fresno C. & I. Co., 98 Cal. 179, 32 P. 943; City of Sacramento v. Clunie, 120 Cal. 29, 52 P. 44; Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L.R.A.,N.S., 178; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P. 2d 547; Sutro v. Pettit, 74 Cal. 332, 16 P. 7, 5 Am.St.Rep. 442; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; County of Los Angeles v. Cline, 185 Cal. 299, 197 P. 67; La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925; Ernst v. Tiel, 51 Cal.App. 747, 197 P. 809; People v. Gustafson, 53 Cal.App.2d 230, 127 P.2d 627; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002. It has been aptly said: "If we say with Mr. Justice Holmes, 'Men must turn square corners when they deal with the Government', It is hard to see why the government should not be held to a like standard of rectangular rectitude when dealing with its citizens." 48 Harv. L.Rev. 1299.

[3,4] In the instant case the facts clearly establish that defendants should be estopped to complain of the late filing of the claim. *Before* the time for filing the claim had expired, and only about thirteen days after the accident occurred, defendants obtained a full and complete statement from plaintiff Lena Farrell concerning the accident, thus not only enabling them to fully investigate the accident but also having the benefit of Mrs. Farrell's version of it. They advised her not to employ counsel, thus lulling her into a sense of security and persuading her not to avail herself of legal assistance in the protection of her rights. She was told that it would be satisfactory with defendants for her to wait until she knew the extent of her injuries before she stated the amount she claimed or made a settlement. Plaintiffs believed and relied upon those statements and conduct of defendants, and as a result did not consult with counsel or take any proceedings in regard to her claim. It is pertinently said in Times-Mirror Co. v. Superior Court, supra, 3 Cal.2d at page 331, 44 P.2d at page 557: "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. 'It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.' Humboldt Sav. Bank v. McCleverty, 161 Cal. 285, 119 P. 82, citing Story's Equity Jurisprudence, §§ 28, 439; 1 Pomeroy's Equity Jurisprudence, § 60. Commenting upon Lord Hardwicke's statement as to the equitable principles which should govern chancellors (Pomeroy's Equity Jurisprudence, 1, 4th ed., note to section 60), the learned author makes the following observation: '* * * No chancellor was ever more governed in his judicial work by principles—but he would guard against the theory which locks these principles up in the already existing precedents, and limits their free application to facts, circumstances and relations similar to those which had been the subject-matter of former adjudications. In other words, Lord Hardwicke in this short passage states the same view which I had given in the text. Although equity is and long has been in every sense of the word a system, and although it is impossible that any new principles should be added to it, yet the truth stands and always must stand that the final object of equity is to do right and justice.' The principles of equity, continues the same author, are based upon a divine morality and possess an inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization."

It has been said in cases involving claim statutes such as here involved that compliance with the requirement of the statute cannot be waived or excused by estoppel. See First Trust & Sav. Bank v. City of Pasadena, 21 Cal.2d 220, 130 P.2d 702; Hall v. City of Los Angeles, 19 Cal. 2d 198, 120 P.2d 13; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Cooper v. County of Butte, 17 Cal.App.2d 43, 61 P.2d 516; Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Johnson v. City of Glendale, 12 Cal.App. 2d 389, 55 P.2d 580; Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035; Kline v. San Francisco U. School District, 40 Cal.App.2d 174, 104 P.2d 661, 105 P. 2d 362. In the First Trust & Savings Bank case and the Douglass case no claim

at all was filed with the proper persons and the factual bases of the claimed estoppel were dissimilar. In the Kline case all that appears is that a letter in regard to the claim was sent to the board of trustees of the school district and some action, the character of which does not appear, was taken thereon by the board. No facts upon which to base an estoppel appeared. The language therein with respect to waiver and estoppel was not necessary to the decision. The Johnson case involved action by the city officials consisting of an investigation of the facts of the claim and a visit to the claimant in the course of the investigation, at which time the officials told the claimant that they would determine the question of liability and advise the claimant in regard thereto. The court does not discuss the estoppel features of the facts presented, but declares that the officials could not waive the requirement of a timely filing of a claim. However, in view of the facts presented an estoppel did exist and the case must be disapproved. The Spencer case held that no estoppel was available because the claimant had nineteen days within which to file her claim in time *after* she became aware that she could not rely upon the false impression given to her by the officials. The facts in the Hall, Cooper and Chapman cases did not contain the elements necessary for estoppel which exist in the case at bar.

[5] Although it has been repeatedly held that compliance with the appropriate claim statute is mandatory and an essential requisite to plaintiff's cause of action, nevertheless the time element with respect to the filing of the claim is essentially procedural in nature (Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365) and is analogous to a statute of limitation. See Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Rhoda v. County of Alameda, 134 Cal. App. 726, 26 P.2d 691. It has been intimated by some authorities that the claim statute is the measure of the power of the governmental agency in paying the tort claims involved, and hence any deviation from that procedure cannot be dispensed with by waiver, estoppel, or otherwise. That conclusion, at least with respect to the time of filing the claim, is not supported by the statute or reason. The various reasons advanced for the adoption of the claim statute, that is, to afford the agency an opportunity to investigate the merits of the claim, and to arrive at a settlement, thus avoiding litigation, are not inconsistent with the view that the statute is not the measure of the power. From the standpoint of the agency it has general power to pay claims arising from the liability imposed by the public liability act. Hence the filing of the claim within ninety days, while mandatory upon the claimant and a condition precedent to his cause of action, is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel. There are cases where the procedure specified in the statute is manifestly the measure of the power. See Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570. There are instances where the procedural steps are not the measure of the power and estoppel may be invoked against a governmental agency from relying upon irregularities therein. See Chas. R. McCormick L. Co. v. Highland S. Dist., 26 Cal.App. 641, 147 P. 1183; Clark v. Conley School District, 86 Cal.App. 527, 261 P. 723; Briney v. Santa Ana High School Dist., 131 Cal. App. 357, 21 P.2d 610. This court has held that compliance with the claim statute is not jurisdictional with respect to the power of a court to give judgment against the governmental agency where no claim was filed. Redlands, etc., School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490.

[6-8] There is no merit in the contention that there is a misjoinder of parties defendant or that the joint liability of the defendants Placer and Sutter Counties is not sufficiently alleged. The complaint charges that a highway runs along the boundaries of the two counties, being partly in each; that there was a bridge situated on the highway; "That at all times herein mentioned, said wooden bridge and the approaches thereto and said public highway *were maintained by defendants said Sutter County and said Placer County* in a defective and dangerous condition." (Emphasis added.) Those allegations are sufficient to charge joint control and maintenance of the public place where the injury occurred. They are sufficiently certain to show the lawful basis of such joint control, the details of which are peculiar-

ly within the knowledge of defendants. Where two or more persons jointly engage in the commission of a tort they are jointly and severally liable and they may be sued jointly. 20 Cal.Jur. 510.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



23 Cal.2d 647

SHEALOR v. CITY OF LODI et al.

Sac. No. 5630.

Supreme Court of California.

Feb. 1, 1944.

1. Constitutional law ⇐48

If a statute is susceptible of a construction which will render it constitutional, and a construction which will render it unconstitutional, in whole or in part, the court will adopt construction which, without doing violence to reasonable meaning of language used, will render it valid in its entirety.

2. Constitutional law ⇐48

A presumption exists that Legislature intended not to violate the Constitution, but to enact valid statutes within the scope of its constitutional powers.

3. Counties ⇐69(3)
Municipal corporations ⇐187

The statute relating to creation of a police pension fund in the several counties, cities and towns would be construed as imposing no mandatory requirement upon counties, cities, or towns in regard to establishing a pension fund. Gen.Laws 1937, Act 6012, §§ 1–3, 6, 7, 12; Const. art. 11, § 12.

4. Statutes ⇐219

Administrative construction of an ambiguous statute will be followed if not clearly erroneous.

5. Statutes ⇐219

Fact that for more than 50 years the counties and cities had treated statute relating to creating of police pension fund in the several counties, cities and towns as an enabling act, supported conclusion that statute imposed no mandatory requirement upon counties, cities, or towns in regard to establishing a pension fund. Gen.Laws 1937, Act 6012, §§ 1–3, 6, 7 and 12.

CURTIS and SHENK, JJ., dissenting.

In Bank.

Proceeding by F. Shealor against the City of Lodi and others for writ of mandate to require defendants to retire petitioner from active service as a police officer upon a pension. From a judgment ordering the writ, the defendants appeal.

Judgment reversed, with directions.

Prior opinion, 138 P.2d 683.

Glenn West, of Lodi, for appellants.

Christopher J. Griffin, City Atty., of Huntington Park, Louis H. Burke, City Atty., of Montebello, Thomas Bewley, City Atty., of Whittier, John McCall, City Atty., of Torrance, Clyde Woodworth, of Inglewood, M. Tellefson, of Culver City, Ray Thompson, City Atty., of Fullerton, Paul Garber, City Atty., of Monrovia, J. C. Bone, City Atty., of Arcadia, Paul B. Wilson, City Atty., of Redlands, Carlton H. Casjens, City Atty., of Bell, J. H. Cragin, City Atty., of Maywood, and Richard C. Waltz, City Atty., of Beverly Hills, as amici curiae on behalf of appellants.

Chester E. Watson, of Stockton, for respondent.

EDMONDS, Justice.

The petitioner, a policeman employed by the city of Lodi, claims the right to retire upon a pension as provided by a statute enacted in 1889 "to create a police relief, health, and life insurance and pension fund in the several counties, cities and counties, cities, and towns of the State." Stats.1889, p. 56, Deering's Gen.Laws, Act No. 6012. Following a trial, the court held that he is entitled to the benefits of the act and issued a writ of mandate requiring the city, and certain of its officers, to retire him from active service.

The principal problem is one of construction. The appeal of the city and those persons against whom the writ was directed is rested mainly upon the contention that the statute is an enabling act and not mandatory legislation requiring a municipality of the sixth class to comply with its terms. Also, the trial court's finding that there are ample funds in the

city's treasury to pay the pension fixed by the judgment is challenged as being without support in the evidence. The respondent argues that the statute mandatorily applies to every municipality having a police force, and in support of the finding he points to undisputed testimony showing the receipt by the city, during the five years preceding the trial, of more than $7,800 from collections specified by the Legislature as the sources of the pension fund.

Section 1 of the act provides: "The chairman of the board of supervisors of the county, city and county, city, or incorporated town in which there is no board of police commissioners, the treasurer of the county, city and county, or incorporated town, and the chief of police, and their successors in office, are hereby constituted a board of trustees of the police relief or pension fund of the police department * * * which board shall be known as the 'Board of Police Pension Fund Commissioners'; provided however, that where there is in any county, city and county, city, or town, a board of police commissioners, then such body shall constitute said board of trustees of the police relief and pension fund of the police department."

By section 2 of the statute the board is directed to organize and annually to file a report. Section 3 specifies, so far as is pertinent here, that an officer having served 20 years and having reached the age of 60 years shall, upon his application, be entitled to be retired upon a pension equal to one-half of the salary attached to the rank he held for the year preceding his retirement. It is admitted by the pleadings that, if the legislation is mandatory, the petitioner possesses the qualifications both as to age and length of service as a member of the police department of the city of Lodi entitling him to the benefits of the act.

The statute has no preamble or introductory clause from which the intent of the Legislature may be ascertained, and it includes no specific provision either creating a pension fund or requiring a municipality to do so. On the other hand, the express terms of the enactment do not clearly indicate that it merely authorizes the adoption of a pension plan by a local governmental body. The respondent's construction of the act as mandatory is based upon the language of section 1 that designated officials "are hereby constituted a board of trustees of the police relief or pension fund * * *" and the frequent use of the word "shall" in its provisions.

For example, by the terms of section 2 the local officials *"shall* organize as such board * * * [and] *shall* have charge of and administer said fund, and to order payment therefrom. * * *" Section 3 states that "said board *shall* upon the application [of a qualified policeman] order and direct that such person * * * be retired from further service in such police department, * * * and such person so retired *shall* thereafter, during his lifetime, be paid from such fund a yearly pension * * *." Section 6 declares that whenever a policeman shall lose his life in the performance of his duty, "such board *shall* order and direct" that a pension be paid to his widow or children. By section 7, whenever a member of a police department, after 10 years of service, dies from natural causes, his widow, children, mother or unmarried sisters *"shall be entitled to* the sum of one thousand dollars from such fund." According to section 12, the governing authority in a municipality *"shall,* for the purposes of said 'police relief and pension fund' * * * direct the payment annually, and when the tax levy is made, into said fund of the following moneys * * *." (Italics added.) All of these provisions, however, as the appellants contend, are subject to the interpretation that if, but only if, a city elects to adopt a pension plan and sets up a fund under the authority of the statute, it must act in accordance with the express provisions of the legislation. Concededly, the city of Lodi has never adopted such a plan nor set aside any money for that purpose.

The respondent urges that the title of the statute may be considered in construing the act, which the Legislature declared is one "to create a police relief, health, and life insurance and pension fund in the several counties, cities and counties, cities, and towns of the state." The words "to create," he says, indicate a mandatory intent. But the appellants point out that the Legislature did not adopt an act "creating" a pension fund. The wording of the title, they say, is consistent with an interpretation of the statute as one enabling a municipality to create a pension fund. And they argue that section 13 refers to the fund "created under the provisions of this act," rather than to a fund "created by this act."

Reading the statute as a whole, it may reasonably be construed as legislation authorizing a city to make provision for a

fund rather than as an enactment creating one. Yet none of the language used by the Legislature is so clear as to compel a construction of it either as mandatory legislation or as an enabling act, and, although the statute has frequently been considered by the appellate courts of this state, the question now presented has not before been raised. See, for example, Pennie v. Reis, 80 Cal. 266, 22 P. 176; Clarke v. Police Life, etc., Ins. Bd., 123 Cal. 24, 55 P. 576; Id., 127 Cal. 550, 59 P. 994; Kavanagh v. Board of Police P. F. Com'rs, 134 Cal. 50, 66 P. 36; Nicols v. Board of Police Pension Fund Com'rs, 1 Cal.App 494, 82 P. 557; Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 249 P. 46; Frisbee v. O'Connor, 119 Cal.App. 601, 7 P.2d 316; Simmons v. Board of Police, etc., Com'rs, 48 Cal.App.2d 682, 121 P.2d 39.

However, these decisions impliedly support the position taken by the appellants. In the Kavanagh case, supra, a writ of mandate was awarded ordering the defendants to pay the widow of a deceased San Francisco police officer the sum of $1,000 under the 1889 act. But the court did not construe the act as mandatory, and there was no occasion for it to do so because the evidence clearly showed that the city had adopted a pension plan. Indeed, according to the brief of the city attorney, the city had retained the sum of $2 per month from Kavanagh's salary for a period of 15 years, which amount was paid into the Police Relief and Pension Fund. Moreover, prior to his death the officer had been placed on the retired list and given a pension. See, also, Simmons v. Board of Police, etc., Com'rs, supra, 48 Cal.App.2d at pages 683, 684, 121 P.2d at page 40, wherein the court said that the 1889 act was "designed for and made use of by" San Francisco, but was made to apply to all cities and counties to avoid the constitutional inhibition against special legislation. In Frisbee v. O'Connor, supra [119 Cal.App. 601, 7 P.2d 317], it was held that a city had no power, in view of the 1889 act, to set up an insurance plan and pension fund of a new and different type from that provided by the state Legislature. Although the District Court of Appeal there referred to the pension funds that "the Legislature created," it was not considering the present question and there is nothing in the opinion from which a determination that the statute is mandatory may be implied. The court held only that a city can adopt no policemen's or firemen's pension plan other than the one provided or authorized by the Legislature, and it did not decide, nor does the language of the opinion suggest, that any pension plan must be adopted. In the Klench case, supra, the city of Stockton had by ordinance established a pension fund, and the court determined that the local pension board was required to pay a pension under the terms of the 1889 act which, it was said, the city had adopted in enacting the ordinance 79 Cal.App. at page 180, 249 P. at page 48. Other language in the opinion indicates that the court considered the 1889 act as "authorizing" creation of pension plans by the cities. 79 Cal.App. at page 180, 249 P. at page 49; compare also statements on pp. 176, 177, 178 and 185 of 79 Cal.App., pages 47, 48, 50 and 51 of 249 P.

Amici curiae argue that if every municipal corporation must comply with the provision of the statute, then the act violates the constitutional provision which reads: "Except as otherwise provided in this Constitution, the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Const., art. XI, sec. 12. They cite the Klench case, supra [79 Cal.App. 171, 249 P. 48], where the court in considering the powers of a chartered city declared "that the matter of the fixing of the compensation and providing for the pensioning of policemen and firemen is strictly a 'municipal affair.'" Cf. Butterworth v. Boyd, 12 Cal.2d 140, 147, 82 P.2d 434, 126 A.L.R. 838; Popper v. Broderick, 123 Cal. 456, 56 P. 53; Richards v. Wheeler, 10 Cal.App.2d 108, 111, 112, 51 P.2d 436; Murphy v. City of Piedmont, 17 Cal.App.2d 569, 571, 572, 62 P.2d 614, 64 P.2d 399. And they also rely on San Francisco v. Liverpool, etc., Insurance Co., 74 Cal. 113, 15 P. 380, 5 Am.St.Rep. 425, where the court held unconstitutional legislation requiring that insurance companies pay certain sums to the treasurer of any county in which insurance was effected, the money to constitute a firemen's "relief fund." Upon the ground that the exaction was a tax for a municipal purpose, the statute was said to be in violation of section 12 of article XI, supra. "The management and control of the fire departments have always been left to local authorities," said the court. "The fact that the state at large

has an interest in the efficiency of the departments does not render the end any less a municipal one. The people of the state have such an interest in all the police powers granted to these municipalities. And even if the state may exercise a concurrent supervision over a subject, still, so far as actually controlled by the local board, it is a matter of municipal concern." 74 Cal. at page 124, 15 P. at page 384, 5 Am.St.Rep. 425. However, the courts of other states are not in agreement upon the question as to whether state legislation requiring municipal payment of pensions to policemen and firemen is prohibited by constitutional provisions such as the one of our state. See 46 A.L.R. 683-693 and 106 A.L.R. 914, 915.

[1-3] If the statute concerns a strictly municipal affair, then the next question presented by the contention of amici curiae is whether, in effect, it imposes a tax upon a municipality in violation of article XI, section 12. The statute, if mandatory, compels every municipality to pension its policemen, thus placing a direct burden upon a city, and also specifies that amounts equal to two per cent of policemen's salaries be set aside for that purpose. Amici curiae argue that the imposition of such a burden constitutes the indirect imposition of a tax and is, therefore, within the prohibition of article XI, section 12. Cf. McCabe v. Carpenter, 102 Cal. 469, 471, 36 P. 836; 46 A.L.R. 628, 640. But there is no contention that if interpreted as enabling legislation the act runs counter to any provision of the Constitution. Under such circumstances the rule recently stated in Miller v. Municipal Court is applicable. In that case it was said: "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." 22 Cal.2d 818, 828, 142 P.2d 297, 303. Applying the reasoning of that decision to the uncertainties of the language used by the Legislature, it must be held that the enactment imposes no mandatory requirements.

[4, 5] Another established rule of statutory construction leads to the same conclusion. Administrative construction of an ambiguous statute "will be accorded great respect by the courts and will be followed if not clearly erroneous." Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 325, 326, 109 P.2d 935, 939. See, also, Los Angeles County v. Superior Court, 17 Cal.2d 707, 712, 112 P.2d 10; Carter v. Commission on Qualifications, etc., Appointments, 14 Cal.2d 179, 185, 93 P.2d 140. Unquestionably, although the statute was enacted in 1889, neither the cities nor the counties of this state have considered its provisions as mandatory, nor have more than one or two cities complied with its terms. On the contrary, the respondent does not deny the assertion of amici curiae that more than 200 cities and 57 counties have, for more than 50 years, treated the legislation as an enabling act.

The judgment is reversed with directions to the trial court to enter judgment for the appellants.

GIBSON, C. J., and TRAYNOR, J., concurred.

CARTER, Justice (concurring).

I concur in the judgment of reversal. Sound judicial policy in the construction and interpretation of statutes compels the conclusion that the Pension Act in question, Stats. 1889, p. 56, is not mandatory. It has now been on the statute books for over 50 years and has not been considered as mandatory by any of the counties or cities of this state. Those few agencies which have availed themselves of its terms have done so in a manner clearly indicating their understanding that it was merely an enabling act. The legislative bodies of the counties and cities and the other officers of those agencies are presumed to have known of the existence of the law, and to have regularly performed their official duties, Code Civ.Proc. § 1963 (15), yet the law has not been considered or acted upon by them as mandatory legislation, and no tax has been levied to provide a fund to meet the pension demands. There are no cases in the appellate courts of this state where the beneficiaries under the act have sought to compel its enforcement as mandatory legislation. These circumstances present a situation which makes certain rules of statutory construction especially pertinent and forceful. It is said

that "Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute. * * * In addition, the use of contemporary and practical interpretation makes for certainty in the law and justifies reliance upon the conduct of public officials." Sutherland Statutory Construction, 3rd Ed., sec. 5103. And "The practice and interpretive regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute will carry great weight in determining the operation of a statute." Sutherland Statutory Construction, 3rd Ed., sec. 5105. And "However, interpretations made by the public and those affected by a law, interpretations resulting from the practice of the bar, and interpretations made by administrative officials of similar legislation in other jurisdictions may have important bearing as to the meaning of a statute. * * *

"Non-action by administrative officers may be indicative of a lack of statutory power. Thus is has been said by the United States Supreme Court, 'Authority actually granted by Congress, of course, cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'" Sutherland Statutory Construction, 3rd Ed., sec. 5106. Citing Federal Trade Commission v. Bunte Bros., 312 U.S. 349, 61 S.Ct. 580, 85 L.Ed. 881. Further, "Like all precedents, where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving at the proper construction of a statute. Thus contemporaneous interpretations of five, nine, ten, eighteen, twenty, twenty-five, fifty, fifty-six, sixty, and seventy years have been permitted to govern legislative meaning. One of the soundest reasons sustaining contemporaneous interpretations of long standing is the fact that reliance has been placed thereon by the public and those having an interest in the interpretation of the law. While the principle here is not strictly that of estoppel running against the government there is some analogy to that principle when the interpretation has been made by a government agency or officer." Sutherland Statutory Construction, 3rd Ed., sec. 5107.

In addition to the foregoing reasoning there are other factors indicating that the legislation is not mandatory. Three other statutes have been enacted since 1889, which cover comprehensively the subject of pensions for county and city employees. In 1919 a statute was passed authorizing counties to establish a pension system for their employees. Stats. 1919, p. 782. A county peace officers' retirement act enabling counties to make provision for pensions was adopted in 1931. Stats. 1931, p. 477. Cities were authorized by an act of 1937, to adopt a pension system for their employees Stats. 1937, p. 699. In view of these acts it may be that the act of 1889 is no longer in effect, or at least they establish sound basis for the contention that the Legislature did not consider said act to be a mandatory statute when it adopted the above mentioned acts which embrace substantially the same subject matter as the act of 1889.

SCHAUER, J., concurred.

CURTIS, Justice.

I dissent. The most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its face need not and cannot be interpreted by a court, and only those statutes which are ambiguous and of doubtful meaning are subject to the process of statutory interpretation. Sutherland, Statutory Construction, 3rd Ed., vol. 2, sec. 4502, p. 316; 23 Cal.Jur., sec. 109, p. 730. The act here in question is plainly mandatory in form. As appears from its pertinent sections as quoted in the main opinion, the board of trustees of the pension fund was thereby "created," its powers and duties were all prescribed therein, and nothing was left to be done by the governing body of the county or municipality except to levy the tax as directed therein and make other specified payments to the fund. To evidence in unmistakable terms its intent, the Legislature consistently used throughout the act the imperative auxiliary "shall." As is said in 57 Corpus Juris, page 548: "In common, or ordinary parlance, and in its ordinary signification, the term 'shall'

is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission."

While it does not appear that the precise character of the act now in question has been heretofore adjudicated in this state, its mandatory form has been impliedly recognized in decisions establishing the impropriety of a variant pension plan adopted by a municipality when the "Legislature created such insurance and pension funds" by such act (Frisbee v. O'Connor, 119 Cal. App. 601, 604, 7 P.2d 316, 317) and referring to the act as "made to apply to all 'counties, cities and counties, cities, and towns of the state' to avoid the constitutional inhibition against special legislation." Simmons v. Board of Police, etc., Com'rs, 48 Cal.App.2d 682, 684, 121 P.2d 39, 40. Any language in the case of Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 249 P. 46, as cited in the main opinion herein, purporting to distinguish the act as mere enabling legislation, has no special significance here since the action of the municipality there concerned, in its prior enactment of an ordinance embracing the act in its entirety, operated to eliminate from the court's consideration any point as to statutory interpretation. But withal, there was no holding in the Klench case that such formal procedure of acceptance on the part of the city was necessary to make the act applicable thereto. Whether or not the administrative officials of other cities and towns have regarded the act as only a permissive statute is of no consequence, for their construction, no matter how long prevailing, cannot change its clear language or alter its plain meaning. 23 Cal.Jur., sec. 152, p. 776; Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86.

Nor does the act as mandatory legislation violate article XI, section 12, of the state Constitution, prohibiting the Legislature from imposing taxes for *municipal* purposes. While it is conceded that the duties of police officers are primarily local and municipal, in maintaining law and order in their respective communities, it is generally known that many of the local police officers spend much of their time and effort in performing duties in which the state at large is interested. The general pension plan prescribed by the act in question was intended to promote, and undoubtedly would promote if its mandatory language were given effect, a better police service for the entire state. To the extent such statute has a state as distinguished from a purely local purpose, it occupies an intermediate field of legislation and does not come within the constitutional ban in its contemplation of the following test as to "municipal purposes": Is it for strictly local uses, from which the municipality and its inhabitants alone would benefit, or is it for a purpose in which the entire state is concerned or will benefit? Upon such premise the case of San Francisco v. Liverpool, etc., Insurance Co., 74 Cal. 113, 15 P. 380, 5 Am.St. Rep. 425, cited in the main opinion herein, is distinguished in City of Los Angeles v. Riley, 6 Cal.2d 621, 623, 624, 59 P.2d 137, 106 A.L.R. 903, to the effect that while the Legislature is without power to interfere in the management of purely municipal affairs, such matters as are of public and state-wide concern are properly subject to its control. In line with this observation the conclusion is inescapable that to the extent the police forces of the various cities and towns serve a state purpose, the Legislature could with propriety pass the act here involved and not violate article XI, section 12, of the State Constitution.

For the foregoing reasons I think that the petitioner correctly sought a writ of mandate to enforce his right to the benefits conferred by the act in question, and that the judgment of the trial court in so holding should be affirmed.

SHENK, J., concurred.

23 Cal.2d 670

PEOPLE v. KOLEZ.

Cr. 4507.

Supreme Court of California.

Feb. 1, 1944.

Criminal law ⊂768(4)

An instruction that, if jury found defendant guilty of first-degree murder and also found some extenuating circumstances or facts, it was within their discretion to pronounce such sentence as would relieve defendant from extreme penalty, but that, if evidence showed no such facts or circumstances, it was jury's duty to find simple verdict of first-degree murder and leave with the law responsibility of fixing punishment, was not erroneous as attempt to control jury's statutory discretion to sentence defendant to either death or life imprisonment. Pen.Code, § 190.

TRAYNOR and SCHAUER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Dan Kolez was convicted of murder in the first degree, without recommendation, and he appeals.

Affirmed.

Grover C. Julian, of Susanville, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PER CURIAM.

An information was filed charging defendant with the murder of Roscoe Edward Sutton in Lassen County on December 25, 1942. Defendant pleaded not guilty and not guilty by reason of insanity. After trial, the jury returned a verdict finding defendant guilty of murder in the first degree, without recommendation. Defendant then moved to withdraw the insanity plea. The trial court informed defendant that as a result of the verdict there was no alternative except to pronounce the death sentence if he withdrew his plea of insanity. Defendant and his counsel assured the court that they fully understood the effect of the verdict and in response to the court's inquiry stated that they still desired to withdraw the insanity plea. The motion to withdraw the plea was thereupon granted and defendant was sentenced to death. He orally announced this appeal from the judgment. Defendant is a cook by trade and at the time of the homicide was employed in a restaurant at Doyle, Lassen County. Deceased was a regular patron of the restaurant. He died from stab wounds in the abdomen inflicted by defendant while the two men were in the restaurant. There was no eyewitness to the scuffle which preceded the stabbing, but the restaurant proprietor heard the noise incident thereto and, turning, saw the deceased bending over and the defendant holding a knife, which the proprietor took from him. Apparently the homicide resulted from defendant's jealousy over attentions shown by the deceased to a waitress in the restaurant.

No challenge is made as to the sufficiency of the evidence to support the verdict and judgment, and further statement of the facts surrounding commission of the homicide is therefore unnecessary.

Defendant's sole contention upon this appeal is that the trial court erred in giving the following instruction:

"If the Jury in this case should find the defendant guilty of murder in the first degree, and they also shall find the further fact that there are some extenuating circumstances or facts in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The Penal Code invests a Jury in a criminal case of murder with the discretion, limited to determining which of two punishments shall be inflicted, and is to be employed, only when the Jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating facts or circumstances, it is the duty of the Jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment."

Defendant argues that this instruction is prejudicially erroneous as an attempt on the part of the trial court to circumscribe and control the discretion given to the jury in such cases by section 190 of the Penal Code, which reads: "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *." The

trial court also gave an instruction in the language of the code section.

It has been held in a long line of decisions that the giving of an instruction similar to the one above quoted is not erroneous. People v. Jones, 63 Cal. 168, 169, 170; People v. Murback, 64 Cal. 369, 370, 30 P. 608; People v. Brick, 68 Cal. 190, 191, 192, 8 P. 858; People v. Olsen, 80 Cal. 122, 128, 22 P. 125; People v. Bawden, 90 Cal. 195, 197, 198, 27 P. 204; People v. Rogers, 163 Cal. 476, 483, 484, 126 P. 143; People v. Harris, 169 Cal. 53, 70, 145 P. 520; People v. Wolfgang, 192 Cal. 754, 761, 762, 221 P. 907; People v. Reid, 193 Cal. 491, 496, 225 P. 859; People v. Casade, 194 Cal. 679, 682, 683, 230 P. 9; People v. Perry, 195 Cal. 623, 640, 234 P. 890; People v. Craig, 196 Cal. 19, 28, 235 P. 721; People v. Bollinger, 196 Cal. 191, 207, 237 P. 25; People v. Arnold, 199 Cal. 471, 500, 250 P. 168; People v. King, 13 Cal.2d 521, 525, 90 P.2d 291; People v. Smith, 15 Cal.2d 640, 651, 104 P.2d 510; cf. People v. Smith, 13 Cal.2d 223, 228, 88 P.2d 682; and see People v. Welch, 49 Cal. 174, 178.

The judgment is affirmed.

TRAYNOR, Justice (dissenting).

I dissent. Section 190 of the Penal Code in providing that the punishment for first degree murder is life imprisonment or death "at the discretion of the jury" imposes no limitation on that discretion. The Legislature did not distinguish between one kind of first degree murder and another, nor did it establish death as the ordinary punishment for first degree murder and life imprisonment as the exceptional one. The Legislature did not prescribe, nor did it authorize the court to prescribe, rules to govern which punishment should be imposed but "confided the power to affix the punishment between these two alternatives to the absolute discretion of the jury." People v. Leary, 105 Cal. 486, 495, 496, 39 P. 24, 26. It thus left it to the jury to decide whether capital punishment should be invoked. "The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. * * *" Winston v. United States, Strather v. United States, and Smith v. United States,* 172 U.S. 303, 313, 19 S.Ct. 212, 43 L.Ed. 456, quoted in People v. Bollinger, 196 Cal. 191, 206, 237 P. 25, 31; see Bye, Capital Punishment, 17 Journal of Amer. Inst. of Crim. Law, pp. 234, 236.

* "These cases involved the act of Congress of January 15, 1897, chapter 29, 29 Stats. at Large, 487, [18 U.S.C.A. § 567] which reads in part: 'In all cases where the accused is found guilty of murder * * * the jury may qualify their verdict by adding thereto "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.' The juries in those cases were instructed in effect that their discretion was not an arbitrary one and that the qualification should be added to the verdict only in those cases showing palliating or mitigating circumstances. In condemning the instructions and reversing the judgments, the court said:

" 'The right to qualify a verdict of guilty, by adding the words "without capital punishment," is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. * * *

" 'The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words "without capital punishment," unless mitigating or palliating circumstances were proved.

" 'This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express words or by the apparent purpose of the statute. * * *' " People v. Bollinger, 196 Cal. 191, 206, 207, 237 P. 25, 31.

The trial court in the present case limited the jury's discretion in this respect by instructing it that "If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating facts or circumstances it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of fixing the punishment." In disregard of the statute, the court usurped the power of the jury to determine the considerations that would govern its choice of one punishment or the other. Moreover it decided, without statutory authority, that death should be the ordinary punishment for first degree murder and life imprisonment the exceptional one. It thereby greatly reduced the chances of the jury's imposing the lesser sentence to the prejudice of the defendant. It was the duty of the jury to follow the court's instructions, and since it was not permitted to exercise the discretion plainly given it by the statute, there are no grounds for holding that a different result would have been improbable had the instruction not been given. People v. Putnam, 20 Cal.2d 885, 892, 129 P.2d 367. "The proper practice for the trial court is to refrain from giving any instructions which might have a tendency in the slightest degree to influence or control the discretion of the jury in its determination of the proper penalty in a case where the defendant is charged with murder in the first degree." People v. Martin, 12 Cal.2d 466, 470, 471, 85 P.2d 880, 883.

For over fifty years precedents have accumulated condemning such instructions, even though the court has fallen short of reversing judgments because of them. As early as 1891, in People v. Bawden, 90 Cal. 195, 27 P. 204, 205, the court said, "It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain." In 1912, when the instruction was challenged, the court declared that such an instruction was not error, but that "If the question presented were a new one, there would be strong reasons for holding in accord with defendant's claim." People v. Rogers, 163 Cal. 476, 483, 484, 126 P. 143. In 1925, in People v. Bollinger, 196 Cal. 191, 207-209, 237 P. 25, 31, the court expressed itself in more emphatic terms: "In our opinion, the trial court should never instruct the jury as to how the discretion should be exercised. * * * While we are satisfied that the giving of such instructions is opposed to the provisions of section 190 of the Penal Code, we are not prepared to depart from the decisions on this point. * * * We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone * * *. And considering the number of times this court has held that section 190 confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury." See, also, People v. Ross, 134 Cal. 256, 258, 259, 66 P. 229; People v. Martin, supra. In 1939, in People v. Smith, 13 Cal.2d 223, 88 P.2d 682, 685, the court again declared that such an instruction violated Penal Code section 190, adding, "Just why this and similar warnings by this court have not been observed by prosecuting officers and trial courts, we are at a loss to understand." It stated that such an instruction might be a ground for reversing the trial court, even though it concluded that under the facts of that case the possibility that the jury might have voted for life imprisonment was so remote that prejudice could not be assumed.

The court has thus been unwilling to overrule the cases holding that it is not error to give the instruction in question but has also been unwilling to hold that it is proper to give it. It has thus placed itself in the inconsistent position of tolerating the giving of an instruction that it condemns. It has sought to overcome this inconsistency by admonishing trial courts not to give the instruction. There can be no such middle ground, however. If the instruction is not erroneous it is quite proper for trial courts to give it and an unwarranted interference for this court to admonish them not to give it. If the instruction is erroneous it should be held to be so outright. The dilemma is not resolved but perpetuated when this court, in deference to precedent, sanctions an incorrect instruction and at the same time admonishes the trial court to cease giving it. The repeated disregard of such admonitions demonstrates that if the correct rule is to be applied, this court must join in its enforcement and reverse the judgments of trial courts that vitiate it. Dis-

regard of admonitions of this court in the past has been held to indicate an attempt to influence the jury improperly and therefore to constitute ground for reversal. People v. Maughs, 149 Cal. 253, 263, 86 P. 187; People v. Costello, 21 Cal.2d 760, 135 P.2d 164; see People v. Ryan, 152 Cal. 364, 92 P. 853. There can be no justifiable reliance on decisions allowing this instruction in view of the repeated warnings by this court that district attorneys should not offer and trial courts should not give it. A decision that cannot properly be relied upon cannot serve to justify adherence to an interpretation it condemns. Nothing is gained and much is lost by insisting upon a mechanical adherence to precedent that perpetuates an admittedly erroneous interpretation of a statute and defeats the very purpose of the Legislature in enacting it.

SCHAUER, J., concurred.



23 Cal.2d 659

BETHLEHEM STEEL CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 16874.

Supreme Court of California.

Feb. 1, 1944.

1. Workmen's compensation ⇐1674

Evidence sustained finding that safety order requiring loads to be secured against displacement was violated in that employer failed to so secure steel beams loaded on truck, justifying award of increased compensation for death of employee killed when beams fell from truck while employee was riding thereon. St.1937, p. 281, § 4553.

2. Workmen's compensation ⇐1376

In proceeding for increased compensation for death of employee killed when steel beams fell from truck, inference arose that load was not secured against displacement, as required by safety order, from fact that beams fell from truck. St.1937, p. 281, § 4553.

3. Workmen's compensation ⇐941

It is not every violation of a statute that is "serious misconduct" which will make employer liable for increased compensation, but a deliberate breach of law, which is framed in the interests of the working man, amounts to "serious misconduct". St.1937, p. 281, § 4553.

4. Workmen's compensation ⇐939

The test of whether employer was guilty of "serious and willful misconduct" so as to be liable for increased compensation is whether he knowingly or willfully committed an act that he knew or should have known was likely to cause harm to employee. St.1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Serious and Willful Misconduct".

5. Workmen's compensation ⇐1674

Evidence supported finding of "serious and willful misconduct" on employer's part in failing to secure steel beams loaded on truck against displacement, as required by safety order, justifying award of increased compensation for death of employee killed when beams fell from truck while employee was riding thereon. St.1937, p. 281, § 4553.

6. Workmen's compensation ⇐939

Permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of employees that commission's finding that such misconduct is "serious and willful" authorizing increased compensation will not be disturbed. St.1937, p. 281, § 4553.

7. Workmen's compensation ⇐939

The mere fact that employer did not believe that conditions under which employees worked was dangerous does not relieve him from liability for increased compensation for serious and willful misconduct. St.1937, p. 281, § 4553.

8. Workmen's compensation ⇐1939

Question whether serious and willful misconduct of employer caused employee's injury and death is one of fact and commission's determination will not be disturbed if it has any evidentiary force. St. 1937, p. 281, § 4553.

9. Workmen's compensation ⇐795

That employee knowingly violated rule forbidding employee to ride upon loaded trucks, at time of sustaining injury, and that such violation constituted willful misconduct on his part, was no defense in proceeding for increased compensation for

serious and willful misconduct of employer in violating safety order requiring loads to be secure against displacement, where injuries sustained resulted in employee's death. St.1937, pp. 280, 281, §§ 4551, 4553.

10. Workmen's compensation ⇐1674

Evidence sustained finding that in failing to secure a load of steel beams on a truck against displacement by chains or cables the employer was guilty of serious and willful misconduct in violation of safety order, as against employer's contention that the load was properly secured by the manner in which the beams were placed on the truck. St.1937, p. 281, § 4553.

11. Workmen's compensation ⇐1674

Evidence supported finding that the work of loading truck with steel beams, which fell from truck killing employee, was under direction of corporation employer's superintendent, justifying award for increased compensation for the serious and willful misconduct of corporation employer in violating safety rule requiring loads on trucks to be secured against displacement. St.1937, p. 281, § 4553(c).

In Bank.

Proceeding by the Bethlehem Steel Company for a writ of review to annul an award of compensation under the Workmen's Compensation Act by the Industrial Accident Commission to Kenneth E. Brinkley, a minor, and others for the death of Charles W. Brinkley, petitioners' employee.

Award affirmed.

Prior opinions, 129 P.2d 718; 138 P.2d 302.

R. P. Wisecarver, of San Francisco, for petitioner.

Thelen, Marrin, Johnson & Bridges, Gardiner Johnson, Walter McGovern, Christopher M. Bradley, and Herbert W. Erskine, all of San Francisco, as amici curiae on behalf of petitioner.

Everett A. Corten, Dan Murphy, Jr., and Albert Picard, all of San Francisco, for respondents.

CARTER, Justice.

The Industrial Accident Commission made an award of increased compensation to the dependents of Charles W. Brinkley for his death on the ground that it was caused by the serious and wilful misconduct of Brinkley's employer, Bethlehem Steel Company, a corporation. The death occurred during and arose out of the course of Brinkley's employment. The employer now petitions to have the award annulled.

The Industrial Accident Commission found that petitioner was guilty of serious and wilful misconduct through its executive, managing officers and general superintendents, in that it had knowingly and wilfully violated a safety order of the Commission reading as follows: "Transportation by Trucks. (d) Workmen shall not ride on top of loads that may shift, topple over, or become unstable. (e) All loads shall be *secured against displacement.*" (Emphasis added.)

Petitioner's main contention is that the evidence is insufficient to support the foregoing finding.

On December 31, 1940, Brinkley, a structural steel worker, was working with a crew loading, hauling and unloading steel beams. The general work in progress was the dismantling of a building. The steel was removed from the building, loaded on trucks where removed, and hauled to a storage area varying in distance depending on the point of loading. The particular haul in question involved a distance of 100 to 150 feet. The trucks traveled upon a construction road which was rough and uneven, being "full of depressions and chuck holes." The truck which was used for the hauling had a flat bed and no side stakes. The steel beams were I shaped, with dimensions of about 3 feet deep, 10 inches wide at the flanges and 30 feet long. They each weighed 3,200 to 3,500 lbs. At the time Brinkley suffered the fatal injury, several beams had been loaded on the truck. The evidence as to the number varies between six and nine. All except two of the beams were placed on the bed of the truck, resting on the flange side. Two beams were laid on top of the others, resting on their flat side.

Brinkley and his fellow worker, Black, remained on the truck after it was loaded to ride to the storage area and then assist in the unloading. After the truck had proceeded a short distance at a slow speed, it apparently struck a hole or a rough spot in the road, four beams fell from the truck on the right side on which Brinkley was riding and one on the left side where Black was riding. The beams crushed Brinkley, fatally injuring him. There were

no chains, ropes or cables securing the beams and they were not fastened to the bed of the truck.

[1, 2] The commission was fully justified in finding that subdivision (e) of the safety order, that loads must be secured against displacement, was violated. It may well have inferred that if chains, cables or similar devices had been used the beams would not have fallen from the truck and that security against displacement required the use of some device of that character. Indeed, an inference would arise that the load was not secured against displacement from the very fact that the beams did fall from the truck under the circumstances. In Newkirk v. Los Angeles Junction R. Co., 21 Cal.2d 308, 131 P.2d 535, this court held that an inference of the violation of a safety measure of the Safety Appliance Act, 45 U.S.C.A. § 11, requiring efficient hand brakes, may arise from the failure of the brake to operate properly when used in the customary and usual manner.

Petitioner refers to evidence indicating that the placing of the two beams on top of the others interlocked them by means of their flanges and made the load secure. If there were seven standing beams with a 10-inch width, the flange of the beam resting on top of four of the standing beams could not interlock that group on one side. Even if there were six standing beams, the two groups of three would not have been interlocked. If the edge of the flange of the top beams rested on top of the standing beams rather than extending down the side only, the weight would tend to secure the beams, but Goucher, the foreman of the crew with which Brinkley was working, testified:

"Q. Now as you have drawn this there is no tieup of any kind or character whatsoever between the three girders standing up or the one on top of the right side of the truck and three girders standing on the left hand side of the truck? A. I don't think there was.

"Q. Were the two top girders in any way connected together? A. No."

There is also evidence that 75 to 100 loads of seven beams each had been hauled without casualty. That did nothing more than create a conflict in the evidence which was resolved against petitioner.

[3, 4] The part played by the employer's violation of a safety order or rule of the commission in the determination of whether or not he is guilty of serious and wilful misconduct, was stated recently by this court in Parkhurst v. Industrial Acc. Comm., 20 Cal.2d 826, 830, 129 P.2d 113, 115, in commenting on the employer's violation of a law: "It is true that not every violation of a statute is serious and willful misconduct. * * * '* * * Where there is a deliberate breach of law * * *, which is framed in the interests of the working man, it will be held that such a breach * * * amounts to serious misconduct.'"

And again at page 830 of 20 Cal.2d, at page 115 of 129 P.2d, that: "The test under these cases is whether the employer knowingly or willfully committed an act that he knew or should have known was likely to cause harm to his employee."

[5] The above rules viewed in the light of the facts in this case justified the commission's finding of serious and wilful misconduct on the employer's part. We have seen that the evidence was sufficient to establish a violation of the safety order. Petitioner's superintendent Scanland and Goucher, the foreman on the work in which Brinkley was engaged, knew of the safety order. The road over which the truck hauled the beams was rough, hence a load not properly secured was likely to shift. Loads were secured by chains or ropes on occasions. Goucher, the foreman, testified:

"Q. Were there some of the loads you took out of there you did tie down with chains? A. Yes.

"Q. And there were chains and ropes there which you used whenever necessary? A. Yes, they had them on the premises, plenty of them."

Scanland testified:

"Q. Were those girders fastened to the truck in any way? A. I don't think they were. No, I saw no indication that * * *. I saw the load after it was off, but I saw no indication of it having been fastened.

"Q. Aren't there safety measures that require that girders of that type be fastened to the truck? A. Yes, there is.

"Q. Then the safety regulations were not being complied with? A. Well, this safety applies to moving loads on highways, as I understand it."

No device or method was used to secure the load except the arrangement of the

beams, which we have seen probably would not keep one or the other groups of standing beams from shifting. There were chains available for securing loads. Scanland when asked whether compliance with the safety regulations had been had, replied: "Well, this safety applies to moving loads on highways, as I understand it." The clear implication is that the order was knowingly not observed in the instant case. Applying the foregoing test the commission was justified in concluding that the employer knowingly and wilfully committed an act that he knew or should have known was likely to cause harm to the employee. In Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919, the safety order required the maintenance of secure handholds on a ladder from which the employee fell. There was grease on the platform from which the employee was descending. This court said at page 704 of 219 Cal., at page 921 of 28 P.2d: "It may be conceded that, generally speaking, the mere failure of an employer to comply literally with the requirement of a safety order of the Industrial Accident Commission does not of itself justify a finding that the employer is guilty of serious and wilful misconduct. *In the final analysis, the circumstances presented by the evidence in any case will be determinative of the question of whether or not the employer's act* may properly be characterized as 'serious and wilful misconduct.' What would amount to no more than simple negligence in one situation may well be denominated serious and wilful misconduct in another. * * * In the instant case the continued presence upon and about the derrick of so slippery a substance as crude oil would seem to point unmistakably to the necessity of strict compliance with the provisions of the commission's Safety Order 1618 and to suggest to the person in charge of the oil well that a ladder utilized by workmen should be provided with secure handholds rather than with such makeshift supports as the end of a bolt or an upright post supporting a railing. At all events, *the question of whether, under the circumstances, the employer should have known that the failure to provide more secure and more readily accessible handholds would be so likely to jeopardize the safety of employees as to evince a reckless disregard for their safety and a willingness to inflict injury, was a question of fact to be determined by the referee to* whom the evidence in the case was submitted." (Emphasis added.)

[6, 7] There is evidence that Goucher thought the load was properly secured against displacement. The rule on that subject is stated in Hatheway v. Industrial Acc. Comm., 13 Cal.2d 377, 381, 90 P.2d 68, 70: "The cases are quite uniform to the effect that permitting employees to work under dangerous conditions which are capable of being guarded against, constitutes such a reckless disregard for the safety of the employees that the commission's finding that such conduct is serious and wilful will not be disturbed. The mere fact that the employer did not believe the condition was dangerous does not relieve him from liability. Thus in Blue Diamond Plaster Co. v. Industrial Acc. Comm., 188 Cal. 403, 409, 205 P. 678, the employee was killed as a result of the failure of the employer to place guards on machinery. The managing agents of the employer testified that they knew of the condition, but stated that they did not consider the condition unsafe. 'Their mistake in judgment upon that subject cannot be held to relieve their employer from liability.'"

[8] Finally, it must be remembered that whether serious and wilful misconduct of the employer caused the employee's injury is essentially one of fact and the commission's determination will not be disturbed if it has any evidentiary support. Parkhurst v. Industrial Acc. Comm., supra.

[9] The employer had a rule forbidding its employees to ride upon the loaded trucks. Brinkley was riding upon the truck when he was injured. However, even if it be assumed that he was knowingly violating that rule at the time of the accident, and that such constituted wilful misconduct, it is no defense in this proceeding. Section 4551 of the Labor Code, St.1937, p. 280, provides:

"Where the injury is caused by the serious and wilful misconduct of the injured employee, the compensation otherwise recoverable therefor shall be reduced one-half, *except:*

"(a) *Where the injury results in death.*

"(b) * * *

"(c) Where the injury is caused by the failure of the employer to comply with any provision of law, or any safety order of the commission, with reference

to the safety of places of employment." (Emphasis added.)

The serious and wilful misconduct of the employee is not a defense to a claim for ordinary compensation if the injury occurring by reason of the misconduct of the employee resulted in his death. Western Pac. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754. It must also be true that it is not a defense when the claim is for additional compensation by reason of the serious and wilful misconduct of the employer. In the instant case the injuries suffered by Brinkley arose out of and occurred in the course of his employment and his death resulted. The commission's finding that the employee was injured by reason of the serious and wilful misconduct of the employer, is supported by the evidence. Furthermore, it should be observed that the rule against riding the loads was not always enforced. Although there is sharply conflicting evidence on that subject. Black, Brinkley's fellow employee, testified:

"Q. Mr. Black, were you and Mr. Brinkley riding this load the same way you had done on previous occasions? A. Yes.

"Q. And you have never been told not to ride the load that was not a shaky load? A. Well, you see some of these loads we had loaded up we put ropes and we put chains on some of them and Mr. Goucher had told us to be careful of the shaky loads. I heard him say that, and this being an apparently safe load there was no mention of this particular load.

"Q. And there was no mention not to ride loads of this kind? A. Not that I can recall.

"Q. Hadn't Mr. Goucher taken men off of these loads before when he found them riding? A. I could not say, he had never taken me off before.

"Q. Do you know if Mr. Goucher had ever seen you riding this type of load and he did not speak to you? A. He probably has.

"Q. Do you know whether he ever saw you riding this type of load? A. Sure. * * *

"Q. Do you know whether he ever saw you riding there? * * *

"Q. After the load was complete? A. Yes.

"Q. And the driver started to go? A. Yes.

"Q. When did he do that, can you give us any time? A. No.

"Q. No time at all? A. No, but it happened a number of times.

"Q. You think it happened a number of times that he saw you? A. Sure."

Under these circumstances the injury was the result of the failure to secure the beams against displacement, rather than the riding of the load. The case of Guy F. Atkinson Co. v. Industrial Acc. Comm., 38 Cal.App.2d 366, 101 P.2d 156, is clearly distinguishable. There the main basis of the decision was that none of the persons mentioned in section 4553(c) (managing officers, etc.) knew that a guard had not been installed, and if the employee killed were a person in that class, his death resulted solely from his failure to install the guard. In Folsom v. Industrial Acc. Comm., 3 Cal.App.2d 282, 38 P. 2d 786, the court merely affirmed the commission's finding that the employee's conduct was the cause of the injury.

It is earnestly contended that petitioner, being a corporation, was not guilty of serious and wilful misconduct because the persons mentioned in section 4553 of the Labor Code were not guilty of such misconduct. That section reads in part: "The * * * compensation * * * shall be increased * * * where the employee is injured by reason of the serious and wilful misconduct of any of the following: (a) The employer, or his managing representative. (b) If the employer is a partnership, on the part of one of the partners or a managing representative or general superintendent thereof. (c) *If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof.*" (Emphasis added.) The particular serious and wilful misconduct of which the commission found the employer to be guilty was that "at the time of the injury and death sustained by the deceased employee herein, the employer, through its executives, managing officers and general superintendents, did knowingly and wilfully, fail, refuse and neglect to comply with Construction Order 1168, subdivisions (d) and (e) thereof, issued by the Industrial Accident Commission * * *, to-wit: 'Order 1168. *Transportation by Trucks.* (d) Workmen shall not ride on top of loads that may shift, topple over, or become unstable. (e) All loads shall be secured against displacement.' "

[10] Petitioner argues that the placing of the two beams on top of those lying on the bed of the truck tended to make the load secure and constituted compliance with the safety order provision that loads shall be secured against displacement. However, a construction engineer and inspector of the commission, who investigated the accident two days after it occurred, testified that although the manner of loading the beams would tend to keep each individual beam from tipping, "it would raise the center of gravity so that the load as a whole * * * would probably tip easier," that "It is my opinion if the load had been secured by chains or cables of sufficient strength the accident would not have occurred," and that "I would say in some of these cases many times they are lucky that accidents just don't happen, but the potentiality is there, if they weren't secured properly then the potentiality of an accident is always there." He testified further that the size of the depressions in the area where the accident actually took place was from 8 to 10 inches and the size of the humps from 6 to 8 inches. This testimony fully supports the commission's finding that petitioner had failed to comply with the safety order and that such failure constituted serious and wilful misconduct.

[11] Petitioner corporation contends, however, that the acts found to constitute misconduct here were not those of "an executive, managing officer, or general superintendent" as specified by section 4553 of the Labor Code, but could be charged to no one higher in authority than Goucher, the foreman of the crew with which Brinkley was working. However, as shown by the evidence and as recited in petitioner's petition for writ of review, the work of dismantling the building "was entirely in the charge of Mr. Scanland, its [petitioner's] superintendent." Scanland testified that his office "was perhaps 50 feet from the site of the building, maybe 100. It was close by the building that was being dismantled"; that although he had not seen the loading of the particular haul in which Brinkley was killed and was in his office when the accident occurred, he had been on the scene, which was on the same tract of land 300 or 400 feet from his office, about thirty minutes or an hour earlier; that most of the time he was on the job "around that area during the demolition of this old building" and was "*actively in charge*" of the work; that he made tours of inspection. Under cross-examination he described generally the equipment that was being used in the particular operation involved and the method of its use. He was asked the following question and gave the answer quoted: "Q. Now, you have mentioned a few minutes ago something about the fact that you went along and checked these things as you went along; is that the way you did it? A. Yes. * * *" Scanland further testified that all of the loads of steel "that we felt were unsafe, they were chained, *and some loads that we felt were safe because they can be stacked and slung over, they did not chain*"; that as a safety measure he had "cautioned the foreman about men riding loads and not to permit them to ride on the load"; that there was a doubt in his mind about the safety of men riding on the loads; that it was a company rule that the men should not ride the loads, although he did not know whether the rule had ever been brought to Brinkley's attention; that he was familiar with the safety order requiring that loads be secured against displacement but that "*this safety applies to moving loads on highways, as I understand it*"; and that the "subforeman, Mr. Goucher" was "supposed" to carry out "orders of safety regulations" but that it was his, Scanland's, responsibility to watch the subforeman. Goucher testified that during the loading and unloading Scanland was "around there two or three times a day. He had a big territory and lots of men to look over, and he would come around and see if we were doing all right and then go on"; that the only orders he, Goucher, had received about securing or fastening the loads were that "when the truck looked unsafe they should fasten it"; and that he did not know whether Brinkley had received a copy of the company's book of rules, which forbade the men to ride the loads, although he had on several occasions ordered Brinkley off the loads.

The driver of the truck, A. J. Banchero, testified as follows:

"Q. Did you ever hear anyone tell any of the men not to ride the load of girders at any time while you were employed there? A. No, sir.

"Q. How long were you employed there when this accident happened? A. Three or four months, something like that.

"Q. And during that entire time you had never heard any of the workmen told not to ride on the loads? A. No, sir.

"Q. And when you say 'No, sir,' you mean you have never heard the foreman tell anyone they should not ride? A. No one.

"Q. Did you ever hear anyone tell Mr. Brinkley at any time not to ride on the load or to get off the load? A. No, sir.

"Q. Did you see Mr. Scanland? A. No, I did not.

"Q. Do you know Mr. Scanland? A. Yes, sir.

"Q. Did you see Mr. Scanland there at any time while you were working there? A. Yes, quite a few days walking around.

"Q. Did you ever hear Mr. Scanland tell Mr. Brinkley or any of the workmen that they should not ride on the loads? A. No, sir.

"Q. Did you ever hear Mr. Goucher * * * tell Mr. Brinkley or anyone else that they should not ride on the load? A. No, sir.

"Q. At any time did you see Mr. Scanland or Mr. Goucher or anyone else tell either Mr. Brinkley or any of the other workmen to get off the load? A. No, sir.

"Q. Did you ever see any of these loads fastened on with chains or ropes or stakes or anything else? A. Down there?

"Q. Yes. A. Yes, to fasten some of the loads down.

"Q. When did they do that? A. When the loads were pretty bulky.

"Q. How often about at the time you were there? A. Oh, I could not say. I know they fastened the loads that were bulky and stopped at that.

"Q. Would you say it happened often or very seldom? A. Very seldom.

"Q. *Did they ever fasten any loads of girders?* A. *No, sir.*"

In view of all of the testimony in this case the commission may well have concluded that the acts of misconduct charged against petitioner were those of its admitted superintendent, Scanland, who was actively supervising the job in question, who made frequent tours of inspection, and who was familiar with the safety order, who knew that it was not being observed, who thought that the order applied only to loads transported over a public highway, and who failed in his responsibility of requiring strict compliance with it as to loads being moved on private property, he having admitted that some loads were not chained or otherwise secured against displacement.

For the reasons above stated, the award is affirmed.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.



62 Cal.App.2d 903

PEOPLE v. KEYS.

Cr. 623.

District Court of Appeal, Fourth District, California.

Feb. 15, 1944.

1. Homicide ⇐244(1)

Evidence sustained conviction of manslaughter as against defense of self-defense.

2. Homicide ⇐188(2, 5)

Generally, where claim of self-defense is interposed, defendant may introduce evidence that deceased's reputation for peace and quiet was bad and known to him to be bad, but proof of specific acts of violence or a prior conviction for assault is not admissible.

3. Homicide ⇐188(2)

In self-defense when it is shown that decedent was the assaulting party it is competent to show that he was a violent, dangerous, and bloodthirsty man, and so known to accused.

4. Homicide ⇐188(2, 5)

In murder prosecution with defense of self-defense, records establishing that decedent had a slight brain lesion, that prior to some four years before the homicide he was subject to fits of violent temper, that his right arm had been paralyzed, although it had improved, and that he was then suffering from hysteria, were properly excluded, where records did not establish that decedent was insane with dangerous tendencies at the time of the homicide or

that accused knew the contents of the records.

5. Criminal law ⇐670
Homicide ⇐188(2)

In murder prosecution with defense of self-defense, hospital records disclosing that deceased suffered from complete amnesia some four years prior to the homicide and that X-rays of decedent's head showed a line which might have been a skull fracture were properly excluded, where there was no offer to connect such facts with decedent's condition at the time of the homicide and no evidence that accused knew more than the amnesia.

6. Homicide ⇐188(5)

In murder prosecution with defense of self-defense, affidavits filed in divorce action to obtain relief from order requiring decedent to pay support money to wife because decedent was receiving treatments for arthritis, the cost of which did not permit him to respond to the order, were properly excluded.

7. Criminal law ⇐755½, 757(1)

Trial courts should be cautious in the exercise of their power to comment on the evidence, testimony, and credibility of witnesses. Pen.Code, § 1127; Const. art. 6, § 19.

8. Criminal law ⇐811(6)

Instruction that jury might consider whether accused's position and interest had not affected his credibility and colored his testimony was not improper, notwithstanding accused was singled out as the only witness whose testimony and credibility was commented upon. Pen.Code, § 1127; Const. art. 6, § 19.

9. Homicide ⇐300(9)

In murder prosecution with defense of self-defense, portion of instructions that accused may not create a situation which would give rise to appearance that his life was in danger was inapplicable under evidence, and portion of instruction that accused must have been without fault before he could claim full protection of the law was too broad.

10. Homicide ⇐300(3), 340(1)

In murder prosecution with defense of self-defense, instructions that, if accused was a trespasser upon decedent's land and decedent notified accused to keep off his property, accused must keep off decedent's property and any use of force by accused to resist force exerted by decedent, was unlawful were improper, but not prejudicial where evidence sustained conviction of manslaughter. Const. art. 6, § 4½.

11. Homicide ⇐120

The law of "self-defense" is based upon reasonable appearance of imminent peril of death or serious bodily injury to the party assailed and, when that danger has passed and the attacker has withdrawn, accused is not justified in pursuing and killing the attacker.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Defense".

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

William F. Keys was convicted of manslaughter, and he appeals.

Affirmed.

Paul Barksdale d'Orr and Thomas A. Reynolds, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

MARKS, Justice.

Defendant was charged with the murder of Worth Bagley. After a protracted trial he was convicted of manslaughter and has appealed from the judgment pronounced upon him, and from the order denying his motion for new trial. Counsel agree that the evidence is sufficient to support the verdict and judgment. However, it will be necessary to summarize the evidence in order to determine if errors of law occurring during the trial constituted prejudicial and reversible error under the provisions of section 4½ of Article VI of the Constitution.

Defendant had lived on the desert in Riverside County since 1910. He acquired land there on which he built a home for himself and family. He also acquired land in San Bernardino County north of and adjoining the line dividing the two counties. Land belonging to the Southern Pacific Railway Company lay between the properties.

Defendant operated a mine in San Bernardino County. Some time after 1910 he built a stamp mill, tank, water

troughs and a pumping plant on his San Bernardino County property. We will refer to this as Keys Mill. There was also a well on the railroad property where he had a windmill which he removed when Bagley acquired the property. In the record this is referred to as Bagley's well. The removal of this windmill was one of the causes of disagreement between Bagley and defendant. There were roads crossing the railroad property which connected the two properties of defendant. He testified he had used these roads without obstruction or objection for about 30 years. He also testified that one or more of these roads had been opened and in use since about 1874. Defendant started raising range cattle in 1918. It was his custom to let the cattle range on the railroad property. Twice each year he drove them along a road crossing this property when moving them between the summer and winter ranges.

In 1936 Bagley acquired the railroad land lying between defendant's properties. He was then a deputy sheriff. At some indefinite date, probably prior to 1939, he made cement blocks with which to build a house. He complained that defendant's cattle were breaking those blocks while ranging on his land. This seems to have been the start of the differences between the two men. With Bagley's consent, defendant, at his own expense, built a fence which kept the cattle off from about 80 acres of land around the Bagley house which he commenced using, probably in 1939. There may have been other fences and also cattle guards and gates which we are unable to locate because of the manner in which the witnesses testified. When a witness points to a map and says a certain thing is "here" or "there" it is understandable in the trial court but is meaningless on appeal.

Someone shot and killed a cow belonging to defendant and later a Spanish jack. Defendant accused Bagley of killing the animals, which Bagley denied. He became enraged and threatened defendant. Bagley interfered with defendant's travel over the roads across his property and ordered him to stay off. Without going into further detail it should be sufficient to say that the relations existing between the two men deteriorated rapidly. There is evidence that Bagley made threats against defendant which were communicated to him. A disinterested witness testified that defendant threatened Bagley's life although he denied doing so. Both men armed themselves. Bagley usually carried a 38 caliber police special revolver and also sometimes had a rifle when traveling in his automobile. Defendant carried a 30-30 caliber automatic rifle with him in his car. He testified that he regarded Bagley a dangerously insane man. This was the state of the relationship between the two men at the time of the fatal affray which occurred at about eleven o'clock on the morning of May 11, 1943.

Defendant was the only living witness to the killing and we gather the following from his testimony. On that morning he arose at his usual time, had breakfast and went to Keys Mill to pump water for his cattle. He drove over the road across Bagley's property and on to Keys Mill. There was an obstruction in the road over Bagley's property which he drove around. He started his pump and pumped enough water to fill two troughs, but not his tank, when his engine stopped because of magneto trouble. Being unable to fix it he took the magneto off, placed it in his automobile and started home over the same road he had traveled earlier that morning. When he reached the Bagley property he saw several obstructions in the road ahead of him. These obstructions, separately placed, consisted of broken glass, of stones, and of Yucca logs across the road. There was a sign on a stake in the road about 50 feet beyond Bagley's property line. Defendant drove to a point near the sign and read it: "Keys This is my last warning Stay off of my property." Defendant backed his car up the road to a point which he believed was on his own property, though it is highly probable that he did not leave the Bagley property. For a distance of approximately 104 feet the road in front of defendant rose to an elevation of about six feet and descended on the other side. Defendant got out of his car and walked forward to a point where he could look over the top of the rise. He saw Bagley approaching, crouched over with his revolver in his right hand. Defendant ran back to his automobile, armed himself with his rifle and stood beside the car. When Bagley reached the top of the rise he fired one shot at defendant. The bullet passed close to his head and hit the door of his car although he was not conscious of this last fact. Defendant immediately returned the fire. He

described the subsequent events to an officer as follows:

"He said he shot at his gun hand, but he shot a little high; he hit him in the arm, and Bagley turned to the left and started to run, and he ran in a zigzag manner; and I asked him why he was running in a zigzag manner, and he said he thought to make him miss him. He said where he—he said he fired another shot as Bagley was going away from him, and he hit him in the left arm, partially turning him around, and when he partially turned, he fired another shot and he dropped, he hit him in the side. * * * Deputy Heap asked Keys about the shooting. Keys told Heap that Bagley was coming over the hill, he shot at him; he went back and got his rifle out of the car, shot at Bagley's gun hand and shot a little high and hit him in the upper right arm, and Bagley turned to the left and started running from him in a zigzag manner. Heap told him he was shooting the man in the back, and Bagley said it was an automatic and shot fast.

"Q. By 'Bagley' do you mean—A. Or Keys."

Defendant's rifle was an old model and is what is now sometimes called a semi-automatic. The explosion would eject the shell that had been fired and insert another in the chamber, but pressure on the trigger was necessary to fire each shot.

Defendant's testimony at the trial did not differ materially from the story he told the officers. It is significant that sufficient time elapsed between each of the shots so that he could observe the effect of each and could see that Bagley was running away from him when the second and third shots were fired. It was the opinion of the medical experts that the third shot caused immediate death.

After Bagley fell defendant got into his car, turned it around and drove to his home by a circuitous route which did not cross the Bagley property. He cleaned up, had his lunch, secured another magneto and returned to Keys Mill by the same circuitous route. He attached the magneto to his engine and pumped his tank full of water. He climbed a hill which gave a view of the Bagley property but could see nothing unusual. He returned to his car and drove it to about the same place where it had stood during the affray. He alighted and walked up the rise, probably about 50 feet, to a point about half way between his car and where Bagley stood when he fired at him. He did not see Bagley's body which was lying in low weeds and brush off the road. He testified that while he thought he had killed Bagley he was not sure and that Bagley might have been wounded. He returned to his automobile and drove to Twenty-Nine Palms where he surrendered to constable O. J. Cones. Defendant, the constable, David M. Poste, Dr. Gilbert John Leonard and W. E. Ketcham of the Federal Park Service returned to the scene of the shooting, arriving there shortly after four o'clock in the afternoon. They found the body of Bagley lying prone on its face near the top of the rise and a short distance from the road. The revolver was cocked and was clasped in the right hand with the forefinger resting on the trigger. No fingerprints were found on it on subsequent examination. Low Grass and brush were standing around the body.

Various witnesses described the wounds on the body and photographs show them clearly. There was a rather slight flesh wound on the right arm just above the elbow. From defendant's evidence it would appear that this was caused by the first shot he fired. He testified that he tried to shoot the gun from Bagley's hand but shot a little high. This would indicate that the right arm was not fully extended from the shoulder in pointing the revolver towards defendant but was flexed at the elbow. Dr. Leonard was of the opinion that the shock of this wound was sufficient to have caused Bagley to have dropped the revolver from his hand. Defendant demonstrated the position of the right arm and the revolver when the shot was fired but there is nothing to indicate that position to us.

There was a severe wound in the left forearm. Both bones were shattered and the flesh badly torn. From defendant's account this must have been caused by his second shot.

A lacerated wound was found on Bagley's left side. The bullet entered about fifteen inches below the shoulder level posterior to the axillary line on the left side at the tip of the 12th rib and ranged slightly upward across the body. Surgeons testified that there was dirt forced into this wound; that death followed almost immediately with complete collapse of the entire body; that anything in Bagley's hand would have dropped to the ground. They were of the opinion that the dirt forced into the wound might indicate that

Bagley had received this last wound while he was prone on the ground.

An expert was called to the scene of the affray who made an examination, among other things, of weeds and low brush growing adjacent to where the body lay. He found human blood mixed with bone, tissue and dirt on these weeds and brush in close proximity to the ground. From the shape of the stains he was able to determine to his satisfaction that the substances had been projected laterally, parallel to the ground, onto their resting places. Some of the weeds are before us. The stains are clearly visible on some of them and range between six and nine inches above the roots. From these facts, and from the further fact of dirt having been forced into the body wound, he drew the conclusion that Bagley had received the fatal wound while lying prone on the ground. The same expert found small human blood stains on a pair of trousers found in defendant's home. Defendant accounted for these stains as being the result of nose bleed to which he was subject.

[1] It should hardly be necessary to say that the foregoing facts and the reasonable inferences to be drawn from them amply support the verdict and judgment. While not disputing the sufficiency of the evidence to support the judgment, defendant argues that errors of law occurring during the trial were so prejudicial as to prevent his having a fair trial and to require a reversal of the judgment.

Defendant offered in evidence three sets of records for the purpose of proving that Bagley not only "on previous occasions had looked and acted like one mentally unbalanced, but that he actually was at times insane". The trial court sustained an objection to their admission and this is now urged as error.

The first group of documents had been used in proceedings before the Board of Pension Commissioners of the Peace Officers' Retirement System, and had resulted in a resolution passed on November 22, 1939, retiring Bagley on December 1, 1939, "on account of permanent and total disability * * * due to the fact that he is incapacitated for the performance of his duties as a Deputy Sheriff * * *."

Bagley's first application was dated December 2, 1938, and asked retirement "for the reason that I am unable to perform the duties of a Deputy Sheriff". Attached to the application was a letter from C. F. Bayer, M. D., Clinical Director of the Veterans' Administration, Los Angeles, reciting that Bagley's illness had been diagnosed as "Paralysis, right upper extremity, functional". An examination was made by a physician who reported to the Board on December 13, 1938. The physician reported his findings as follows: "This patient has a definite organic lesion of the brain which is, however, very small and is probably located in the region of the left temporal lobe in the posterior portion. In addition to this the patient has a very marked hysteria and many of his symptoms are made up of involuntary simulation. Whether there is also a voluntary element is exceedingly difficult to say. The elements which indicate a functional disturbance, that is, the hysteria, are: the type of sensory loss, the flail-like arm, the voluntary contraction of the fingers of the right hand in anticipation of a blow with the percussion hammer, the absence of pharyngeal reflexes, and the patient's manner of talking. The patient is at present totally disabled but he would probably not be totally disabled if the hysteria were cleared up."

Bagley made a second application for retirement, for the same reason, under date of July 24, 1939. Attached to the application is a letter from Bagley's personal physician dated July 22, 1939, which recited that he had known Bagley for several years; that "it has been revealed that over this period of time a slow change in his mental balance has taken place that was climaxed by the past year's experience. I believe his symptoms are due to a brain lesion from which full recovery cannot be expected, and prognosis is progressive and unfavorable."

Two physicians examined Bagley and reported to the board. Considerable portions of both reports, made on October 10, 1939, are couched in technical language that means little to the lay mind. No explanation was offered in the trial court. One physician thus expressed his opinion of the case: "As near as I am able to judge this is a case of hysteria or functional neurosis. His general condition is considerably better than when I saw him on November 7, 1938. During the interim his right hand and arm have practically cleared up. The sensory changes then present have also cleared up. He is more cooperative than I have seen him heretofore. The Romberg is strongly positive and he staggers about in a most peculiar manner holding on to objects and

furniture. I consider that he is completely disabled at this time. He seems to be improving and it is trusted his improvement may continue to the point where he may again be able to return to duty. I am unable at this writing to state when this may be."

The other physician formed the following opinion: "This man alleges ill health for the past two years, his principal complaints being headaches, vomiting, uncontrollable temper at times, and persistent dizziness so that he is unable to walk without assistance. On physical examination, there is nothing indicative of any organic disturbance of his central nervous system. I can only account for these symptoms, as well as the findings at examination, on a hysterical and neurosis basis. I believe that this man is totally disabled at this time and is unable to carry on the regular duties of that of deputy sheriff. With a change of environment, occasionally, a very marked improvement occurs in these cases, and they return to normalcy. As to when this might occur, I believe one is unable to state, as frequently they may persist for years."

[2] It is the general rule in California that in a prosecution for murder where the defense of self-defense is interposed, the defendant may introduce evidence that the reputation of the deceased for peace and quiet was bad, and known to him to be bad. Proof of specific acts of violence or proof of a prior conviction for assault are not admissible. People v. Griner, 124 Cal. 19, 56 P. 625; People v. Garcia, 2 Cal.2d 673, 42 P.2d 1013; People v. Soules, 41 Cal. App.2d 298, 106 P.2d 639.

[3] Defendant relies on the case of State v. Shahane, 55 N.D. 642, 219 N.W. 132, 134, where, in a homicide case involving self-defense, it was held error to exclude evidence tending to prove that the deceased was subject to insane seizures and therefore was dangerous; that this was known to defendant. The real reason for that decision was thus summed up by the court: "In all cases of self-defense when it is shown that the deceased was the assaulting party, it is competent to show that the deceased was a violent, dangerous and blood-thirsty man, and so known to the accused."

[4] The North Dakota rule is broader than any announced in any California case to which we have been cited. Even that rule is not applicable under the facts before us. All that the excluded evidence tended to establish was that deceased had brain lesion, described as slight; that prior to October 10, 1939, he was subject to fits of violent temper; that his right arm had been paralyzed although it had improved; that he was then suffering from hysteria or functional neurosis. There was no offer to prove that these conditions resulted in Bagley becoming a dangerous or violent man nor that these conditions existed in 1943. We are cited to no offer to prove that defendant had any knowledge of these conditions other than that Bagley had told him that he had been retired for permanent disability and that he had suffered an attack of amnesia. Under these circumstances the objection was properly sustained since the offered evidence did not tend to establish either that Bagley was insane, with dangerous or homicidal tendencies at the time of the affray, or that defendant had any knowledge of the contents of the above described documents.

[5] Defendant also offered in evidence records of the Riverside County Hospital, to the admission of which an objection was sustained. These records disclose that Bagley suffered from complete amnesia and was picked up on the streets of Riverside on February 18, 1939, taken to the hospital and released to the Veterans Hospital at Sawtelle on February 22, 1939. The only other matter of interest disclosed by these records is that X-rays of the head, while revealing no definite evidence of a skull fracture, showed a line which might have been "suggestive of a fracture in this region, although the line is not sharp cut as is usually seen, having more the appearance of a vessel". There was no offer to connect this with Bagley's condition in May, 1943, and no evidence that defendant knew anything more about the occurrence than having been told by Bagley of the amnesia in Riverside. Even under the rule announced in State v. Shahane, supra, the objection was properly sustained.

[6] Defendant also offered in evidence Bagley's affidavit dated January 22, 1941, and an affidavit by his attending physician dated December 11, 1940, which were filed in an action in Riverside County wherein Bagley sought a divorce. The court had evidently ordered Bagley to pay support money, court costs and attorney's fees to his wife. The clear purpose of the affidavits was relief from the order, by post-

poning the payments, because Bagley was receiving diathermy treatments for arthritis, the cost of which were too great to permit him to respond to the order. We can find nothing in either affidavit bearing on the issues in this case and the objection was properly sustained.

Counsel for defendant complains of several instructions given to the jury. The first is instruction number 9, in which the attention of the jury was called to the fact that defendant had testified as a witness, and stated that the jury should bear in mind the situation of the defendant, the effect on him of the verdict, and the grave interest he must feel in the outcome of the case; that it was proper to consider whether his position and interest had not affected his credibility and colored his testimony. The usual instruction was given that the jurors were the sole and exclusive judges of the weight and sufficiency of the evidence and the credibility of the witnesses.

In California the trial court is permitted to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for a proper determination of the case." Sec. 19, Art. VI, Const.; Sec. 1127 Penal Code.

[7] It is urged that as the trial court singled out the defendant as the only witness whose testimony and credibility was commented upon, there was an unfair inference to be drawn from the instruction that his evidence be regarded with suspicion. It is true that trial courts should be cautious in the exercise of the power given so that the rights of a defendant to a fair trial be protected. People v. De Moss, 4 Cal.2d 469, 50 P.2d 1031.

The same argument was made in People v. Ottey, 5 Cal.2d 714, at page 727, 56 P.2d 193, at page 199, was disposed of as follows: "The defendant urges prejudicial error in singling out the defendant's testimony for special comments on the credibility to be accorded it. The court remarked upon the defendant's interest in the case, its opinion on a phase in the testimony that 'things don't happen that way,' and included a charge that if a witness is deliberately false in one material instance, the jury has the right to disregard all of his testimony not shown by other evidence to be true; also 'from that you have a right to conclude his statements in this case are wilfully and deliberately false.' The remarks cannot be said necessarily to go beyond the bounds of propriety."

[8] While examinations of various records on appeal in criminal cases disclose that few trial judges single out the testimony of a defendant for such comment, we cannot conclude that the trial judge here went beyond the limits imposed by the Constitution and the statute.

Complaint is made of instructions numbered 29 and 30, which, among other things, informed the jury in effect that a defendant may not by his own acts create a situation which would give rise to the appearance that his life was in danger and that he "must himself have been without fault before he can claim full protection of the law."

[9] People v. Conkling, 111 Cal. 616, 44 P. 314, 315, is a case in which defendant claimed the right to travel a private right of way over land possessed by deceased, which deceased had blocked to prevent its use. There the trial court gave a similar instruction which was held erroneous for two reasons applicable here. There, as here, there was no sufficient evidence that defendant had created a situation which he could interpret as showing that he was in immediate peril of death or serious bodily injury, so that portion of the instruction was held inapplicable to the facts of the case. Further, it was held that the portion instructing the jury that the defendant must have been free from fault or forfeit the right of self-defense was entirely too broad, under the facts, as the jury might have concluded that the fault of the defendant in attempting to travel the roadway deprived him of the right of self-defense which is not the law.

Instruction number 31 was couched in the following language: "It is the law that an owner of property who has requested a trespasser to leave, may lawfully use as much force as is reasonably necessary to remove the other; he may meet force with force and may increase such force to overcome that of the intruder. But this rule does not apply in favor of the trespasser, and if you find that the defendant was a trespasser upon the lands of the deceased, and that the deceased told or otherwise notified defendant to leave or keep off his property, it was the duty of defendant to leave or keep off deceased's property, and any use of force by defendant to resist the

force exerted by the deceased was unlawful and without justification."

Instructions numbered 32 and 33 were to the same general effect. A quite similar instruction was held to be erroneous in People v. Conkling, supra, where it was said: "For a clear understanding of the evidence bearing upon the homicide, the jury should have been enlightened upon these collateral questions to the extent of showing generally that deceased was in possession of the land as a lessee, that he obstructed the road leading over the land for the purpose of preventing travel thereon, and that defendant claimed that the road was such a road as that he had a right to travel over it, and the deceased had no right to prevent him from so doing. This was far enough for the evidence to go in this direction. It showed the facts leading up to the homicide, and was all that was necessary for the jury to know in order to fully comprehend the case in its important essentials. There is no question of defense of property or habitation here, which would justify the deceased in killing the defendant, nor any question of deceased's preventing defendant from exercising a right which would, in law justify defendant in killing the deceased. Conceding defendant had the legal right to travel the road, he was not justified in killing deceased in order that he might exercise that right; and, conceding defendant had no right to travel the road, deceased was not justified in killing him to prevent him from traveling it."

[10] As there were serious errors in the instructions, we must next consider the question of whether or not those errors resulted in a miscarriage of justice under the provisions of section 4½ of Article VI of the Constitution.

In approaching this question we are impressed with the statements of defendant that deceased was retreating when the fatal shot was fired, that he was shot in the back and that markings on the ground indicate he was running away from defendant when the fatal shot was fired. Of course the defendant, when testifying, tried to minimize the damaging effect of his admission to the officers on the day of the killing by saying that defendant was jumping sideways to make himself a difficult target. This does not alter the established facts that deceased was killed by a shot in the back and that markings on the ground indicated that he was running away when the fatal shot was fired and that defendant so stated on the day of the killing.

[11] The law of self-defense is based on the reasonable appearance of imminent peril of death of, or serious bodily injury to the party assailed. When that danger has passed and when the attacker has withdrawn from the combat, the defendant is not justified in pursuing him further and killing him, because the danger is not then imminent, and there is no apparent necessity to kill to prevent the death of or serious bodily injury to the defendant. People v. Conkling, supra; People v. Brown, 62 Cal.App. 96, 216 P. 411; People v. McCurdy, 140 Cal.App. 499, 35 P.2d 569; People v. Giovanni, 45 Cal.App.2d 229, 113 P.2d 912; People v. Spinelli, 14 Cal.2d 137, 92 P.2d 1017.

With evidence before it that deceased was running away when the fatal shot was fired, and the markings on the ground supporting that fact, coupled with the further fact that the fatal shot struck deceased in the back, we fail to understand how any intelligent jury could have found the defendant not guilty. Certainly, this establishes that Bagley had abandoned the conflict and was running away when defendant killed him. Thus, danger to defendant was not imminent and under the law of self-defense he had no right to take the life of Bagley. In view of these facts, which were clearly placed before the jury, it does not seem reasonable to suppose that the erroneous instructions could have led that body into error when the evidence, including the statements of defendant himself, showed his guilt and that he had no right to kill when he did under the law of self-defense. We therefore conclude that there has been no miscarriage of justice in this case.

The judgment and order are affirmed.

BARNARD, P. J., GRIFFIN, J., concur.

62 Cal.App.2d 895

LEMON et al. v. HANCOCK.

Civ. No. 3253.

District Court of Appeal, Fourth District, California.

Feb. 15, 1944.

Hearing Denied April 13, 1944.

1. Trial ⇐396(3)

Findings that purchasers from assignee of conditional sales contract were owners of legal title to shovel subject to right of conditional buyer's transferee to complete contract and that transferee had always claimed equitable title were within pleaded issues.

2. Sales ⇐479(1)

Under conditional sales contract authorizing seller to repossess property on default, seller may either disaffirm contract and retake property or affirm contract declaring all payments due and sue for purchase price.

3. Sales ⇐479(5)

Where conditional seller makes a practice of accepting delinquent payments after repeated threats to forfeit conditional buyer's interest in property, definite notice is required to work a forfeiture on conditional buyer.

4. Equity ⇐66

Purchasers from assignee of conditional sales contract by seeking aid of equity in action to quiet title to property as against conditional buyer's successor in interest instead of standing on strict legal rights impliedly offered to do equity so that equitable principles were applicable and adherence to strict rules of law was unnecessary.

5. Equity ⇐66

Where evidence justified inference that partner procured assignment of conditional sales contract to brother and brother's wife in order to deprive copartner, who made most of the payments under contract, of interest in personalty transferred to copartner as trustee subject to contract, trial court had discretion in assignees' action to quiet title to allow copartner ten days after judgment in which to pay amount due under contract in order to perfect his title as trustee, notwithstanding payments were in default when contract was assigned and assignees had given notice of termination of interests of conditional buyer and buyer's successor in interest.

6. Trusts ⇐265

Where court found that conditional buyer of personalty conveyed an interest therein to defendant as trustee and that defendant was entitled to complete the performance of conditional sales contract, judgment should have been in favor of defendant as trustee and not individually.

Appeal from Superior Court, Orange County; L. N. Turrentine, Judge.

Action by S. W. Lemon and Roswell C. Jones against Horace S. Hancock to quiet title to a power shovel, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiffs appeal.

Judgment modified, and, as modified, affirmed.

Drumm & Drumm, of Santa Ana, and E. O. Leake and J. J. Leake, both of Los Angeles, for appellants.

Blodget & Tobias, of Santa Ana, and Joseph O. Morris, of Pasadena, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to a power shovel. On June 4, 1941, the Northwest Engineering Company sold this shovel on conditional sales contract to the Caledonia Operating Company, a limited partnership, of which Roger E. Jones was the general partner. This contract provided that the vendor might at its option take possession of the shovel on default of any payment but did not provide that time was of the essence thereof.

On December 10, 1941, the Caledonia Operating Company transferred its interest in the shovel by bill of sale to the defendant Hancock, as trustee. This was done pursuant to a written agreement between Roger E. Jones and Hancock and two other parties, which provided in general that Hancock was to advance $5,000 to enable a mining operation to be continued, that certain obligations were to be paid and that a corporation was to be later formed in which Jones would have a half interest, Hancock a one-fourth interest and the other parties a one-fourth interest. Hancock advanced $6,000, of which $1,100 was used to pay off a chattel mortgage on the vendee's

interest in the shovel, a considerable amount was used to pay past due payments and later payments on the contract price of the shovel, and the balance was used in paying expenses of the mining operations. The chattel mortgage was assigned to Hancock. The Northwest Engineering Company was notified that the vendee's interest in the contract had been assigned to Hancock and it accepted payments from him. The shovel remained on the mining property, the mine being operated by the new partnership including Hancock and Roger E. Jones, and Hancock paid all installments on the purchase price of the shovel except the final three payments of $315 each, which came due about the first of April, May and June, 1942, respectively. Most of the payments on the shovel were made late and after repeated demands by the vendor, and at least some of them were made and accepted after the time when the vendor had stated that it would take possession of the shovel.

Finally, on June 15, 1942, the Northwest Engineering Company notified Hancock, Roger E. Jones and the Caledonia Operating Company that it had instructed its San Francisco office to repossess the shovel unless the past due notes were paid by June 20, 1942. On June 22, 1942, the vendor notified these parties that it would hold up action on the repossession until June 29.

On June 29, 1942, an attorney, in whose office the Caledonia Operating Company maintained its office, informed Roswell C. Jones that the mining company, Roger E. Jones and Hancock were unable to meet the last payments on the shovel. Roswell C. Jones is a brother of Roger E. Jones, and is the husband of "G. I. Jones." On the same day this attorney wrote a letter to the Northwest Engineering Company stating that he was enclosing a check for the $1,005.79 then due on the shovel for the purpose of purchasing the contract and requested that the contract be assigned to "Mr. G. I. Jones", that a bill of sale be issued "to him", and that the assignment and bill of sale be sent to this attorney. The attorney signed this letter as attorney for the Caledonia Operating Company, Roger E. Jones and G. I. Jones.

On July 1, 1942, the Northwest Engineering Company executed an assignment of this contract to G. I. Jones subject "to the right of the conditional vendee to complete the contract in accordance with its terms." In its letter of July 1, 1942, transmitting that assignment, the original vendor stated that the assignment was sufficient without a bill of sale "especially in view of the fact that any bill of sale which we could issue would necessarily be subject to the rights of the assignee and the vendee under the contract."

On July 3, 1942, "G. I. Jones" sent a letter to the Caledonia Company, to Roger E. Jones and to Hancock, giving notice that it had purchased the Northwest Company's interest in the original contract of sale for this shovel, stating that the contract "is hereby canceled and terminated and all of your rights thereunder are canceled and terminated" and making demand for the immediate possession of the shovel. On July 15, 1942, G. I. Jones or Roger E. Jones leased the shovel to another concern for a period of months and received $2,700 in advance rental which was used to pay certain debts and obligations which were apparently the debts of Roger E. Jones or the mining partnership, or both. On August 18, 1942, G. I. Jones gave a bill of sale for the shovel to Roswell C. Jones and on October 15, 1942, Roswell C. Jones gave a bill of sale for a one-third interest in the shovel to Stuart W. Lemon.

The plaintiffs then brought this action to quiet title to the shovel. The complaint alleged that the plaintiffs are the owners and entitled to the possession of the shovel and that the defendant claims some right or interest, which claim is wholly without right. The defendant answered denying all of the allegations of the complaint except that he admitted that he claimed some right or interest in the shovel. He also filed a cross-complaint against the plaintiffs setting forth that he held a bill of sale given him by the Caledonia Operating Company, a copy of which was attached, and alleging, in effect, that the plaintiffs and cross-defendants had conspired with Roger E. Jones and the attorney above mentioned to deprive him of his interest in the shovel, that by reason thereof the plaintiffs and cross-defendants were not entitled to any interest in the shovel or entitled to the possession thereof, and that he himself was the only one who had a legal interest therein.

The court found in favor of the defendant. While it made no finding of fraud in connection with the purchase of this contract by G. I. Jones it found most of the facts above set forth, and which appear in the evidence, and found that the plaintiffs and Roger E. Jones and G. I. Jones had full knowledge of all of these facts and knew that the defendant was the owner of the

equitable title to said shovel under the contract of sale, and that the plaintiffs and G. I. Jones had expended no money and incurred no liability in connection with this transfer except the payment made to the Northwest Engineering Company. It was further found that the plaintiffs are the owners of the legal title to the shovel subject to the right of the defendant to complete the contract in accordance with its terms and the terms of the assignment to G. I. Jones, that the defendant was entitled to the possession of the shovel on the completion of the terms of the contract, that the defendant has at all times claimed to be the owner of the equitable title to the shovel subject to the original contract of sale, and that the defendant is entitled to the possession of the shovel free of all claims of G. I. Jones and the plaintiffs except the payment of the said sum of $1,005.79, with interest from July 1, 1942. As conclusions of law it was found that the defendant's right to redeem under the original contract has not been terminated, that the defendant is entitled to redeem upon paying the above amount with interest within a reasonable time, that a period of ten days after the judgment herein becomes final is a reasonable time within which to make such payment, that upon payment of this amount within said time the defendant will be entitled to the shovel, and that if this amount is not paid within said time the plaintiffs will be entitled to a judgment quieting their title. Judgment was accordingly entered, with one exception hereafter noted, and the plaintiffs have appealed.

[1] It is first contended that paragraph I of the findings of fact, in which it was found that the appellants are the owners of the legal title to this shovel subject to the right of the respondent to complete the contract in accordance with its terms, and paragraph XV of the findings in which it was found that the respondent has at all times claimed to be the owner of the equitable title to the shovel subject to the contract of sale, and that he is entitled to the possession thereof free of all claims except the payment otherwise provided for in the findings, are not within the issues presented by the pleadings. It is argued that the respondent thus claimed to be the full owner of the property and that through his pleadings he made no claim either to an equitable interest in the shovel or to any right of redemption under the original contract. By the complaint and the respondent's answer issues were raised as to whether the appellants were the full owners of the shovel and entitled to its possession and as to whether the respondent had any right, title or interest in and to the shovel in question. Whether or not the respondent proved everything he alleged in his cross-complaint the matters covered by the findings in question were clearly within the issues presented by the pleadings.

It is next contended that paragraphs I and XV of the findings are unsupported by any evidence and are inconsistent with other findings to the effect that certain payments were due under the original contract, that certain notices were given and that the payments had not been made to G. I. Jones or to the appellants. The gist of appellants' contentions is that respondent lost all of his rights under the original contract when the final payments were not made on or before June 29, 1942, and that the court erred in finding and concluding that he had an equitable interest in the shovel and in giving him ten days after the judgment becomes final in which to pay the amount which the court found had been paid by Roswell C. Jones and G. I. Jones out of their community property for the assignment of the original contract. Incidentally, the respondent states that this amount was paid into court although we are pointed to no place where this appears in the record.

[2, 3] We are not convinced that this judgment could not be affirmed if the strict rules of law were to be applied. The appellants rely on the rule announced in Martin Music Co. v. Robb, 115 Cal.App. 414, 1 P.2d 1000, that the vendor under such a contract may either disaffirm the contract and retake the property or may affirm the contract declaring all payments due and sue for the purchase price. It is then argued that the contract was here disaffirmed, thereby putting an end to all of the vendee's rights; that the vendor had title and there was nothing that needed to be done in order to perfect its title; and that the Northwest Engineering Company had given notice of its intention to terminate the contract and was therefore free to treat the property as its own and to dispose of it as it saw fit. However, the Northwest Engineering Company did not disaffirm the contract or give any notice that it was terminated. On the contrary, it recognized the contract as still in force and

assigned it to G. I. Jones. Even this assignment of the original contract was made subject "to the right of the conditional vendee to complete the contract in accordance with its terms," and in the letter transmitting this assignment the vendor declined to give the bill of sale which had been asked for stating that any bill of sale they might give would "necessarily be subject to the rights of the assignee and the vendee under the contract." All, or nearly all, of the payments had not been made at the time they were due. The Northwest Engineering Company had repeatedly given notice that the payments must be made by a certain date or they would enforce their rights under the contract. This was not done and the payments were later accepted. The matter was allowed to drift along until all the installments of the purchase price had become due. Under well-established rules, when such a course of conduct is pursued a rather definite notice is required in order to work a forfeiture on the vendee. The final notice that the overdue payments must be made by June 29 is somewhat indefinite, stating that the vendor was instructing its San Francisco office to repossess the shovel if the payments were not made by that date. However, the San Francisco office took no steps to repossess the shovel immediately, or at all. A few days later the vendor recognized the continued existence of the contract by assigning it. No further notice was given except the notice given by G. I. Jones on July 3 that the contract was canceled and terminated. In view of the prior actions of the parties it could well be held that the respondent was entitled to a notice that the contract would be terminated and giving him an opportunity to pay the required payment before the specified date before the contract could be terminated and canceled since the vendor had not stood squarely upon its contract and taken possession when the payment was not made on June 29.

[4, 5] However, we are here confronted with a somewhat different situation. Regardless of what would otherwise have been the strict legal rights of the parties the appellants elected not to stand on those rights but to bring this action in equity to quiet their title to the property. In thus seeking the aid of equity they impliedly, at least, offer to do equity. The court could apply equitable principles and was not compelled to adhere to strict rules of law. The court then had a wide discretion in order to do justice between the parties. Veterans' Welfare Board v. Burt, 4 Cal. App.2d 659, 41 P.2d 587. The evidence here justifies the inference that Roger E. Jones engineered the transaction through which his brother and his brother's wife obtained an assignment from the original vendor and that this was done in order to deprive this respondent of any interest in the shovel although he had furnished most of the money and was a partner of Roger E. Jones in the mining operations. The entire situation was one in which a court, in exercising its equitable jurisdiction, would naturally feel that the interests of the respondent were real and substantial and that he had not been fairly dealt with. The condition imposed by the court that the respondent should have the right to pay the amount due on the original contract, and which had been paid by or for the appellants, within ten days after judgment, and that if this amount was not paid title should be quieted in the appellants was reasonable, was in accordance with the equities of the parties and was well within the court's discretion in such a case.

[6] While the court found that the respondent acquired an interest in the shovel through a bill of sale executed on December 10, 1941, to the respondent as trustee, and as a conclusion of law found that the respondent was entitled to complete the performance of the contract for the purchase of the shovel, as successor in interest to the Caledonia Operating Company and pursuant to the bill of sale which he thus received, the judgment provides that upon payment of the amount found to be due to the appellants, with interest, the "defendant will be entitled to the delivery of said property to him and to have his title thereto quieted." This part of the judgment should have been in favor of the defendant "as trustee" and the portion of the judgment just above quoted is modified by inserting those words therein so that the same shall read: "defendant, as trustee, will be entitled to the delivery of said property to him and to have his title thereto quieted." As so modified, the judgment is affirmed, the respondent to recover his costs on appeal.

MARKS and GRIFFIN, JJ., concur.

62 Cal.App.2d 706

AEBLI et al. v. BOARD OF EDUCATION OF CITY AND COUNTY OF SAN FRANCISCO et al. and seven other cases.

Civ. 11824.

District Court of Appeal, First District, Division 1, California.

Feb. 2, 1944.

Hearing Denied March 31, 1944.

1. Schools and school districts ⇐63(5)

Where board of education deducted claimed salary overpayments from employees' salaries after employees had challenged validity of claims, but employees did not take steps to have money impounded by court until validity of claims had been determined, employees who owed money to board waived objection to method pursued.

2. Mandamus ⇐3(4)

Available administrative remedies must be exhausted before redress is had to court by instituting mandamus proceeding.

3. Mandamus ⇐3(6)

Where board of education deducted claimed salary overpayments from teachers' salaries after teachers had challenged validity of claims, superintendent of public instruction had no power to pass on questions concerning claimed overpayments because of improper rating of teachers and therefore there were no administrative remedies available and mandamus was proper remedy. School Code, §§ 5.760, 5.761.

4. Schools and school districts ⇐144(4)

Letter of board of education to teacher regarding reduced rating of teacher was sufficient to notify teacher that future rating would be based on the rating as reduced, for purpose of determining teacher's future salary.

5. Schools and school districts ⇐144(4)

Where 1925–1926 salary schedule adopted by board of education provided that adjustments in salary of teachers now in service to be made at middle of next session shall continue in effect until adjustment is made for August 1, 1927, the provision meant that salary paid for last half of 1925–1926 was to continue as salary for 1926–1927 in all cases where there had been a middle session adjustment in year 1925–1926, so that continuance of middle session adjustment beyond 1925–1926 school year was improper.

6. Schools and school districts ⇐144(4)

Particular provision of salary schedule adopted by board of education applying to teachers for whom middle session adjustment was provided in year 1925–1926, controlled general provision for annual advancement in rating.

7. Payment ⇐85(7)

Money paid under a mistake of fact may be recovered back, however negligent party paying may have been in making mistake, unless payment has caused such change in position of other party that it would be unjust to require him to refund.

8. Payment ⇐82(3)

The rule that money voluntarily paid under no mistake as to facts cannot be recovered back is inapplicable where payment is made by public officers.

9. Payment ⇐84(2), 85(2)

Money paid out by a governmental agency under either mistake of fact or law may be recovered from payee and the good faith of the payee in no way affects the applicability of the rule.

10. Estoppel ⇐62(4)
Schools and school districts ⇐144(4)

Where paymaster of board of education erroneously interpreted salary schedule or resolution of board and gave teachers improper salary ratings, the board was not estopped from challenging the erroneous ratings and the board could not have ratified them.

11. Estoppel ⇐62(1)
Municipal corporations ⇐883

In absence of unusual circumstances, an illegal payment of public funds cannot be ratified, nor can recovery be estopped.

12. Estoppel ⇐62(1)

Generally, estoppels will not be invoked against the government or its agencies, except in rare and unusual circumstances.

13. Schools and school districts ⇐144(4)

Where paymaster of board of education erroneously interpreted salary schedule or resolution adopted by board and gave teachers erroneous salary ratings, the board on discovering the error could recover illegal payments for period not

barred by statute of limitations, and was required to restore teachers involved to their proper ratings.

14. Schools and school districts ⇐144(4)

Where board of education adopted resolution "freezing" for one year salary status of high school teachers, but not elementary teachers, elementary teachers transferred to high schools should have been frozen in salary schedule for one year, and erroneous failure of board's paymaster to do so could be corrected.

15. Schools and school districts ⇐144(4)

Where salary schedule adopted by board of education provided that vice principals "at time of adoption of this schedule" who have not already reached maximum rating were to receive a three-year jump in rating, vice principals thereafter appointed were not entitled to the three-year jump in rating.

16. Schools and school districts ⇐144(4)

Where paymaster because of error and inadvertence gave teachers a higher salary rating than they were entitled to under resolution of board of education, the board properly re-rated teachers by placing them on their proper rating and could recover overpayments for period within statute of limitations.

17. Schools and school districts ⇐144(4)

Board of education's rule that no credit should be given for term of service of less than five months during one year, applied to rating of teachers on their original entrance into the department, and not to teachers in the department who took leave of absence.

18. Schools and school districts ⇐59

In construing rule adopted by board of education, it was proper to analyze other rules in whose company the rule involved was found.

19. Schools and school districts ⇐144(4)

In construing rule regarding teachers' salary rating adopted by board of education, the title or heading of the resolution containing the rule could be considered.

20. Schools and school districts ⇐144(4)

Where teachers, although appointed as substitute teachers, were paid as probationary teachers, and were regularly assigned to a particular school to fill a regular vacancy and their services were continuous in that capacity until close of term and they started next term as probationers, they were "full time teachers" within resolution of board of education providing for salary increases.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Time Teacher".

21. Schools and school districts ⇐144(4)

The board of education in fixing teachers' salary schedule had power to determine whether any credit should be given for outside experience or to determine, within realm of reasonableness, whether credit should be given for certain types of experience and not others, and board had power, prospectively, to change its policies in regard thereto.

22. Schools and school districts ⇐133

A teacher's status is that of an "employee" and the relation between teacher and board of education is a relation arising out of contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

23. Schools and school districts ⇐144(4)

A board of education has right, acting in good faith and in exercise of sound discretion, to reduce salary of teacher, notwithstanding permanency of teacher's tenure.

24. Schools and school districts ⇐144(4)

A reduction in salary of teacher cannot be made after beginning of school year.

25. Schools and school districts ⇐144(4)

Board of education hiring new teacher had right to make salary rating based on past experience of prospective teacher, so that when terms of contract were fixed by board and accepted by teacher, contract was valid and board was without power to reduce rating retroactively. School Code, §§ 5.731, 5.734.

26. Schools and school districts ⇐144(4)

Where original salary ratings of teachers were not based on fraud, error, or mistake and were valid when given, board of education did not have power to rerate and lower ratings of teachers for salary purposes without change in duties, functions or hours of service solely because board believed that original ratings were too high. School Code, §§ 5.731, 5.734.

27. Schools and school districts ⇐63(5)

Board of education possesses power to reduce salaries at commencement of school year, even of permanent employees with tenure, provided there is reasonable basis for such a reduction and reduction is not result of unreasonable, arbitrary or capricious act.

28. Schools and school districts ⇐144(4)

Board of education has no power to discriminate against any teacher in making salary classification.

29. Schools and school districts ⇐144(4)

Where board of education has once adopted a policy and, without fraud, error or mistake, rates a teacher under that policy, although board may change its policy as to new entrants into department, it has no power years later to review that teacher's case and to re-rate that teacher prospectively on the theory that the original rating was too high. School Code, §§ 5.731, 5.734.

KNIGHT, J., dissenting in part.

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Consolidated actions by Ada Aebli and others, by David N. Barker and others, by John P. Burnside, by Margaret H. LeSeur, by Martin Pihl, by Marie D. Roache, by Edythe Aceves and others, and by Grace Dixon and others against the Board of Education of the City and County of San Francisco and Mrs. Mary Prag and others, as Commissioners of the Board of Education, to recover amounts charged back against plaintiffs' salaries as excess payments for the period of 1930–1932 and by mandamus to compel the Board to give plaintiffs for the school year starting July 1, 1932, the rating they had prior to the re-rating of 1932. From parts of the judgment, the plaintiffs appeal, and the Board appeals from a part of the judgment.

Judgment affirmed in part and reversed in part.

Piccirillo & Wolf, of San Francisco, for appellants.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy Atty., Irving Breyer, Deputy Atty., Franklyn M. O'Brien, and O'Brien, Dibert & Acton, all of San Francisco, for respondents.

PETERS, Presiding Justice.

In 1932 the Board of Education of the City and County of San Francisco hired Wilbur S. Owensby to examine and audit the books, records and accounts of the school department, with particular regard to the service status rating classification and salary of all of the teachers in the department. In San Francisco salaries of teachers are fixed by a salary schedule, the amount of salary being dependent and rated according to years of service. Owensby made an exhaustive investigation and audit, and reported to the Board that all of the 189 teachers involved in these proceedings had been overrated due to errors of various kinds, and consequently overpaid for periods varying from one to more than ten years prior to 1932. He recommended that the service status rating of each of these teachers be re-rated downward in accordance with his interpretation of the rules of the Board in effect when these teachers were first employed. Some of the errors in rating were due to errors in calculation made by employees of the Board, either purely mechanical or caused by errors in interpretation or application of the rules of the Board, while others were due to the fact that when these teachers were first hired they were given by the Board as it was then constituted ratings, which according to Owensby's views, were too high and in violation of the rules of the Board as they then existed. The Board in 1932 adopted Owensby's recommendations. It proceeded to re-rate these 189 teachers downward, and also took steps to recover from such teachers the amount of the alleged overpayments for a period of two years next preceding July 1, 1932, that being the date of the beginning of the next succeeding school year. Although, in most cases, the alleged errors in rating had occurred more than two years prior to the re-rating of 1932, the charge back was limited to two years on the theory that recovery of excess payments beyond that period was barred by the statute of limitations. The revised rating was also applied in making salary payments for the school year commencing July 1, 1932, and for all subsequent years. The net result of the action of the Board in 1932 was that these 189 teachers had deducted from their salaries in installments substantial sums of money alleged to have been overpaid them for the period 1930–1932, and for the period starting July 1, 1932, their

ratings, and consequently their salaries, were substantially reduced below what their ratings were in 1931–1932, and prior thereto. The teachers affected protested the deductions and reductions in salary, and immediately instituted these eight *mandamus* proceedings which have been consolidated. In these actions the 189 teachers affected seek the recovery of the amounts charged back against their salaries as excess payments for the period 1930–1932, and also seek by *mandamus* to compel the Board to give to them for the school year starting July 1, 1932, and thereafter, the ratings they had prior to the re-rating of 1932.

After a lengthy trial (the reporter's transcript contains 3425 pages), the trial judge, the Honorable C. J. Goodell, prepared two opinions in which he discussed the law and the facts applicable to each of the litigants. Thereafter complete and carefully prepared findings and conclusions of law were filed. Generally speaking the trial court divided the 189 teachers into three main groups.

As to group one, involving the so-called "mechanical" error cases (which group is, itself, divided into several distinct categories hereafter discussed), it was held that the teachers included therein could neither recover the amounts charged back against their salaries, nor were they entitled to be restored to their ratings as they existed prior to the re-rating of 1932. The court found that these teachers had been rated too high due to "mechanical and clerical errors," of employees of the Board, mainly of the paymaster's department, without authorization by the Board. It was held that the Board was legally required to place the teachers in this group on their correct salary rating as soon as the errors were discovered, and to collect back all overpayments based on the alleged errors not barred by the statute of limitations.

As to the second group, involving the so-called "non-uniformity" cases (also divided into several categories hereafter discussed), the court found that the teachers included therein were entitled to recover the alleged excess payments charged back against their salaries, but, that the Board could and did lawfully re-rate them downward effective as of the commencement of the school year 1932–1933. In other words, as to this group it was held, that the Board could change its ratings prospectively, but it could not do so retroactively.

The third group included but six teachers. As to them the trial court held that because of facts peculiar to their individual cases the Board was estopped from charging back the allegedly excess payments and from changing their ratings prospectively for the school year 1932–1933, and thereafter. In other words, it was held that, regardless of any error that may have been committed when the teachers were originally rated, the Board, because of facts peculiar to each of the six cases, was estopped from re-rating these teachers either prospectively or retroactively.

The teachers in the first group appeal from the judgment in so far as it denies them relief both prospectively and retroactively. Their main contentions are that there were no errors in the original ratings, but even if there were, the teachers had a vested right in the original ratings; that the Board had no lawful right to interfere with that vested right; that the Board ratified the errors, if any there were; that the Board is now estopped to claim error.

The teachers in the second group appeal from the judgment in so far as it sustained the right of the Board to re-rate them prospectively for the year commencing July 1, 1932. The teachers here involved make the same contentions as those in the first group, and in addition, point out that every teacher in this group had his or her original rating fixed by formal resolution of the Board. It is contended that the Board as it was constituted in 1932 had no lawful right to overrule or change a right granted by an earlier Board in the exercise of its discretion. The Board appeals from the judgment in so far as it sustains the right of the teachers in this group to recover amounts charged back against current salary. The main thought of the Board is that these teachers were originally erroneously rated, and that it was the duty of the Board, upon discovering the error, not only to re-rate them prospectively but to recover overpayments based upon the error.

The Board appeals from the judgment in favor of the six teachers in the third group, it being contended that no lawful basis for an estoppel exists.

Before directly discussing the contentions of the parties some reference must be made to the salary schedule of the school department and to the rules applicable thereto. The salaries of certificated personnel in the school department are not fixed by

separate contract with each employee. Such salaries are fixed by a salary schedule, the amount of salary being dependent upon years of service. Each year, between May 1st and May 21st, the Board, acting pursuant to the provisions of the City Charter and of the School Code, adopted a schedule of salaries for teachers for the next ensuing school year, which starts on July 1st. Such schedules when once worked out were not changed each year. Frequently the Board would readopt the schedule for the preceding year. For the school year 1925–1926 a new salary schedule was adopted. That schedule was readopted each succeeding year until 1930–1931 when a new schedule was adopted. This last mentioned schedule remained in effect through the school year 1932–1933. These schedules fixed the salaries of the teachers in the several divisions of the school system, a separate schedule being set forth for teachers in the elementary schools, continuation or part-time high schools, junior high schools, attendance officers and senior high schools. In these schedules the salary of each teacher depends upon her "service status rating," which in turn depends upon her years of service. The 1925–1926 schedule has twelve "service status ratings" for each division, designated 1st through 12th, except that the ratings for attendance officers stop at 9th. The schedule for 1930–1931 shows fifteen "service status ratings," with ten for attendance officers. Salaries rise as the rating progresses. When a teacher has acquired the last "service status rating" listed in the schedule for her division she has reached the maximum salary rating, and thereafter is paid according to that maximum.

These various salary schedules usually contained a provision that the service status rating of the teachers should advance one position each year. Thus, in general, there was an advance of one place in service status rating for each year in the department. There were, however, exceptions to this rule. Thus in 1925–1926, after the salary schedule for that year had been adopted, the Board of Supervisors made available an additional sum of money to give the teachers an increase in salary. In order to accomplish this result, it being too late, apparently, to revise the salary schedule, the Board of Education provided that teachers should be advanced more than one place in service status rating for the year 1925–1926. In 1930, as already pointed out, a new schedule was adopted. That schedule contained substantial raises for all high school teachers over the corresponding salaries contained in the schedule for the preceding year. The Board concluded that to give the higher rate, and, at the same time advance the high school teachers one year in rating, would result in too great an increase. Hence, by resolution, the ratings for high school teachers were "frozen." Each teacher in the "frozen" group was to retain the rating of the preceding year. In 1932 the entire schedule was "frozen" and no raises at all allowed for several years thereafter. Under such a system the amount of salary received by each teacher depends on seniority, until the maximum has been reached.

Another problem should be generally mentioned. When a teacher first enters the department it is necessary for the Board to determine whether she is to be entitled to any credit for experience, either teaching or non-teaching, gained outside the San Francisco school department. The Board determined to give credit for outside experience. To this end, the Board on August 11, 1925, adopted a series of rules entitled "Credit for Teaching Experience Elsewhere and in Other Classes of Schools." These rules purported to state what credit would be allowed not only for outside teaching experience, but also for outside "vocational experience in industry and commerce." These rules remained in effect until May of 1930, when they were modified in certain respects, and then in February of 1932 the Board changed its entire policy on this subject. At that time the Board abolished the giving of credit for salary purposes for outside experience, and thereafter commenced all new teachers on the first year of the salary schedule.

Under the rules adopted in 1925 the applicant for a position would submit to an employee of the Board her credentials, including a detailed reference to her outside experience. In January, 1926, there was created a department of personnel whose duty it was to make the preliminary survey. The department of personnel did not always rigidly apply the 1925 rules. Moreover, many applicants had had experience of a type not covered by the rules. The department would calculate a rating for the applicant. This recommendation would be submitted to the personnel committee of the Board, composed of three members of the Board. This committee

would then transmit the recommendation to the full Board. The Board would then by formal resolution approve, reject or modify this rating, and would provide for the hiring of the teacher at the rating so fixed. In the various cases here involved there are seventy-five teachers (hereafter discussed in detail under the "non-uniformity" cases) whose ratings were thus fixed by formal resolution in the years 1925 through 1931, and who strenuously object to being re-rated ab initio in 1932.

When the Board determined to its satisfaction from Owensby's report that a particular teacher had been originally, due to some error, improperly rated and therefore improperly compensated at a rate of salary higher than that to which she was entitled, it sent, prior to the commencement of the school year 1932–1933, a letter to each teacher. This letter informed her that for certain specified years she had drawn salary in excess of the uniform schedule of salary rates fixed by the Board for other teachers of the same experience and classification. She was then informed that since July 1, 1930, she had been overrated and the amount of excess salary alleged to have been received was specified. She was told that she had the option of reimbursing the department for the overpayment either by an immediate lump sum payment, or in monthly payments to be deducted from her salary from June 30, 1932, to October 31, 1933.

[1] The teachers contend that even if they owed the Board money for the overpayments, and even if the Board could sue them and recover the overpayments, it had no power to exercise the right of self-help by thus deducting sums from their salaries without their consent, at least after the teachers had challenged the validity of the claims by filing these actions. The teachers did not attempt to enjoin the deductions. When these cases went to trial all the deductions had been made and the money impounded by the Board. While we have some doubt of the propriety of a governmental agency, after it has determined that an employee owes it money, to deduct all or part of the amount claimed from the employee's salary after the employee has challenged the validity of the claim, and before the validity has been determined, we have no doubt at all that if the employee does not see fit to take steps to see that the money is impounded by the court until the validity of the claim is determined, and then it is determined the employee owed the money, he has waived any objections to the method pursued. In the instant case it has been determined that some of these teachers owed the Board various sums of money. Before these cases were tried, the Board, by the exercise of a form of self-help, deducted the sums owed to it from these teachers' salaries. If the teachers in fact owed the money they are in no position at this late date to complain of the procedure adopted by the Board.

[2, 3] The Board insists that all of the petitions for mandate in all of the cases must be denied because the teachers did not exhaust their administrative remedies before instituting these proceedings. It is, of course, well settled that available administrative remedies must be exhausted before redress is had to the courts. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Alexander v. State Personnel Board, Cal.Sup., 137 P.2d 433. The Board urges that §§ 5.760 and 5.761 of the School Code provide an administrative remedy that should have been utilized before these *mandamus* proceedings were instituted. Section 5.760 provides that: "Any teacher whose salary is withheld may appeal to the superintendent of public instruction, who shall thereupon require the superintendent of schools to investigate the matter and present the facts thereof to him." The next section provides that: "The judgment of the superintendent of public instruction shall be final; and upon receiving it the superintendent of schools, if the judgment is in favor of the teacher, shall, in case the trustees refuse to issue an order for said withheld salary, issue his requisition in favor of said teacher."

These sections have no application to these appeals. These cases do not involve disputes over whether warrants of the teachers were being properly withheld. Here the warrants were made out and delivered to the teachers each month, with a deduction from the amount admittedly owed. The dispute is over the right of the Board to re-rate in 1932. The superintendent of public instruction has no power to pass on the complicated questions of law and fact concerning the proper rating of these teachers. The partial salary withholding feature of the case was incidental to this main feature. Under such circumstances there were no administrative remedies available and *mandamus* was the

proper remedy. See Dupuy v. Board of Education, 106 Cal.App. 533, 289 P. 689; Williams v. Bagnelle, 138 Cal. 699, 72 P. 408.

[4] In their closing brief the teachers argue at some length that whatever right the Board may have had to deduct for the overpayments during 1930–1932, it at no time notified the teachers, prior to July 1, 1932, that their compensation for the year 1932–1933 would be pursuant to the reduced rating. It is urged that the notices sent to them in May and June, 1932, merely notified them of their reduced ratings and of the amount of the excess salary received by them prior to June 1, 1932. It is also urged that the re-rating resolution itself did not purport to re-rate for the future.

No useful purpose would be served by setting forth the form of letter and the resolution in this opinion. It is true that the letter does not expressly state what the teacher's rating for 1932–1933 will be. But the clear and inevitable implication of the letter, and of the resolution, was that future ratings would be based on the ratings as reduced. Thus the letter to Miss Cushman, which is typical, informs her that she should have been rated 11th year for 1931–1932, but that she had been erroneously rated 12th year. It is true that in her case the court held that the Board was without legal right to reduce her rating and salary retroactively for 1931-1932 and that she should be paid on 12th year rating for that year. But the letter clearly indicated the Board's intent that she should be reduced in rating for the future. To any one familiar with the salary schedule of the San Francisco school department and familiar with the method of rating teachers, as all the teachers here involved were, the letter could have no other meaning.

The Clerical or Mechanical Error Cases.

In general.

As already noted, the trial court held, as to the group of cases where the error in rating was mechanical or clerical, that the Board was legally justified in re-rating retroactively and prospectively—that is, that the Board could collect the overpayments for the two-year period 1930-1932, and was justified in lowering the ratings of these teachers for the future. There are several categories within this large group and some teachers appear in more than one category. These main categories will be separately considered.

The "split year" cases.

The trial court correctly placed 47 teachers in this category. Their names and the facts relating to each of their cases are set forth fully in the findings and need not be set forth herein. These cases arose in connection with the granting of the so-called "big raise" in the school year 1925-1926. As already pointed out, the salary schedule for this school year was adopted before the money for the raise of at least $360 per year for each teacher was made available. For this reason a salary schedule without providing for the $360 raise was adopted. But, contingent upon money being made available for the "big raise" the schedule provided as follows: "Under the provisions of this Salary Schedule and of the rules governing the placing of teachers now in service upon the new Schedules, all full-time teachers, all principals, supervisors and assistant supervisors in the day schools will receive during the next school year (1925-1926) an increase of not less than Three Hundred and Sixty Dollars above that which they received during the school year 1924-1925, apart from small odd amounts added or subtracted in order to fit the teachers' salaries exactly into the new schedule."

This raise was accomplished through placing teachers in a higher rating of the 1925-1926 salary schedule than they would have received with only the usual one year advance of rating. The salary schedule contained a section indicating where on the old schedule (1924-1925) were to be placed the various salary brackets of the 1925-1926 schedule. For example, an elementary teacher who had been receiving a salary of $1,400 for the year 1924-1925, the lowest or first service status rating, was to receive $1,824 for 1925-1926. In order to arrive at this figure, the schedule adopted a most complicated procedure. As to some of the teachers, it provided that they should be paid on a "split year" basis. For example the schedule provided that a teacher who was on first year rating for 1924-1925, instead of being placed on second rating for the next school year, was to be jumped and placed on the 5th year rating for the first half of the school year 1925-1926, and on the 6th year rating for the second half. The salary for the 5th year rating on the 1925-1926 salary schedule was $1,776, that for the 6th year rating, $1,872. One-half of $1,776 plus one-half of $1,872 is $1,824. This feature of paying for one-

half of the year according to the 5th rating, and one-half according to the 6th year salary was designated the "split year" rating. On the other hand, a teacher who had 2d rating in 1924-1925 and received a salary of $1,450 that year was advanced to the 6th rating on the 1925-1926 salary schedule, which carried a salary of $1,872. Thus the schedule continued up through the various salary ratings. Some ratings were advanced without this "split year" method and others with it. This made the salary schedule most complicated, but the Board's schedule expressly provided for this "split year" system as to certain of the salary brackets and not as to others. No complaint is here made of the Board having adopted this procedure. The error which Mr. Owensby found was in the continuance of the "split year" rating beyond the year 1925–1926. In Mr. Owensby's analysis of the 1925-1926 salary schedule, which was adopted as the schedule for the succeeding years until the year 1930-1931, the teacher with "split year" rating 5½ for 1925-1926 (one-half of year at 5th year rating, second half at 6th) should for the year commencing July 1, 1926 (1926-1927) have been placed on straight 6th year rating and have continued at that rating until the year 1927-1928, when she would have gone on 7th rating for the year commencing July 1, 1927. Instead, for 1926-1927 she was given 6½ "split year" rating, on 6th the first half of the year and on 7th from January, 1927, to June 30, 1927. This continued, that is, advancement on such plan, until the school year 1930-1931. A new schedule was adopted for that year. At that time the Board's paymaster or superintendent of schools, or both, determined that the "split year" system should be then terminated. To accomplish that object elementary teachers on the "split year" rating were placed on the next even rating plus one, commencing with July 1, 1930. That is, the general rule for elementary teachers that year was that they advanced a year in rating. But if a teacher had 9½ year rating for 1929-1930, she was, at the commencement of the school year 1930-1931, given full 11th rating. In Mr. Owensby's view, and that of the trial court, the continuance of this "split year" system beyond the school year 1925-1926 was contrary to the provisions of the Board's salary schedule for the year 1925-1926, readopted for succeeding years. If a teacher with 5½ rating during 1925-1926 had for the year 1926-1927 been given 6th rating and thereafter advanced one rating a year, she would for the year 1930-1931 have had 10th rating, instead of 11th.

This additional one-half year in rating given by the paymaster in 1930 did not only apply to elementary teachers. As already pointed out, the new salary schedule adopted in that year "froze" high school teachers. They were not given the usual one year advance in rating for that school year. This was because the 1930-1931 schedule was higher than the old schedule and it was felt that the increase in pay would be too large if the teachers got an advance in rating under the higher schedule. But for "split year" teachers in the high schools an advance was in effect given. That is a teacher on 9½ "split" rating for 1929-1930 was placed on 10th rating. If, for 1926-1927, she had been placed on 6th rating instead of 6½, as should have been done, she would have found herself for 1930-1931 with 9th rating, rather than 10th.

The theory of the Board in 1932 was that this "split year" system was continued beyond the year 1925-1926 contrary to provisions of the Board's salary schedule for 1925-1926, readopted for the years up to 1930-1931. In the Board's view, its employees (either the paymaster or the paymaster acting under the direction of the superintendent of schools), acting under a misunderstanding of the Board's direction as contained in the schedule and contrary thereto, continued the "split year" system, thereby giving certain teachers a higher rating than they would have had if the Board's direction contained in the schedule had been followed.

The trial court found, in accordance with the Board's interpretation of the salary schedule of 1925-1926 that under that schedule, in so far as it provided as to certain groups for the "split year" method of payment for that school year, such method of payment should have terminated with the school year commencing July 1, 1926; that at that time a teacher who was paid, for example, on the "split year" basis for 1925-1926 one-half on fifth year and one-half on sixth, should have been placed on 6th year rating commencing July 1, 1926, instead of 6½ year as was done; that "at no time has the said Department ever adopted or maintained a salary schedule based on semi-annual or split year rates and that when (after said $360.00 increase had been effected) said teachers were advanced from year to year, commencing with the school

year 1926-1927, at such semi-annual or 'split year' ratings, they were so advanced in violation of said resolution of June 16, 1925, and as an unwarranted continuation of the plan for effecting said $360.00 increase, and that such advances and increases were made by reason of clerical error, inadvertence and mistake on the part of said Department and its employees" (Finding No. 61, Cl.Tr. p. 198); that by reason of these errors occurring in 1926 and in 1930 these teachers erroneously received a full year's increase in rating; that "none of said advances was made in the exercise of discretion or judgment in the rating of said teachers or any of them * * * that in charging said teachers, in 1932, with excessive payments which they had received during the two year period next immediately preceding the time when said charges were made, namely, for the difference between what they received on the erroneous semi-annual or split year basis and what they should have received on the yearly basis shown on said schedule [and in re-rating these teachers prospectively since July 1, 1932] said Board was within its rights, and all such charges were legally and properly made; the Court finds that said overpayments were made to said teachers by and through mistake and clerical error and that all thereof were properly collectible back and were properly and legally collected, and that none of said teachers is entitled to collect back from the defendants any part thereof, or entitled to the mandate of this Court ordering any restoration or change in status." (Finding No. 18, Cl. Tr. p. 207.)

In considering the propriety of the trial court's ruling there are really two questions involved. The first problem is one of interpretation—that is, should the "split year" have been continued after July 1, 1926? The second problem involves a question of law, that is, assuming an error was committed by the employees of the Board, could the Board in 1932 lawfully recover back the amount overpaid during the period within the statute of limitations?

[5, 6] On the first question the teachers contend that there was no misinterpretation of the salary schedule, and that what was done was in accordance with the schedule. That the trial court properly construed the 1925-1926 schedule, which was readopted each year until 1930, is not open to reasonable doubt. In addition to the provision above quoted from the 1925-1926 salary schedule, there was another provision which read: "The adjustments in salary of the teachers now in service to be made at the middle of next session, in order to give teachers proper amount of salary, shall continue in effect until the adjustment is made for August 1st, 1927." (This date, was, on July 22, 1925, changed to read "July 1st, 1927.") The salary schedule was adopted in May of 1925. The Board in 1932, and the trial court, interpreted the reference to "the middle of next session" as referring to the middle of the 1925-1926 school year, when certain teachers were to be paid for the last half year at a higher rating than for the first half. In their analysis the above provision means that the salary paid for the last half of 1925-1926, was to continue as the salary for 1926-1927, that is until July 1, 1927, in all cases where there had been a middle session adjustment in the year 1925-1926. This appears to be the plain purport of the provision. The teachers, while not seriously contending that the quoted paragraph standing alone should not be so interpreted, seek to qualify the quoted paragraph by an earlier provision in the schedule which reads as follows: "Increases in salary on account of years of service in the San Francisco School Department will be made once annually; effect August 1 [later changed to July 1, as August 1 is an obvious error] each year." The teachers contend that any teacher on a "split year" basis for the school year 1925-1926, for example fifth year rating for the first half of the year and sixth for the second half, was to be rated one full year advance or 6½ for the school year 1926-1927. The obvious error in this construction is that the "middle of next session" paragraph above quoted is a particular provision applying to those with a "split year" rating, which controls the general provision for annual advancement in rating. The "annual" provision, relied upon by the teachers, obviously applied to those not on a "split year" basis, and applied to the "split year" teachers after July 1, 1927.

Once it is determined that the rating these teachers enjoyed in 1932 was the result of an error or mistake, the question next presented is whether the Board could then recover back the overpayments for the period within the statute of limitations. The trial judge fully discussed this problem in his first opinion. We are satisfied that his discussion adequately disposes of this phase of the problem. We therefore adopt

as a portion of this opinion the following portions of the opinion of the trial court:

[7] "In my opinion there is no doubt as to the Board's right to sue the teachers, and therefore none as to its right to deduct from money admittedly owing to them. The legal doctrine upon which the Board based its action in charging back the overpayments, and now justifies that action is that of mistake. The law recognizes and deals with two kinds of mistake,—that of law and that of fact. As a general rule mistake of law is of no legal consequence, just as ignorance of the law is no excuse. Mistake of fact, however, as a general rule furnishes a good ground for relief. Moreover, the mistake need not be mutual, or known to or shared by the party receiving the money. Money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund. National Bank of California v. Miner, 167 Cal. 532 [140 P. 27].

"Now in these cases it is a close question whether the errors claimed by the Board to have been made by persons employed by the department, whereby the teachers were paid more than they were entitled to (according to the Board) were mistakes of fact or mistakes of law. As the various cases are discussed herein this question will be dealt with. Preliminarily, however, it is sufficient to point out that, generally speaking, where money is paid out by mistake by the state or an agency of government (whether by mistake of fact or mistake of law) it can be recovered back in many instances where, if paid out by an individual or by a private corporation it could not be.

"The reason for this, and the theory underlying it, is that the funds paid out are public funds,—trust funds,—and not the property of an individual who can deal with them as he pleases.

"Take as an illustration a case where the paymaster of the department erred in the interpretation of a section of the School Code or other legal enactment and because of such erroneous interpretation paid a teacher more than under the law rightly interpreted was coming to her. This would be a mistake of law.

"A comparatively recent case in Massachusetts clearly illustrates the rule. Norfolk County v. Cook, 211 Mass. 390, 97 N. E. 778, Ann.Cas.1913B, p. 650. Cook was clerk of the County Court of Norfolk County. The county seat was at Dedham. Cook lived at Weymouth, and journeyed each day from there to the courthouse and back. There was a law allowing clerks necessary travelling expenses, and Cook claimed the expenses of his daily trips and the County Commissioners allowed them. 'It seems' says the court, 'to have been supposed by all parties that the statute authorized the payment of these bills. There is no question of their good faith.' Here was a plain mistake of law. Cook and the County Commissioners simply misconstrued the law. Later it was held that the statute did not authorize the payments, whereupon the county demanded repayment by Cook, which he refused, and the County sued. The court in that case held that 'The county treasurer had no authority to pay, and the defendant no right to receive this money.'

"The following excerpt from the decision should be read with care:

" 'His next contention is that the county commissioners as a court adjudicated that the money was due him, and that such adjudication is conclusive upon the county. But this is not tenable. So far as they acted within the statute they were by its plain language acting simply as auditors, and so far as they were acting outside the statute they were acting outside their jurisdiction.'

"And the following should also be noted well for it points out in exceptionally clear and unambiguous language the reason for the exception,—the reason that is to say, why a governmental agency can sue and recover back money paid by mistake (despite the fact that it is not by mistake of fact) where an individual cannot do so.

[8] " 'As the last ground of defense the defendant invokes for his protection the rule that money voluntarily paid under no mistake as to the facts cannot be recovered back. He takes the position that even if the transfer of the money from the treasury of the county to his pocket was illegal, and even if he neither then nor since has had any equitable right to it, still he will invoke this technical rule of law to keep the money if he can. Without

stopping to comment upon the ethical aspects of such a defense we proceed to consider its legal aspects.

"'The rule is of very general application between individuals. An individual is dealing with his own money. If, to avoid trouble facing him in the shape of a lawsuit or in any other form, he with full knowledge of the facts and not under compulsion but voluntarily pays out money, he has waived his right to contest the validity of the claim. He is dealing with his own money and as a principal. He can do as he chooses with it and is answerable to no one. But public officers are dealing with money which is not their own and over which their powers are subject to well-known limitations. They can pay when the law requires or permits, and they cannot pay when it forbids. So far as they act within their powers the public, whose agents they are, must abide the consequences. But when they act beyond their powers they do not bind their principals. The payment of this money in this case was not the act of the county, but simply the unauthorized act of a public officer. It was not the voluntary payment of money by the owner, but by one who had no beneficial interest in it and who was not authorized by the principal to make the payment. Manifestly one of the chief conditions for the application of the rule is wanting. To such a condition of things the rule does not apply; and such is the great weight of authority.' (Citing cases.)

"See also the annotation at pages 651–653.

"A leading case on the same subject is State of Iowa v. Young, 134 Iowa 505, 110 N.W. 292, 13 Ann.Cas. 345, where the subject is fully discussed and numerous cases cited both in the decision and in the annotation following it. It comes to the same conclusion as the Massachusetts case just cited, and arrives at that conclusion by the same process of reasoning.

"See also Jones County v. Arnold, 134 Iowa 580 [111 N.W. 973], and County of Pocahontas v. Katz-Craig Contracting Co., 181 Iowa 1313, 1323 [165 N.W. 422].

"The trust fund rule was applied in this state in the case of City of Petaluma v. Hickey, 90 Cal.App. 616 [266 P. 613]. There the City of Petaluma had paid out upwards of $3000 and sued to get it back. The money had been paid out under circumstances which made it neither a mistake of fact nor of law, but it was held that the money was a trust fund and that the person to whom it had been paid had become an involuntary trustee. The City could not recover, however, for the single reason that it had not brought suit in time, —its claim on the trust theory being barred by the statute of limitations.

"The case of Puterbaugh v. Wadham, 162 Cal. 611, 620 [123 P. 804], tacitly recognizes and applies the same rule, holding past overpayments to be deductible from salary." Opinion quoted in entirety Res. Br. pp. 69–131; part here quoted Res. Br. pp. 76–81.

[9] In addition to the cases cited above, the following cases hold that money paid out by a governmental agency under either mistake of fact or law may be recovered from the payee: Foster v. Pension Board, 23 Cal.App.2d 550 [73 P.2d 631]; City of Duluth v. McDonnell [61 Minn. 288], 63 N.W. 727; Chrysler Light & Power Co. v. City of Belfield [58 N.D. 33], 224 N.W. 871 [63 A.L.R. 1337]; Independent School Dist. No. 6 v. Mittry, 39 Idaho 282, 226 P. 1076; Inhabitants of City of Biddeford v. Benoit, 128 Me. 240, 147 A. 151; United States v. Barlow, 132 U.S. 271, 10 S.Ct. 77, 33 L.Ed. 346; Wisconsin Central R. Co. v. United States, 164 U.S. 190, 17 S.Ct. 45, 41 L.Ed. 399; Haralson County v. Golden, 104 Ga. 19, 30 S.E. 380. It should be added that the good faith of the payee in no way affects the applicability of the above rules. Smith v. Rubel, 140 Or. 422, 13 P.2d 1078; Grand Lodge, A. O. U. W. of Minnesota v. Towne, 136 Minn. 72, 161 N.W. 403, L.R.A.1917E, 344.

[10] The teachers, as to this and all other cases of error, urge that the ratings having been once given, although based on error, are final, and, that in any event, the Board is estopped from challenging, or that the Board has ratified, the ratings. It should be noted that we are not here dealing with ratings given by the Board after full examination of the facts by the Board. That problem will be discussed hereafter. We are here dealing with errors of employees of the Board in applying the will of the Board as disclosed in its resolutions or in the salary schedule. The so-called "mechanical error" cases were the result of employees of the Board erroneously interpreting the salary schedule passed by the Board or in interpreting some resolution of the Board. Certainly it cannot be urged successfully that the em-

ployees of the Board in rating teachers and paying their salary and in interpreting the resolutions of the Board acted in a judicial or quasi judicial capacity so that their determinations would become res judicata. Yet this is the necessary import of the argument of the teachers on this point.

[11-13] The same fallacy exists in the arguments based on estoppel and ratification. It is urged that, however erroneous the interpretation by the employees of the salary schedule and other resolutions of the Board may have been, the Board should have known in what manner the paymaster's department was violating the resolutions. It is also urged that the records of the Board were open to the Board, and that such records revealed the true situation. The above cited cases establish beyond a doubt that in the absence of unusual circumstances not here present an illegal payment of public funds cannot be ratified nor can recovery be estopped. There is no doubt a modern tendency to invoke estoppels against public authority in exceptional circumstances. La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370. But these cases all involved most unusual sets of facts. There is no doubt that the general rule is that estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances. See cases collected 19 Am.Jur. p. 818, § 166. No unusual circumstances are here presented. It is a simple case of employees of the Board erroneously interpreting the will of the Board and illegally paying out money to those not lawfully entitled. We conclude that in this, as well as in all the other mechanical error cases, the Board upon discovering the error, lawfully could recover the illegal payments for the period not barred by the statute of limitations, and, of course, was required to restore the teachers involved to their proper ratings.

The "frozen year" cases.

[14] As to the group of teachers here involved the trial court, as in the "split year" cases, held there was mechanical error, and for that reason the teachers were without right to recover the deductions, or to be re-rated prospectively. The trial court found, as to this group of cases, that the employees of the Board, in applying and interpreting the salary schedule, acted contrary to the will of the Board as disclosed by the resolutions of the Board.

As has already been pointed out, the salary schedule for 1930–1931 gave a substantial raise in salary for each of the ratings relating to senior and junior high schools, but gave no such similar raise to elementary teachers. The Board determined that to give the high school teachers both the raise and the usual one year advance in rating would result in giving those teachers more of an increase than the Board intended. To prevent this result the Board determined to "freeze" the status of the high school teachers for one year—that is, to keep their service status ratings for 1930–1931 identical with those existing in 1929–1930. Inasmuch as the elementary teachers did not receive a raise, their service status ratings were not frozen. The "freezing" resolution was adopted on May 21, 1930, and reads as follows: "All senior high school teachers [an identical resolution was adopted relating to Junior High School teachers] with less than twelve years service shall be placed beginning July, 1930, on the year of the new schedule corresponding to their service status as of the date of the adoption of this schedule, and shall advance thereon according to the requirements and effective dates set forth, except that in no event shall a teacher now in the service suffer a reduction of salary by virtue of the adoption of the new schedule."

Many of the cases now under discussion involve elementary teachers who were transferred to the junior or senior high schools effective July 1, 1930. If those teachers had remained in the elementary division they would have advanced a year in rating. The Board's employees advanced them one place in rating notwithstanding the transfer to high school. The result was that a teacher with two years' teaching experience in the junior high remained on 2nd rating for 1930–1931, but the elementary teacher transferred to the junior high with two years' elementary experience received 3rd rating on the junior high schedule, getting a higher salary than the teacher whose entire experience had been in the junior high. The re-rating of 1932 placed such transfers on the same basis as those who were junior high teachers and were "frozen."

Other elementary teachers involved in this group were transferred effective as of July 1, 1931. Salary ratings did not freeze for the year 1931–1932. But it is perfectly obvious that if an elementary teacher was, for example, advanced from 2d to 3d rating for 1930–1931 (which was perfectly proper) and then, when she was transferred to the high school division commencing July 1, 1931, if she were to be advanced to 4th rating, she would be one year ahead of the junior or senior high school teacher of similar years experience all of whose experience had been in the high school. That is exactly what the employees of the Board did.

The same situation existed as to new entrants in the department. Outside teachers were given credit for each year of their outside teaching experience, less one. As a result such new entrant was placed on the salary schedule one year ahead of high school teachers in the San Francisco department with equal experience whose entire teaching had been done in the San Francisco high schools.

A somewhat similar situation existed as to attendance officers. Before 1930–1931 their separate salary schedule was midway between elementary and junior high. The salary schedule of 1930–1931 placed them on the junior high schedule. The Board's employees did not "freeze" their ratings, but permitted an advance of one place. Thus if an attendance officer had second rating, she was advanced to 3d rating and given the same salary as 3d rating junior high teachers. Thus an attendance officer who, for 1929–1930 had second rating and received less than a junior high teacher with second rating, in 1930–1931 was paid on the basis of third junior high rating, receiving more than the junior high teacher with equal experience.

The re-rating of 1932 reduced these several groups one place in rating so as to give them one frozen year, and provided for the recovery of the overpayments. The trial court approved these actions of the Board, holding that all of these teachers should have been frozen in the schedule for one year.

That this determination was correct seems obvious. When the purpose of the freezing resolution is considered, it seems clear that these groups were intended to be included in the frozen group. Such conclusion is predicated upon the scheme of the 1930–1931 schedule as a whole, rather than upon any particular provision of the schedule. For the reasons and upon the authorities discussed under the "split year" cases this portion of the judgment should be affirmed.

The vice-principal cases.

[15] This category includes four vice-principals. The problems here involved also grow out of the 1930–1931 salary schedule. Under that schedule vice-principals were given a rating on the teacher's service status rating schedule, and in addition to the teacher's salary for that rating received a flat sum of $300 per year in addition, except for Class B, elementary schools, where $240 per year additional was received.

The salary schedule for 1930–1931 was adopted by the Board on May 21, 1930. In reference to vice-principals the schedule provided: "All vice principals, except those of Class B, elementary schools, who shall not have had at the time of the adoption of this schedule the respective service status as listed above [14th and 15th year ratings], shall receive the salary, on the new schedule for their respective teacher groups, of a year, three years in advance for their 1929–1930 service status plus $300 per annum." A similar provision applied to Class B, elementary school vice-principals, except that their flat raise was to be $240. It will be noted that under this schedule, vice-principals "at the time of the adoption of this schedule" who had not already reached maximum rating, were to receive for 1930–1931 a three-year jump in rating plus an additional sum of either $300 or $240 per year.

The four vice-principals here involved were not vice-principals "at the time of the adoption of this schedule." They were appointed vice-principals after May 21, 1930, either for the school year 1930–1931, or for the school year 1931–1932. The paymaster nevertheless gave these four vice-principals a three-year advance in rating upon their appointment, in addition to the flat sum increase to which they were undoubtedly entitled. This was clearly an erroneous application of the schedule. The Board had determined that the extra raise of a three-year jump in rating should be limited to those in service on May 21, 1930. That classification was based on the theory that most of the vice-principals already in service had years of experience in their positions and were entitled to the extra big

raise of three jumps in rating. Acting well within its powers, the Board determined that newly appointed and therefore inexperienced vice-principals were not entitled to this consideration. The paymaster clearly acted in violation of the Board's mandate. The rating as to the group here involved was therefore erroneous. The Board, for reasons fully discussed in connection with the "split year" cases, properly collected back the overpayments, and properly placed these persons on their proper ratings. The judgment should be affirmed as to them.

Cases where the teachers admit error.

[16] In the cases of Nellie Foley, Frances Murphy, Edna Jiminez Herrington, Dorothy Reilly and Ruth Peabody, counsel for the teachers admits that a purely mechanical error was made in their ratings by the employees of the Board. To this group should be added Emma Betts, not mentioned in the brief of the teachers.

As to these teachers the trial court found that "for some unexplained reason or for no reason at all," or "through some clerical error and mistake, which is wholly unexplained," or "for some unexplained reason and because of clerical error," or because of "error and inadvertence," the paymaster gave these teachers a higher rating than they were entitled to under the resolutions of the Board. For example, teacher Nellie Foley was given fifth year rating by resolution of the Board in 1926. The paymaster erroneously placed her in the seventh year. The other five cases are similar. These cases furnish the clearest examples in the record of purely mechanical errors by which the teachers involved were overrated. The Board properly recovered back the overpayments made to these teachers, and properly re-rated them in 1932 by placing them on their proper rating. The judgment as to them should be affirmed.

Miscellaneous cases.

The teachers list five persons under this heading. As contended by the Board, and as found by the trial court, all five of these cases fall within one or more of the categories heretofore or hereafter discussed.

Perry Kittredge for the school year 1924–1925 was entitled to a rating calling for an $1,800 salary. He was paid at that rating until February, 1925, when for some unexplained reason he was raised to the next rating by the paymaster at $1,900 per year. There is no evidence of any resolution warranting the raise in rating, and no evidence of any practice or custom of thus raising a teacher in mid-year. This rating was clearly the result of some mechanical and wholly unexplained error by the paymaster's department.

The Board admits that Charlotte Morton should be in the "non-uniformity" group, hereafter discussed. The rulings hereafter made as to that group will apply to this teacher.

Mary Rossi falls both within the "frozen" year cases, heretofore discussed, and the "nine months rule" cases, hereafter discussed. The respective rulings there made as to each group shall apply to this teacher.

The cases of Kathryn Coles and Eloisa Courtright fall within the "nine months rule" and the "split year" categories, and the respective rulings made as to those categories shall apply to these two teachers.

Conclusion as to mechanical error cases.

The above constitute the main groups found by the trial court to fall within the mechanical error category. We are convinced that as to all of these cases (those mentioned above as well as those not specifically mentioned but set forth in the findings of the trial court) the trial court correctly determined that overpayments based on error were properly collectible for the period within the statute of limitations, and that the Board acted well within its powers in placing these teachers prospectively in the rating they would have been in had the error not occurred.

"Nine months rule" cases.

The Board contends that the teachers falling within this group should also be classified with the mechanical error cases. The solution of the problem here involved depends upon the proper interpretation to be given to a rule adopted by the Board. If the employees of the Board correctly interpreted this rule the ratings given these teachers were proper, and no error was committed. On the other hand, if the employees of the Board misinterpreted the rule, then an error was committed and the cases should follow the same course as the other mechanical error cases.

The trial court found that the rule in question had no application to the teachers in this group. It therefore found that the ratings given these teachers by the employees of the Board were correct—in oth-

er words, that no error had been committed. Accordingly, the trial court ruled that no overpayments had been made as to these teachers, that the Board had no legal right to deduct any sum from their salaries, and that these teachers were entitled to a refund for all sums so deducted. The Board appeals from this portion of the judgment. The trial court held, however, that the Board had power to classify this group, for salary purposes, prospectively, and that it had properly re-rated these teachers in 1932. The teachers appeal from this portion of the judgment.

According to the findings there are twenty-five teachers in this group. They are all teachers who were in the department and who taught for part of a year and then took leaves of absence. The portion of the year that these teachers taught was less than nine months. The Board had adopted certain rules on August 11, 1925, to guide it and its employees in the matters covered by the rules. These rules read as follows:

"Credit for Teaching Experience Elsewhere and in Other Classes of Schools.

"Credit for teaching experience elsewhere and for teaching experience in other classes of schools may be graded for salary adjustment purposes as follows:

"(A) Teachers with less than three years of successful experience in teaching elsewhere, appointed to positions as teachers in the San Francisco Public Schools, shall receive an annual salary provided for the first year of the Salary Schedule. Teachers with three years' experience shall receive the salary provided in the second year of the schedule; with four years' experience in the third year of the schedule; with five years' experience in the fourth year of the schedule; with six years' experience in the fifth year of the schedule; with seven years' experience in the sixth year of the schedule; with eight years of experience in the seventh year of the schedule; with nine years' experience in the eighth year; with ten years' experience in the ninth year; with eleven or more years of experience in the tenth year.

"(B) Elementary school teachers in the San Francisco School Department when assigned to teaching positions in the high schools shall receive credit for salary adjustment year for year for all teaching experience in the San Francisco Schools, but not to exceed the tenth year of the high school salary schedule. High schools as here used include the junior, part-time and high schools.

"(C) Teachers in the junior high school when assigned to the part-time school or the high school, and teachers in the part-time high school or assigned to the high school, shall receive credit year for year for teaching experience in the junior or in the part-time high school.

"(D) Credit on the basis of two years for one may be given for vocational experience in industry or in commerce to teachers of industrial or commercial branches when such industrial or commercial experience is directly related to the proper preparation for teaching in the respective industrial or commercial branches, provided that the total of such credit shall not entitle the teacher to a salary position higher than the tenth year of the schedule.

"(E) Evening school teachers, when assigned to duties as teachers in the day schools, shall be entitled to credit on a basis of two years' evening school teaching for one year on the salary schedule for day schools.

"(F) Not more than one year of credit shall be given for teaching experience during one year, and no credit shall be given for a term of service of less than nine months during one year.

"(G) Teachers asking for salary adjustments on account of teaching experience elsewhere must file with the Superintendent satisfactory evidence of such experience in years and in months, and the places where such experience was obtained."

[17] The precise question presented is whether Rule F, supra, applied to teachers in the department who took leaves of absence, or whether it only applied to new entrants into the department, in rating their outside experience. The paymaster interpreted the rule to apply only to new entrants. Accordingly, as to the teachers on leave, when they returned, the paymaster advanced them one year in rating although they had not taught a full nine months in the year in which the leave was taken. The trial court agreed with this interpretation, holding that "Rule F" had no application to teachers on leave. It should be pointed out that all teachers similarly situated were so treated by the paymaster.

We agree with the interpretation of this rule given it by the trial court. In his second opinion Judge Goodell discussed this problem at some length. We agree with his analysis. We therefore adopt as part of the opinion of this court the following portions of the trial court's second opinion:

[18] "In seeking the true intent and meaning of Rule F it is certainly proper to analyze the six rules in whose company it is found.

"A reading of Rule A shows that it can apply only to new teachers entering the San Francisco Department. In a word, it says that three years teaching experience here are as good as four elsewhere. This rule was referred to hundreds of times during the trial of these cases.

"Rule B, on the other hand, clearly refers exclusively to teachers already settled in the San Francisco Department (elementary) who are 'assigned' to either junior high, part-time high or high school proper.

"Rule C, following the principle announced in B, provides for the *assignment* from a junior high position to part-time high or high school proper, and from part-time high to high school proper.

"Rule D, again, relates only to new teachers entering the Department who have never taught before but who have had specialized training in the particular subject,—industrial or commercial,—which they are then engaged to teach.

"Rule E, dealing with teachers in evening schools who are 'assigned' to day schools, would seem to be designed for intra-department changes, as in Rules B and C, for the framers of the rule have used the word 'assigned' in E just as they did in B and C. It might also be held to relate to the rating of a newcomer for the very good reason that a newcomer should not enter the Department on more favorable terms than one already in the Department who is 'assigned' from one duty to another.

"Rule G clearly has to do with new teachers entering the Department. It is simply a procedural provision, auxiliary to Rules A and D.

"This brings us to a consideration of Rule F, which reads in its first part,—

" 'Not more than one year of credit shall be given for teaching during one year.'

"This part of the sentence would seem to be addressed to Rules A and D, for in the rating of new teachers the definition of what is a year's teaching would seem to be of paramount importance.

"The last nineteen words of the sentence, with which we are chiefly, if not entirely, concerned, are *'and no credit shall be given for a term of service of less than nine months during one year.'*

"This phrase, it seems to me, must likewise be addressed to Rules A and D. The two phrases which make up the sentence would seem, naturally, to be intended to clarify and define and make more definite, the *years of experience* with which Rule A deals,—to show, in other words, how those *years* should be computed.

"Granting, however, that the language of Rule F applies to B, C and E as well, it does not by any means follow that it was intended to apply to cases such as the eighteen [later found to be twenty-five] now under consideration.

"In the first place, the very tenor of the resolution excludes such thought. Such idea is excluded even without resort to the title or heading of the resolution. It does not purport to deal with the measuring of a year, intra-department, as far as normal or ordinary advancement in the salary scale is concerned. It purports to deal only with cases of (a) new teachers entering the Department with either teaching or vocational experience back of them and (b) Department teachers shifted, 'assigned,' transferred, promoted, from one division of the Department to another.

"The ideas of leaves of absence, or sick leaves, or suspensions, are nowhere to be found from first to last. The idea of defining or measuring a year for the purpose of advancement from one year of salary status to the next above, is nowhere expressed, or implied.

[19] "But, above and beyond what has been said, some meaning and weight must be given to the title or heading of the resolution reading as follows: 'Credit for teaching experience elsewhere and in other classes of schools.' This heading expresses two distinct ideas, but no more. And the introductory sentence repeats 'Credit for teaching experience elsewhere and for teaching experience in other classes of schools may be graded for salary adjustment purposes as follows:'.

"When, therefore, Rule F says that 'no credit shall be given for a term of service of less than nine months during one year'

does it not mean this, to paraphrase the heading: *In computing 'Credit for teaching experience elsewhere and in other classes of schools' within this Department 'no credit shall be given for a term of service of less than nine months during one year'?*

"Rule F, in other words, is cognate to the heading, and vice versa.

"In the construction of statutes where there is doubt or ambiguity, it is settled law in this State that resort may be had to the title and section headings. 23 Cal. Jur. Sec. 145, p. 770; Sec. 147, pp. 772, 773. They are not conclusive by any means, but are legitimate aids in arriving at the legislative intent. It has been recently held that the headnote of a section of the Political Code 'may be considered part of the Code itself, for purposes of interpretation.' Southlands Co. v. City of San Diego, 211 Cal. 646, at page 663, 297 P. 521 at page 529.

"If, then, headings may be considered part of statutory enactments themselves in seeking the true intent and meaning of the law, it would seem that in our search for the real intent of Rule F it is not only permissible but proper to read the heading as part and parcel of the rules themselves. When so read, there is little doubt in my mind that the Board intended these seven rules to apply to the two subjects mentioned in the heading, and to no others.

"No rule has been introduced in evidence bearing upon the subject of leaves of absence or the consequences thereof.

"As the record stands, then, the teachers in this group, when they returned from their leaves went along on the salary schedule and automatically advanced thereon from year to year the same as they would have advanced had they been teaching continuously. They were paid at the advanced rate. A new contract was made on the opening of each school year. Apparently it was the practice to treat teachers who went on leave in this way. There is no evidence to show (save in one or two isolated cases) that some teachers were thus treated while in the cases of others there was a coalescence of the year following their return with that of their absence.

"I have no doubt that if such coalescence had been the settled practice the teachers could not have compelled the Board to advance them, for whether an employee is paid during an absence, or whether he shall be advanced in the line of seniority in spite of an absence, or retarded, or kept at a standstill, is all a matter between employer and employee, a matter purely of agreement or understanding between them. A nine months rule covering absences, such as counsel for defendants contend this is, would be a proper enough rule for the Board to adopt, but in the absence of such rule, and of any showing of discrimination it would seem that the advancement which the teachers automatically received should stand, in view of the fact that (as already noted) they were paid during the intervening years at the higher rate and their contracts therefore became executed contracts for those years. To go back and place them on a lower salary rate would amount to the making of new contracts retroactively after the commencement of the new school year." (Judge Goodell's second opinion is printed in Res. Br. pp. 132–194; part above quoted appears in Res. Br. pp. 165–171.)

As already indicated the Board, in 1932, determined that Rule F applied to teachers on leave, and accordingly the Board deducted from the salaries of these teachers the amounts such teachers had been paid as a result of the alleged error of the paymaster in advancing these teachers in ratings for any year they had taught less than nine months. The trial court, as above pointed out, and for the reasons stated in its opinion above quoted, held that the paymaster had correctly interpreted the rule. It found "that said Rule F was not intended to apply, and did not and does not apply, to teachers who, by reason of leaves of absence, taught less than nine months during any one year, but that said Rule F was intended to, and does, apply to the rating of teachers upon their original entrance into the Department. The Court finds, therefore, that said reductions and deductions were improperly made, and that said teachers are, and each of them is, entitled to recover back the amounts so deducted." We agree with this finding and the portions of the judgment based thereon. We find that the appeal of the Board from the portions of the judgment based on the above finding is without merit, and that these portions of the judgment should be affirmed.

As already pointed out, the teachers in this group appeal from that portion of the judgment that denies them a writ of mandate on the ground that the Board had the power to re-rate these teachers prospective-

ly, commencing with the school year 1932-1933. The arguments advanced on this issue are identical with those advanced in the so-called "non-uniformity" cases, hereafter discussed. The question of the power of the Board to re-rate prospectively is fully discussed in the portion of this opinion dealing with the "non-uniformity" cases. The portion of the judgment dealing with the question of the propriety of the prospective re-rating as to the teachers involved in the present group must be reversed for the reasons fully set forth in the discussion of the non-uniformity cases.

Full time teacher rule.

Six teachers are in this group. The problem here involved grows out of the proper interpretation of a resolution adopted by the Board on June 16, 1925. So far as pertinent here that resolution reads:

"New Salary Schedule * * * Contingent Upon Funds Being Provided From the State and Through the Local Tax Rate.

"Under the provisions of this Salary Schedule and of the rules governing the placing of teachers now in service upon the new Schedules, all full time teachers * * * will receive, during the next school year (1925-1926) an increase of not less than $360 above that which they received during the school year 1924-1925 * * *."

The question here involved depends upon the proper interpretation of the phrase "full time teachers" in the above resolution. These six teachers had been employed as "substitutes," and were not formally employed as "probationers" until August 17, 1925, several months after the above resolution was adopted. The paymaster determined that these six teachers were "full time teachers" at the time the resolution was adopted (June 16, 1925) and therefore entitled to the "big raise," and entitled to be rated accordingly. The Board, in 1932, determined that these six teachers were not "full time teachers" on June 16, 1925, because they were substitutes, were not entitled to be rated according to the above resolution, that the paymaster had made an error, and that the overpayments should be deducted from their salaries. The Board also re-rated the teachers prospectively. The trial court, basing its holding solely on the ground that these teachers were substitutes, and reasoning that a substitute as a matter of law is not a full time teacher, agreed with the Board, held that this was a case of mechanical or clerical error, and entered its judgment accordingly. The teachers appeal from the whole of the judgment insofar as it affects them.

It is conceded by all concerned on this appeal that the so-called "big raise" provided for in the above quoted resolution applied to probationers and regular teachers in the department on June 16th or July 1, 1925. In other words, it is conceded that probationers and regular teachers are "full time teachers" within the meaning of the resolution. It is equally apparent that one who is a substitute teacher, as that term is usually used, is not a full time teacher. Normally a substitute teacher is employed part-time on a per diem basis temporarily to replace a regular teacher who is absent, and normally a substitute teacher has no regular school assignment. The evidence shows that there were about fifty substitutes of this type employed by the Department in the period in question. If the six teachers here involved had been substitutes of this type there would be no doubt that they were not full time teachers, and were therefore not entitled to the "big raise." But there are some unusual facts in relation to these teachers which demonstrate that these teachers were "full time teachers" as those terms are ordinarily used, and as they were used in the above resolution.

These teachers were employed under a resolution of the Board of November 12, 1924. It provided:

"Resolved: That teachers appointed to positions in this department for the remaining portions of the current school year be appointed as substitute teachers at the salary to which they would be entitled as probationary teachers;

"And Further Resolved: That all such substitute teachers will be considered for classification as probationary teachers at the end of the present term."

[20] Thus these teachers, although appointed "as substitute teachers," were paid as "probationary teachers," and at the end of the "present" term were to be "considered for classification as probationary teachers." Each of these teachers, unlike the usual substitute, was assigned to a particular school to fill a vacancy there existing. Each of these teachers, unlike the usual substitute, was paid a regular salary as if she were a probationary teacher. Each of these teachers, unlike the usual substitute, taught full time and continuous-

ly from the date of her appointment until the close of the 1924-1925 school year, at the school to which she had been assigned. Each of these teachers, unlike the usual substitute, received a pro rata vacation pay for the summer of 1925. These teachers were formally appointed probationers in August of 1925.

The evidence also shows that under the practice of the Board then existing the Superintendent of Schools was empowered to appoint the usual substitute without consultation or formal action by the Board. Probationers and other full time teachers were appointed by the Board. These six teachers were appointed by resolution of the Board. Moreover, the teachers in this group were subsequently made "permanent" teachers by Board resolution. Miss Aebli, one of the teachers in this group, for example, was so appointed on May 13, 1927. Under the law and practice of the Board at that time a teacher was classified as a probationer for two years before she was eligible to the rank of permanent teacher. This demonstrates that in 1927 the Board, with the full facts before it, determined that Miss Aebli had been in fact a probationer since at least May 13, 1925, a month before the resolution of June 16, 1925, was adopted.

That the Board intended to include teachers of the type here involved within the designation "full time teachers" is amply demonstrated by the testimony of Dr. Gwinn, superintendent of schools at the time the resolutions of November 12, 1924, and of June 16, 1925, were adopted. He testified that the vacancies of the type to which these teachers were appointed would normally have been filled by probationers, but that the members of the Board were of the opinion that the department was growing too fast, and wanted to appoint substitutes instead of probationers so that they could be discharged at any time if the need did not continue to exist. He also testified that the money for the "big raise" had been made available by the Board of Supervisors, and that that Board wanted to give the "big raise" to all that were then in service. The Board of Education carefully framed the resolution of June 16, 1925, to accomplish that result. He also testified that it was his intent and his understanding of the intent of the Board that so-called substitutes appointed in the spring of 1925 to "open" positions, and appointed probationers in the fall of 1925, were to be included within the June 16th resolution; that these teachers "were in fact probationers but erroneously termed substitutes" (Rep.Tr. 2008); that he believed "that the intent of the rule" was to include teachers of the type here involved as "full time" teachers; that the practice of giving to these teachers the "big raise" "must have been with the knowledge of the Board and that that practice would confirm the interpretation that I have taken in this matter" (Rep.Tr. 2012); that the terms "full time" were intended to include "all substitutes who were still substitutes at the end of the 1924-1925 school term and came back as probationers in the following term," that is if they taught every day, "that is what the expression 'full time' meant * * * and did not teach irregularly because of the irregular absences of teachers—I believe that it was the intent of the rule that those teachers should have the advantage of the extra raise, because the Board's resolution in November said that at some subsequent time the Board would give consideration to their classification" (Rep.Tr. 2013); that he prepared the "full time" paragraph of the salary schedule; that the reason he did not expressly use the words "substitute teachers who were later appointed probationers" "must have been * * * that I understood that the Board so interpreted the meaning of the rule. There was considerable discussion about the application of the salary schedule to individuals, as to whom—as to which ones had a right under the resolution to have that salary increase." (Rep. Tr. 2017.)

It must not be overlooked that the phrase used by the Board in the resolution of June 16, 1925, was "all full time teachers." The Board did not use the phrase "permanent and probationary teachers" as it would have had it intended that the "big raise" should be limited to such teachers. Dr. Gwinn and the members of the Board were thoroughly familiar with the proper designation of each class of teacher. They knew the differences between substitute and probationer, and full time teacher. The above testimony demonstrates that they used the phrase "full time" advisedly, and with intent to include those substitutes who were in fact full time teachers. It is not disputed that on June 16, 1925, each of these teachers was in fact a "full time" teacher in the sense that they were regularly assigned to a particular school to

fill a regular vacancy. Their services were continuous in that capacity until the close of the spring term of 1925. They started the fall term of that year as probationers. In every sense of the word these teachers were "full time teachers," and in our opinion, clearly entitled to the so-called "big raise" of 1925. This being so, no error was committed by the employees of the Board in so classifying these teachers. The Board was not entitled, therefore, to deduct any alleged overpayments from their salaries. These teachers are entitled to a judgment for the amounts improperly deducted from their salaries. The judgment, insofar as it denies them this relief, must be reversed. The judgment also denies these teachers a writ of mandate on the ground that the Board had the legal power to re-rate them prospectively. The arguments advanced on this issue are identical with those advanced in the so-called "non-uniformity" cases hereafter discussed. For the reasons there fully discussed the portion of the judgment denying the teachers in this group a writ of mandate must be reversed.

The "non-uniformity" cases.

This group includes some seventy-five teachers. The problems here involved differ fundamentally from the cases involving mechanical error. The latter cases all involved situations where the Board had adopted certain rules and regulations, and the employees, in violation of those rules and regulations, gave the teachers involved an erroneous rating. The cases involved in the category now under discussion all deal with situations where the Board itself, in the exercise of powers granted to it, rated the teachers. This group all involved the evaluation of the past experience of prospective teachers who had not theretofore taught in the San Francisco school department. On the basis of past experience, teaching and vocational, a newly hired teacher was given a rating on the salary schedule. These ratings were made in the first instance by the employees of the Board based upon information secured from the applicant and from other sources. The findings of the Board's employees, together with all the facts, were then reported to a committee composed of three of the members of the Board and known as the personnel committee. This committee then reported its findings and recommendations to the Board. The Board then would adopt a resolution fixing the rating that was to be given the applicant for her outside experience. As to all of the teachers in this group the trial court held that the Board, acting within its powers and discretion, fixed these ratings when the teachers were hired, that no error had been committed, that the terms of the contracts of hiring were fixed by the Board and accepted by the applicants, and that these contracts were valid. For these reasons the court held that the Board was without power to reduce the ratings retroactively, and that the Board was without power to deduct alleged overpayments from the salaries of these teachers. Accordingly, it granted these teachers judgment for the amounts improperly deducted from their respective salaries. The Board appeals from this portion of the judgment. The court then held that, as to the future, the re-ratings of 1932 were valid. The theory of the trial court was that the Board in 1932 could lawfully exercise its discretion on the same facts, could lawfully reach a different valuation of outside experience, and could lawfully offer the teacher a position and new contract based on the new valuation, and that, when accepted by the teacher, a binding contract arose. The court, therefore, denied these teachers a writ of mandate to be restored to their old ratings. The teachers appeal from this portion of the judgment.

[21] As already pointed out, all of these cases involve the evaluation of outside experience, either teaching or vocational, of new entrants into the department. All concerned on these appeals admit that the Board has power to determine the policy that should be adopted in reference to such evaluation. Thus the Board could determine to evaluate each applicant's experience upon the facts of each case, giving consideration not only to the actual number of years of such experience, but also to the nature of that experience, the applicant's personal attainments and abilities, etc. The Board could likewise determine to adopt fixed rules that would apply to all or some cases regardless of the particular applicant's peculiar and unusual abilities, or it could determine to apply a mixture of these two policies. It had the power to determine whether any credit at all should be given for outside experience, or to determine, within the realm of reasonableness, whether credit should be given for certain types of experience and not for others. These are matters which rest

within the discretion of the Board. Of course, once a policy is adopted, the Board must exercise its powers and apply the policy adopted fairly and without discrimination. The Board undoubtedly has power, prospectively, to change its policies in this regard.

An examination of the evidence shows that at various times the Board has adopted all of the various policies above mentioned in reference to evaluating outside experience. Prior to August of 1925 the Board had no fixed and positive rules for evaluating such experience. The evidence shows that prior to that date the uniform practice of the Board was to evaluate each teacher's rating according to the facts disclosed by her application, each case being weighed as to the particular facts. A substantial number of the teachers here involved entered the department while this policy was in effect.

In August of 1925 the Board, acting well within its discretionary powers, determined to adopt certain rules by which outside experience was to be thereafter evaluated. These rules have been quoted, supra, in the discussion of the "nine month rule" cases and need not be repeated here. It will be noted that the policy adopted by the Board in August, 1925, so far as that policy is disclosed by the rules, was to give to new entrants credit for "teaching elsewhere" for each year less one that they had taught elsewhere, with a maximum credit of ten years. (Rule A.) But under Rule D "credit on the basis of two years for one may be given for vocational experience in industry or commerce," when such experience was directly related to the industrial or commercial teaching position sought by the teacher, with a maximum credit of ten years. It will be at once noted that the above rules are limited to either teaching experience or vocational experience in industry or commerce. Many of the teachers involved in this group, when they first applied for a position in San Francisco between 1925 and 1932 had had experience of a type not included within the categories provided by the rules. As to these, the Board and its employees continued to apply the policy that had existed prior to August, 1925, that is to weigh each case on its particular facts. That was the uniform policy of the Board during this period. Moreover, particularly as to vocational outside experience, the Board did not rigidly apply the newly adopted rules to all cases. From the very first the Board and its employees discovered that if the rules were rigidly applied they would be unable to secure as teachers many specially qualified persons that the Board desired to employ. As a result, the Board, from the very first adopted the uniform practice of liberally construing its rules, of applying its rules to the normal cases, but where a particularly qualified teacher was specially desired for a special position, of weighing her particular qualifications, and rating her accordingly. In other words, between 1925 and 1932 the Board adopted a policy partially based on the general doctrine and partially based on the individual qualification doctrine. Most of the teachers here involved were rated upon their entry into the department according to this policy.

In 1930 the outside experience rules of 1925 were modified in some respects, and in 1932 they were repealed entirely. Thereafter, as to new entrants, the Board, acting within its powers, determined to grant no credit at all for outside experience.

When Owensby, in 1932, came to consider the teachers in this group he determined that in his opinion these teachers had been given too high a rating because of an error in application of the rules. In other words, even as to the group hired before August, 1925, to whom the rules then adopted clearly had no application at all, he determined that under the rules of August, 1925, rigidly and strictly applied, these teachers had been given too high a rating through an error, no different in substance from the mechanical error cases heretofore discussed. Accordingly, he recommended to the Board, and the Board adopted his recommendation, that all these teachers should be re-rated downward both prospectively, and retroactively for a two-year period.

The trial court found, in effect, that no error had been made in originally rating these teachers—that the Board in fixing their original ratings acted within its powers, and that as each teacher advanced in rating a valid contract was entered into with that teacher. It was held that inasmuch as there was no error, fraud, or mistake, the Board could not redraft completed contracts and attempt to recover alleged overpayments for those years of work that were completed. The exact finding of the trial court on this issue is as follows (Finding 31): "The Court finds

that the action of said Board in 1932 in reducing and re-rating said seventy-five teachers was not legal for the reason that said teachers had been given their standing in the first instance, not because of clerical error or inadvertence, but in the exercise of discretion and judgment, and however erroneous said judgments may have appeared to be to the Board as it was constituted in 1932, said conclusions had nevertheless formed the basis for the contracts between said teachers and said Department for all the school years from their entry into the Department to and including 1931–1932, and to then attempt such salary reductions retroactively would be, in legal effect, to attempt to make new contracts after the commencement of the several school years within said intervening period. Accordingly the Court finds that each of said seventy-five teachers is entitled to recover back from said City and County the amounts so charged back, which amounts are set opposite their respective names in finding 29."

We are in hearty accord with this holding. The reasons for this holding were fully and ably stated by the trial judge in his two opinions. We therefore adopt as part of our opinion the following portions of these opinions:

"Each of them involved the exercise of judgment and discretion by an officer of the department in the first instance and by the Board of Education ultimately. Such judgment and discretion were, however, subject to, and governed by the rules adopted in 1925 which rules were designed to insure uniformity. In going over a teacher's history and experience certain credits would be given by one officer, upon which there might be a difference of opinion if the rating were being carried on by somebody else. The fact remains, however, that the particular teacher was employed in a definite class or group, so far as salary schedule was concerned, at a definite salary rate. And each year as such teacher automatically advanced into the next higher bracket a new contract was made according to the new rate. And so it went until 1932, when the Board, composed of somewhat different personnel, concluded that the uniformity rules had been in some cases disregarded or violated and new ratings were made. A distinction must be kept in mind throughout this discussion between mechanical or clerical errors in rating and errors arising from the exercise of judgment and discretion. In the former case you have a mistake pure and simple, and the teacher who benefits by the mistake knows, or should know, that it is a mistake and that she is getting more than she is entitled to, and that, sooner or later, she will probably have to pay back the overplus. On the other hand where facts have been weighed and a judgment arrived at (even though the judgment may be erroneous) there has been a definite meeting of minds between the department and the teacher, and a good contract has been made.

"When, therefore, in 1932 the teacher was charged back with the difference between what she was being paid and what the Board *in 1932* thought she ought to have been paid, the net result was to make (or attempt to make) a new contract with her, at a reduced salary rate, for the two years which had just elapsed, and to do so, of course, after two school years had opened."

After discussing the facts relating to several of the teachers, the trial court discussed at length the holdings in Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912, and Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029. It concluded its discussion of these cases as follows:

[22-24] "What principles are to be gleaned from the two cases just discussed?

"*First*: that a teacher's status is that of an employee, the employer being the School Board; the relationship between the teacher and the Board is a relationship arising out of contract;

"*Second*: that under the law of California the School Board has a right, acting in good faith and in the exercise of a sound discretion, to reduce the salary of a teacher, notwithstanding the permanency of the teacher's tenure;

"*Third*: that such a reduction cannot be made after the beginning of a school year.

"How do these principles bear upon the non-uniformity cases now under submission?

[25] "The City Attorney relies upon the following language found in Section 5.734 of the School Code: 'Uniform allowance may be made in any schedule of salaries for years of training and for years of service,' as establishing a principle of uniformity controlling upon all parties to this litigation. He argues from this that, when the teachers were rated in the first instance by the Department, they were not

rated according to this uniformity rule, and that therefore the Board acted beyond its power (ultra vires); that when in 1932 action was taken rerating the teachers and reducing them, the Board and its agents were simply doing what they should have done in the first instance, namely, acting according to the rule of uniformity laid down by Section 5.734.

"There is no authority in this State which goes so far as to hold in line with this contention. Moreover the fact must be faced that when the Board acted with respect to the rating of teachers in the first instance when they were employed the Board was acting, as 'an administrative agency created by statute' (Grigsby v. King, 202 Cal. 299, 304 [260 P. 789, 791]) invested with the power and charged with the duty 'to fix and order paid the compensation of persons in public service requiring certification qualifications, employed by such boards * * *' (Sec. 5.731 School Code). In the fixing of this compensation the Board is enjoined by Section 5.734 to make 'Uniform allowance * * * in any schedule of salary for years of training and for years of service.'

"It certainly is not ultra vires for the Board to fix the compensation of new teachers, for Section 5.731 expressly says that it shall have this very power and perform precisely this duty. But, counsel for defendants argue, they must exercise this power and perform this duty according to 5.734, i. e., according to uniform rules, and if they do not do so they are acting beyond their powers,—ultra vires. In other words it is not what the Board does that is ultra vires, *but the way in which it does it.* Now in the rating of teachers the Board exercises its judgment and discretion. Presumably when the teachers were first rated the Board considered the rating as having been made uniformly. In 1932 when the same tribunal, but with somewhat different personnel, re-rated the teachers, the Board in the exercise of its judgment, decided that the first rating had not been uniform. In other words, the same tribunal decided that its own acts of several years before had been ultra vires and should be upset, notwithstanding the contracts resulting from the original rating had become executed contracts.

"At the time when teacher X was employed and a deputy superintendent or other authorized officer of the Board told her that she would be employed as a third year teacher at a salary of $1584 a year, a contract was made between the Board and Miss X for that year at that rate. At the commencement of the next school year, when she went automatically to $1680, a new contract was made between the Department and herself, and so on, at the new rate for each succeeding year.

"The California cases to which reference has been made hold that the Board has the power, in the exercise of a sound discretion and acting in good faith, to reduce a school teacher's salary, but that such reduction cannot be made at any time after the opening of the school year (July 1st) when the Board has made a contract with the teacher at a fixed and given rate of salary. It seems to me to follow from these principles that when, in 1932, teacher X was notified that she had been reduced from eleventh year position of $2364 to tenth year position at $2208 and was billed by the Board for the difference in salary between the higher rating and the lower for the two-year period next preceding the re-rating, the net logical result was to retroactively reduce her salary after the school year, and in some cases several school years, had commenced, in violation of the rule laid down in the Fidler and Abraham cases.

"The teachers were not only charged back at that time with the difference accruing within the two-year period, but they were notified that their salaries for May and June of 1932 would be at the lower, rather than at the higher rate, thereby bringing home to the teacher notice of the change in salary rate after the opening of the school year. From what has just been said it naturally follows that, in my opinion, the charging back to the teachers in the non-uniformity cases (and I am not referring to cases of mechanical errors at all) was not warranted for the reason that it served, in substance and effect and for all practical purposes, to reduce the teacher's salary after the school years in question had opened."

The trial judge reaffirmed this holding in his second supplementary opinion. In doing so he gave the following example:

"Miss X in 1926 applied to the Department for a position. She truthfully stated what her educational qualifications and teaching experience had been, and it may be that she had had some office experience and training as well, or had done tutoring, or had taught in a private school. It

might be remarked, parenthetically, that there are virtually as many varieties of experience shown in this record as there are teachers. The deputy who interviewed this teacher, after hearing her story, decided, in the exercise of his judgment and discretion, that she should be placed on the fifth year of the salary schedule, and she entered the Department and was paid for that year at that rate. In 1927 she advanced automatically to the sixth year rate, in 1928 to the seventh, and so on until 1931 when she would be, of course, in the tenth year. In 1932, when the re-rating was carried on, her case,—along with scores of others,—was re-examined and reviewed in the light of the rules of the Board which had been adopted before she entered. It was then determined by the Board that in 1926 she had been over-rated by, let us say, two years,—in other words, that the rules which had been designed and adopted for uniformly valuing and weighing teaching experience had not been followed,—and that she should then, in the interest of uniformity, be reduced by the same two years. Accordingly, teacher X found herself in the school year commencing July 1, 1932, on the ninth year of the salary schedule instead of on the eleventh. * * * Notices of these reductions in rating and deductions in pay were sent to the teachers before the *opening of the new school year July 1, 1932—June 30, 1933.*

"It was held in the first decision, upon the authority of the cases of our California courts therein cited, that separate contracts had been made on July 1st of each of the school years from 1926 to 1931 inclusive, at the higher rate, and that when the Board in 1932 attempted to lower that rate it was attempting retroactively to make new contracts,—*after the respective school years had opened.* It follows from this, for the reasons already given, that if this Court had been convinced that the Board in 1926 had in certain cases departed from its own rules, the Board had, nevertheless, exercised its own discretion in the matter and that discretion could not be disturbed by Court action."

For the reasons given by the trial court it is clear that this portion of the judgment should be affirmed.

But the trial court held that the Board, acting under its undoubted power to fix salaries, which includes the power, in a proper case, to lower as well as to raise salaries of teachers with permanent status, had the power to classify these seventy-five teachers for salary purposes, and, as to the future, offer the teachers a contract at the lower salary. The finding of the trial court on this issue is as follows (Finding 32):

"The Court finds that said notices sent to said seventy-five teachers (with the exception of the six teachers whose cases are discussed in finding 33) in May and June, 1932, and received by them before July 1, 1932, notifying said teachers of said reductions in ratings and salaries was sufficient as, and constituted, an offer of a new contract for the school year 1932–1933 and that it was within the right, power, authority and jurisdiction of said Board to reduce the salaries of said teachers (with the exception of said six teachers discussed in finding 33) for the future and prospectively as long as said reductions were made (as these were) before the commencement of the new school year, and were made fairly and not arbitrarily or capriciously. In this connection the Court finds that the purpose of the Board in reducing said seventy-five teachers (with the exception of said six teachers discussed in finding 33) commencing July 1, 1932, for the future, was to effect uniformity and fairness in ratings within the Department and to remove what had, in the opinion of said Board [in 1932], given said seventy-five teachers (with the exceptions last noted) an unfair advantage over other teachers in said Department, and that said action was neither arbitrary nor capricious. Accordingly the Court finds that none of said seventy-five teachers named in finding 29 (with the exceptions last noted) is entitled to any mandate or order of this Court directing the restoration of said teachers to the status which they had theretofore occupied on said salary schedule, or to any money judgment for salary after July 1, 1932, over or above what they have been paid since July 1, 1932."

We do not agree with this holding and are of the opinion that the portion of the judgment based thereon must be reversed.

[26] The real question presented is whether the Board in 1932 had power to review the service status ratings of these teachers years after the ratings were given, in cases where the original ratings were not based on fraud, error, or mistake, and were valid when given, and to

re-rate and classify, for salary purposes, a group of teachers solely because the Board as it existed in 1932, believed the original ratings were too high. In our opinion such a classification has no reasonable basis, is unreasonable and arbitrary, and was beyond the power of the Board.

[27, 28] There can be no doubt but that the Board possesses the power to reduce salaries at the commencement of a school year, even of permanent employees with tenure, provided that there is a reasonable basis for such a reduction and provided the reduction is not the result of an unreasonable, arbitrary, or capricious act. Cleeves v. Board of Education, 22 Cal.App.2d 183, 70 P.2d 645; Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912; Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029; Annotations 110 A.L.R. 800; 113 A.L.R. 1495; 127 A.L.R. 1298. But this power is not unlimited. The Board has no power to discriminate against any teacher. It cannot pick out some teachers in a particular category, and without a change in duties or functions, classify that group for salary purposes different from others in the same category (Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229), nor can it reduce salaries in an arbitrary, capricious, or unreasonable manner. Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593.

In the present case the Board attempted to re-rate these teachers in 1932 because it was represented to it, and it believed, that an error had been committed when these teachers were originally rated. The Board, as it was then constituted, believed that the Board, as it was constituted between 1925 and 1932, had committed an error, no different in substance from the mechanical error cases above discussed. The trial court has properly held that, in originally rating these teachers, the Board acted within its powers, and that no legal error was in fact committed. Thus the entire basis upon which the Board purported to act in 1932 is found not to exist. The Board purported to be correcting what it believed in 1932 was an error of an earlier Board. When it is held that no error was in fact committed, the foundation of the Board's classification is destroyed. Although the attempt of the Board to classify these seventy-five teachers was thus based on a fundamental misapprehension of the true facts and the law applicable to them, nevertheless the Board now claims its classification should be upheld. The fallacy in the Board's position is demonstrated when we consider just what was done in 1932. At that time the Board purported to review the facts in each case, concluded that, in its opinion, the 1925 rules had been misinterpreted or misapplied in each case, determined that the original rating had been too high, and thereupon re-rated the teacher downward, both prospectively and retroactively, to the rating the Board in 1932 determined the teacher should have been given upon entering the department. A few examples will show how this operated. Marjorie Cushman was appointed, on June 23, 1925, as a probationer for the school year 1925–1926, effective July 1, 1925, with an 8th year rating. She had seven years outside creditable teaching experience. She was given full credit for this outside experience. This was undoubtedly a correct rating under the uniform policy of the Board as it then existed. In 1932 the Board determined that under the August, 1925, rules, this teacher should have been originally placed on the sixth instead of eighth rating, and for that reason re-rated her prospectively downward. Thus the Board in 1932, by erroneously applying the August, 1925, rules to this teacher, when those rules were not in existence when she was employed, and thus had no application to her, reclassified her, for salary purposes, for a completely erroneous and improper reason. This same reasoning applies to all teachers employed prior to August of 1925.

Another example illustrates as to how the re-rating of 1932 applied to those teachers employed subsequent to August, 1925. Lois Woods was appointed a probationer in the department of texts and libraries on maximum 10th year rating in 1928. At that time this teacher had more than eleven years' experience as librarian in various public and school libraries. The 1925 rules are silent as to how such experience should be classified. Obviously this teacher had neither outside teaching experience nor outside experience in "industry and commerce." That was all the 1925 rules purported to cover. The Board, considering her case separately, as was then its policy, determined to give her credit for her library experience as if it were outside teaching experience. Accordingly, it gave her a tenth year rating. The Board undoubtedly acted within its

powers and discretion in so rating this teacher. There is obviously a difference between experience in industry and commerce which is only related to the teaching position that the applicant desires, and outside experience identical with that to be performed for the department. This rating then, when made in 1928, and up until 1932, was legally binding on the Board. In 1932 the Board determined, erroneously, that the Board in 1928 had committed an error in rating her at 10th year status, and held that the library work should have been credited as vocational experience. It therefore determined that this teacher should have come into the department in 1928 at 5th rating instead of 10th, and, accordingly in 1932, purported to reduce her from 12th to 7th rating, at a salary reduction of over $600 per year. This same situation exists to the large group included within this category where the 1925 rules did not apply to their type of outside experience. Other examples could be given of the many cases in which the Board between 1925 and 1932 liberally construed its 1925 rules and rated a teacher accordingly, and then in 1932 the Board strictly construed its rules and purported to re-rate a teacher downward.

The same general situation existed as to all those within the "non-uniformity" category. The Board in 1932, based upon the theory that the original rating was erroneous and in violation of the rules, purported to reduce these teachers in accordance with what it erroneously thought the rules required. The trial court has held, and, we think correctly, that the original ratings were within the power of the Board and binding upon it. For that reason it held that the Board had improperly attempted to apply its re-rating retroactively. Once this is determined, the entire basis of the Board's re-rating falls, and the arbitrary character of the re-rating becomes apparent. Thus, if a teacher, such as Lois Woods, was properly given 10th year rating in 1928, and if for the school year 1931–1932 she was properly given 12th year rating, how can she be classified properly 7th year rating for 1932–1933? What the action of the Board amounts to is that prior to the beginning of the school year 1932–1933 it determined that all teachers properly classified in the 12th year rating for the year 1931–1932 should be "frozen" in that status for the year 1932–1933. But as to Miss Woods, and the others similarly situated, the Board determined that they should be classified as 7th year rating, solely because the Board felt, erroneously, that an error had been committed in 1928. Thus the Board is seeking to uphold a classification based upon an erroneous premise, and one which singles out certain teachers for salary purposes, and seeks to classify them differently from all others in their status group. All others in 12th status remained in that status. A few, including Lois Woods and those similarly situated, were reduced in rating, without any change in duties, functions, or hours of service.

The Board says, and the trial court found, that this was done in a good faith attempt to accomplish "uniformity." Just what is meant by that is not entirely clear. Uniformity with what? The law vests the Board with the power to determine policy. As already pointed out, at various times the Board has adopted different policies in reference to evaluating outside experience. Obviously, any time there is a change of policy, it creates a lack of uniformity in the sense that teachers who become members of the department while one policy is in effect are treated differently from teachers who become members of the department while a new policy is in effect. Such lack of "uniformity" is inevitable as a school board progresses with the needs of various periods and accordingly changes its policy. The Board in 1932 was not attempting to secure overall uniformity as to ratings based on outside experience. In that very year the Board repealed the 1925 rules and determined that as to all new entrants in the department no credit at all should be given for outside experience. Thus at the very time that the Board now claims it was attempting to secure overall uniformity by strictly applying the 1925 rules to all teachers, regardless of when they were first employed, it was making overall uniformity impossible by changing its entire policy as to evaluation of outside experience.

[29] If the position now taken by the Board is correct, it would mean that at the beginning of any school year since 1932–1933 the Board, purporting to be exercising its powers over salaries, and in an endeavor to secure "uniformity," could have determined that every teacher in the department should not have been given

any credit at all for outside experience (in accordance with its existing policy), and that every teacher in the department should have her service status rating reduced accordingly for the future. That is what the Board would have to do did it desire to secure absolute "uniformity." If a school board could thus change the service status rating of those already in the department every time the personnel of the Board happened to change, or every time the members of the Board determined to change policy, the teachers would have no security at all in their employment and in their seniority rights. There can be no doubt but that the Board could impose a horizontal salary cut on all those within certain ratings. This was done by the several resolutions that "froze" the salaries of certain teachers for certain years. But the teachers are protected against any arbitrary reduction in rank or rating. When the Board has once adopted a policy and, without fraud, error or mistake, rates a teacher under that policy, although the Board may change its policy as to new entrants into the department, it has no power years later to go back and review that teacher's case, and to re-rate that teacher prospectively, on the theory that the original rating was too high. The Board having once acted lawfully in rating a teacher has exhausted its power over that subject matter.

The theory of the trial court, as disclosed in the findings above quoted, and as disclosed in that portion of the trial court's opinion quoted in the dissent, was that the Board, prior to the beginning of a school year, has the power to offer any teacher a contract at any salary, and if the teacher accepts by continuing to teach, a valid contract comes into existence. For this reason the trial court was of the opinion that the reclassification of 1932 was not arbitrary or capricious, and was made in good faith.

It should be noted that the trial court's opinion was prepared before the dates of the decisions of the Supreme Court in Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229, and Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593. The Fry case, by necessary implication, and the Kacsur case, by express ruling, held that the Board did not have unlimited power to offer reduced salaries to permanent teachers, which offer, if the teacher continued to teach, became a valid contract. The holding of the Kacsur case is directly opposed to the theory of the trial court in the instant cases. In the Kacsur case the Board, in May, 1938, offered two permanent teachers new contracts at reduced salaries for the school year commencing July 1, 1938. The teachers, as did the teachers in the instant cases, protested, but did perform their assigned duties for the school year 1938–1939. The Board in that case made the contention that a valid contract had come into existence—the exact holding of the trial court in the instant cases. It was urged that the amount of a particular teacher's salary was a matter of contract, and that it was improper for the teacher to refer to her former salary or the salary of others in the department in an attempt to show that the offered salary was discriminatory. The Supreme Court, after recognizing the general rule that the Board may fix salaries, stated (page 592 of 18 Cal.2d, page 596 of 116 P.2d): "However, there are limitations on the powers of boards of trustees to change salaries of permanent teachers. One of the 'legal consequences' referred to in the Abraham case, supra, is that the fixing of salaries must not be discriminatory, arbitrary or unreasonable. The above cited cases all so qualify the general power of the administrative agencies to fix the salaries of permanent teachers. Because of this qualification it necessarily follows that there must be a comparison with the salaries of other teachers or salaries of previous years. If this could not be done, the qualification would be meaningless."

The Supreme Court then held that the Board had attempted to classify these two teachers, for salary purposes, differently from others similarly situated and had attempted to reduce the salary of these teachers below the level paid others in the same category. This, it was held, as a matter of law, was discriminatory, and the decision of the trial court to the contrary, reversed.

The situation, in the instant cases, is similar to that existing in the Kacsur case. Owensby, in 1932, studied individually the cases of these 75 teachers. As to each of them he determined that some error had been made in classifying these teachers when they first entered the department—that some existing rule had been violated. He so informed the Board, and the Board, acting on this representation, and believing in good faith that such errors had been committed, purported to reclassify each teacher prospectively and retroactively. The trial court held, and we are affirming

that part of the judgment, that no error had been committed—that these teachers were all validly rated when they entered the department. But it was only if an error had been committed that the Board would have had power to reclassify these teachers (without a change in duties and functions) differently from other teachers in their service status group. What the trial court did was to say that although no error was committed in the original classification of these teachers, the Board had power to offer a lower salary to these teachers than that offered other teachers in their same category. As a matter of law, for the reasons fully stated in the Kacsur and Fry cases, supra, such classification was arbitrary and capricious, and unreasonable.

It should be pointed out that no changes in duties or functions or hours of work were involved in the reclassification of 1932. Teachers in a particular service status rating continued to perform the same duties and functions, and work the same hours, as all others in that rating, but were reduced to a lower rating for the reasons above pointed out.

Some significance must be given the service status rating of a teacher. Seniority rights in the department depend upon that rating. A teacher may not be subjected to being divested of those rights every time a new policy is adopted by the Board.

For these reasons, the classification, prospectively, of the teachers in this group in 1932 must be held to have been invalid, and the portion of the judgment based thereon must be reversed.

There are several cases in which the trial court held that the Board could not re-rate the teachers either retroactively or prospectively. The court held that as to these cases, because of facts peculiar to each case, the Board was estopped from re-rating the teachers involved. We do not find it necessary to pass on the propriety of the trial court's holding insofar as it is based on estoppel. These cases, in any event, fall within the "non-uniformity" group above discussed. The holding as to these teachers will follow the holdings made as to that category. This means the judgment as to them should be affirmed.

This disposes of all of the major problems involved on these appeals. From what has been said it follows that all portions of the judgment from which the Board appeals should be affirmed. So far as the appeal by the teachers is concerned, all portions of the judgment from which they appeal should be affirmed except the following:

(a) That portion of the judgment denying to the teachers discussed under the heading "Nine months rule" cases a writ of mandate to be restored to their prior ratings should be reversed.

(b) That portion of the judgment denying to the teachers discussed under the heading "Full time teacher rule" the right to recover the amounts deducted from their salaries, and a writ of mandate to be restored to their prior ratings, should be reversed.

(c) That portion of the judgment denying to the teachers discussed under the heading "The 'non-uniformity' cases" the right to a writ of mandate to be restored to their prior ratings should be reversed.

It is so ordered; the teachers to recover their costs on the appeal by the Board; each side to bear its or their own costs on the appeal by the teachers.

WARD, J., concurs.

KNIGHT, Justice (concurring and dissenting).

It is my conclusion that the trial court's decision herein should be sustained in all particulars. I therefore dissent from those portions of the majority opinion which direct a reversal as to the three groups of teachers therein specified.

As will be noted, the principal point on which the majority opinion disagrees with the trial court's decision relates to the validity of the 1932 re-rating by the school board insofar as its prospective operation affects the three groups of teachers included in the order of reversal, and which are referred to throughout the record as the "non-uniformity" cases.

At the time this controversy arose, there were approximately three thousand teachers employed in the San Francisco school department, and it appears from the record that for a number of years prior to 1932, for one reason or another, the 189 teachers whose status is involved in these consolidated actions had been given higher salary ratings than other teachers with the same experience, both outside and inside of the San Francisco school department, and in the same group classifications. This condition finally brought about an investigation and audit of the entire teaching department. It consumed several months, and was made by Wilbur S. Owensby. There-

after and in 1932 the school board adopted his report and recommendations, re-rated the 189 teachers, and readjusted their salaries accordingly. The board claimed that these reduced ratings operated retroactively as well as prospectively. As to the "non-uniformity" cases the trial court held that the 1932 re-rating did not operate retroactively, but did operate prospectively, and in so holding found as a fact that the 1932 re-rating was made in good faith, that it was not discriminatory, arbitrary, or capricious, and was free from any fraud. The majority opinion repudiates the trial court's finding, and on the same facts holds that the re-rating has "no reasonable basis, is unreasonable and arbitrary, and was beyond the power of the Board." In my opinion the record fully sustains the trial court's finding.

The trial spread over a year, and in deciding the controversy the trial judge filed two written opinions, wherein he reviewed and discussed the facts and the law elaborately and with great care. The two opinions are set forth in the brief filed by the Board of Education, and cover some 125 printed pages thereof. With respect to the question as to whether the 1932 re-rating was unreasonable and arbitrary the judge in part said:

"In connection with this subject, the only question that remains is whether or not in the re-rating in 1932 the Board acted in good faith and in the exercise of a sound discretion. I am prepared to make a finding of fact that when the re-rating was done in 1932 the Board and its officers and employees acted in the exercise of a sound discretion, in good faith, without any discrimination in favor of or against any teacher or teachers, but, in fact, in a bona fide attempt to equalize and level off the salary status of all the teachers in the department.

"The investigation and auditing work which led to the re-rating had taken a long time and was conducted by Mr. Wilbur S. Owensby, who was the principal witness in this litigation. Mr. Owensby testified in each one of the cases and he showed that he had a detailed and thorough grasp of each individual case. He testified in each case as to the reason for the re-ratings; he was subjected to cross-examination, and the court had every opportunity to determine whether or not he was informed as to his subject and whether or not he was judicial and impartial in his attitude. The cases took many days for trial, spread over a period of approximately a year, and during the entire time there was nothing in the attitude of Mr. Owensby or of anybody who testified on behalf of the defense to indicate anything but the highest good faith, sincerity, impartiality, and a desire to give each teacher exactly what was coming to him or her, nothing more and nothing less. There may be a wide difference of opinion as to whether or not the investigation in 1932 and the re-rating consequent thereon was necessary or justified. There undoubtedly *is* a wide difference of opinion with respect to the propriety or impropriety of the original ratings of a number of teachers whose cases are before the court. There is an honest difference of opinion, no doubt. But those differences of opinion based upon the judgment of the officers who did the rating and/or re-rating are matters which might arise within any board or tribunal at any time, and under the authorities a court cannot substitute its judgment for theirs. The court in this case is concerned solely with whether or not the reductions were made in good faith and not in any arbitrary or capricious manner or with a view to discriminating in favor of any teacher or teachers or against any. The re-rating was undertaken, and, in my opinion, carried out under a fixed determination to level off, as far as humanly possible to do so, the teachers involved in this litigation with other teachers in the Department who occupied less favorable status, and throughout the entire course of the trial there was nothing in the attitude or demeanor of Mr. Owensby or any other defense witness or in the great volume of testimony and the mass of documentary evidence to indicate any unfairness, favoritism, arbitrariness or bad faith whatsoever. Mr. Owensby was as consistent, logical and fair in his handling and grouping of the different cases as he was accurate in his computations and figures. And so far as I can remember, counsel for the plaintiffs at no time challenged his good faith or impartiality. It is true that counsel for plaintiffs in presenting his cases and in representing his clients took decided issue with the re-rating as a matter of principle contending that the Board was bound by the ratings given in the first instance, but there was no claim of bad faith, favoritism or partiality in the process of re-rating. The case presented from the outset, and now presents, two conflicting and diametrically opposite theories,—

the plaintiffs' being that a rating once made must stand, the defendants' that a rating not 'uniform' under Sec. 5.734 results in an ultra vires contract which is not binding upon the Board. What was done by Mr. Owensby was then submitted to the constituted authorities of the Board of Education and his action became their action, and the re-rating was done officially as a matter of Board action. The re-rating was done by the Board in the carrying out of a policy already discussed, a policy which, in the judgment of the Board, was proper in view of the fact that the advanced ratings given to the teachers resulted in teachers being given positions which, in the judgment of the Board, gave them preferences and advantages over other teachers similarly situated.

"For these reasons I am prepared, as already indicated, to make a finding that the Board acted in good faith in 1932 when it reduced the salaries *commencing with July 1, 1932.*"

In conformity with the views thus expressed, the trial judge entered a finding to the effect that the re-rating and salary reductions "were made fairly and not arbitrarily or capriciously."

As supporting the opposite conclusion and by way of examples the majority opinion selects two individual cases from those of the large number of teachers involved, and after commenting on those two cases the opinion goes on to say: "Other examples could be given of the many cases in which the Board between 1925 and 1932 liberally construed its 1925 rules and rated a teacher accordingly, and then in 1932 the Board strictly construed its rules and purported to re-rate a teacher downward." This is obviously contrary to the view of the trial judge; but to attempt to set forth in this opinion all of the facts and circumstances revealed by the record which may be taken as sustaining the trial court's view would result in an interminable task; furthermore it would seem to be unnecessary to do so in view of the well settled rules governing reviewing courts in dealing with challenged findings of fact. It seems to me that a fair analysis of the facts as they are set forth and discussed in the trial court's opinion will demonstrate that all that was sought to be done by the re-rating was to place the teachers involved in the "non-uniformity" groups on an equal, uniform basis with the other teachers, and pay them accordingly. In other words, it would appear that the other teachers in the department were the ones discriminated against by the ratings given appellants prior to the 1932 re-rating; and the trial court in effect so found. In part the finding reads: "In this connection the Court finds that the purpose of the Board in reducing said seventy-five teachers (with the exception of said six teachers discussed in finding 33) commencing July 1, 1932, for the future, was to effect uniformity and fairness in ratings within the Department and to remove what had, in the opinion of said Board [in 1932], given said seventy-five teachers (with the exceptions last noted) an unfair advantage over other teachers in said Department, and that said action was neither arbitrary nor capricious."

It is stated in the majority opinion that "* * * the Board attempted to re-rate these teachers in 1932 because it was represented to it, and it believed, that an error had been committed when these teachers were originally rated"; whereas the trial court found that the previous ratings were the result of a proper exercise of the Board's power; and it seems to be argued that in that state of the case the 1932 re-rating is shown to be unreasonable and capricious as a matter of law. The real question the trial court was called upon to determine, however, was whether in fact the 1932 re-rating was unreasonable or arbitrary; and since there are facts shown by the record tending to support the negative finding made by the trial court to that effect, this court, under well settled rules, should sustain the finding, regardless of whatever belief may have been entertained by the Board.

The majority opinion appears to go even further than holding that the 1932 re-rating was unreasonable and arbitrary, by declaring the law to be that when a Board has once adopted a policy, and without fraud, error or mistake rates a group of teachers under that policy, although the Board may change its policy as to new entrants into the department, it has no power some years later to re-rate those teachers prospectively "on the theory that the original rating was too high"; that "The Board having once acted lawfully in rating a teacher has exhausted its power over that subject matter." This view would seem to be somewhat at variance with those expressed in the forepart of the opinion, wherein it is stated that the Board has full power to evaluate each applicant's experience upon

the facts of each case, giving consideration not only to the number of years of such experience, but to the nature of that experience, and the applicant's personal attainments and abilities; likewise to adopt fixed rules that would apply "to all or some cases" regardless of the particular applicant's peculiar and unusual abilities; or it could apply a mixture of those two policies; and the opinion then goes on to say: "These are matters which rest within the discretion of the Board. Of course, once a policy is adopted, the Board must exercise its powers and apply the policy adopted fairly and without discrimination. *The Board undoubtedly has power, prospectively, to change its policies in this regard.*" (Italics added.)

However, as shown, the majority opinion goes on to hold that unless it appears that the original ratings are based on fraud, error or mistake, the Board has no power thereafter, upon finding that its original ratings are inequitable, unfair, and in fact discriminatory, to re-rate and reclassify; and on that issue I agree with the trial court that in those circumstances the Board has the power to re-rate so long of course as the re-rating and reclassification is made in good faith and is not unreasonable or arbitrary. In dealing with this feature of the case the trial court in its first opinion extensively discussed the cases of Fidler v. Board of Trustees, 112 Cal.App. 296, 296 P. 912, and Abraham v. Sims, 2 Cal.2d 698, 42 P.2d 1029, and then went on to say:

"What principles are to be gleaned from the two cases just discussed?

"*First*: that a teacher's status is that of an employee, the employer being the school board; the relationship between the teacher and the board is a relationship arising out of contract;

"*Second*: that under the law of California the school board has a right, acting in good faith and in the exercise of a sound discretion, to reduce the salary of a teacher, notwithstanding the permanency of the teacher's tenure;

"*Third*: that such a reduction cannot be made after the beginning of a school year."

Later on the court said:

"While I entertain the views just discussed with respect to the immunity of the teachers from a retroactive cut in their salaries after the opening of any school year, there is another feature of the case upon which I have equally decided views which will result in a denial of the petition for a writ of mandate to compel a restoration (upward to the salary rating or yearly status which they enjoyed before the cut).

"The prayer of the petition in each case is that the Board of Education be ordered to restore on the records and rolls of the School Department the respective teachers to the higher rating or status which they had held before the re-rating in 1932. With respect to this phase of the case a careful study of the case leaves me in no doubt at all that, while the Board of Education had no power to retroactively reduce the salaries which had been paid up to and including June 30, 1932, it had, under the authority of the California cases full power and authority to put the teachers on a new salary basis for the future even though that resulted in a reduction. By reducing a teacher from a twelfth year standing of $2436 to tenth year standing of $2208 the Board naturally effected a reduction of the teacher's salary rate for the ensuing years, and until a further rating was made, for all years to come. Without repeating, it could do this, provided the reduction was made before July 1st, 1932.

"How did this reduction work out in actual practice? The notices were sent to the teachers in May or June of 1932 and conveyed to them in plain and unmistakable language the fact that the teacher's status, and therefore salary rating, had been reduced. While the notice was not sufficient to effect a retroactive reduction for past services, it *was* sufficient to notify the teacher that, commencing with the new school year on July 1, 1932, her salary would be, let us say $2208 a year instead of $2436. With that notice in hand the teacher entered upon her regular duties when school opened in the summer of 1932. True, the teacher might have had mental reservations and entertained a sense of injustice at the reduction in her compensation, and a firm purpose about seeing a lawyer about it and possibly litigating as was ultimately done in these cases, but the fact remains that the teacher did not refuse the contract but signified her acceptance of it by continuing to teach during and after 1932, leaving it to subsequent litigation to determine whether she should continue to get or be restored to $2436 or whether her contract rate would be $2208. Had the teachers, or any of them, come to the School Board and refused to go back to teaching at the reduced figure, the Board

would have been confronted with the alternative of giving the teacher what she asked for or of adhering to its ruling and refusing to pay her any more than the re-rated and reduced salary. It was a matter of contract, as the cases hold, and a new contract was entered into. But it cannot be said, in view of the notices sent out in May and June of 1932, that the new contract was for $2436 a year when the notice said that the compensation would be only $2208. The teacher by her action, resuming or continuing her duties, accepted the contract as tendered at the reduced rate, leaving it to be determined in the future whether or not she was entitled to the higher rate.

"There is no inconsistency between these holdings, the Fidler and Abraham cases holding distinctly to the effect that salary reductions cannot be made during a school year, or after a school year has opened, but that reductions *can* be made *before* the opening of any school year. For these reasons it will follow that the petitions for writs of mandate compelling the Board of Education to restore the teachers to the higher status they had occupied before 1932 will be denied."

The majority opinion seems to construe the foregoing portion of the trial court's decision as holding that the sole basis for its conclusion that the reclassification of 1932 was not arbitrary or capricious and was made in good faith was that prior to the beginning of the school year the teachers accepted contracts to teach at the reduced salary, and that therefore the trial court's decision in this respect conflicts with the decisions rendered in Fry v. Board of Education, 17 Cal.2d 753, 112 P.2d 229, and Kacsur v. Board of Trustees, 18 Cal.2d 586, 116 P.2d 593. But it would appear that this is a misconstruction of the basis of the trial court's decision, for it is therein clearly stated: "With respect to this phase of the case a careful study of the case leaves me in no doubt at all that, while the Board of Education had no power to retroactively reduce the salaries which had been paid up to and including June 30, 1932, *it had, under the authority of the California cases full power and authority to put the teachers on a new salary basis for the future even though that resulted in a reduction.*" (Italics added.)

The other portion of the majority opinion with which I am unable to agree is that portion reversing the trial court's decision relating to the cases falling within the "full time teacher" rule. The facts shown by the record in my opinion support the conclusion reached by the trial court. It appears therefrom, among other things, that the so-called "big raise" resolution of 1925 was adopted on June 16, 1925, and read as follows: "Contingent upon funds being provided from the State and through local tax rate, under provisions of this salary schedule and under the rules governing the placing of teachers now in service upon the new schedule, all full time teachers, all principals, supervisors and assistant supervisors in the day schools, will receive during the next school year 1925–26, an increase of not less than $360 above that which they received during the school year 1924–1925, apart from odd amounts added or subtracted in order to fit the teachers' salaries exactly into the new schedule." And in determining the status of the teachers embraced within this classification, the trial court said in part: "I am satisfied that the six teachers in this group were no more entitled to the 'big raise' in 1925 than were the other substitute teachers who did not receive it. In other words, as I see it, they were not, on June 16, 1925, 'in service' as 'full time teachers.' They were not given probationer status until August 17, 1925. The resolution reads that teachers are entitled to the $360 increase *'above that which they received during the school year 1924–1925.'* This is another reason why the increase was not intended for substitutes paid one month at one rate, the next at another.

"These six cases will have to be treated as cases where by clerical error the teachers received an advance to which they were not entitled."

In referring to the previous resolution adopted by the Board on November 1, 1924, upon which the reversal seems to be based, the trial court held in effect that said resolution did not alter the situation because it was adopted seven months before the "big raise" or "full time" resolution was adopted. It would seem to me, therefore, that in view of these facts the question of the status of this group of teachers was correctly disposed of by the trial court.

In conclusion it does not seem inappropriate to emphasize that the main issue as to whether the 1932 re-rating was or was not arbitrary and capricious involved a question of fact, and that being so was one, necessarily, for the determination of the

trial court. A reading of the two opinions filed by the trial judge will at once disclose the scrupulous care taken by him in going through the lengthy record and assigning the individual teachers to their respective groups in accordance with the testimony; and I have found nothing in the record, or in the majority opinion, which in my judgment shows that any part of his decision is unfair in fact or unsound in law. Therefore in my opinion it should be sustained in all particulars.

Hearing denied; SHENK and SCHAUER, JJ., dissenting upon the ground that in their opinion the judgment should be affirmed in its entirety.



62 Cal.App.2d 891

GLOBE INDEMNITY CO. v. LARKIN.

No. 12527.

District Court of Appeal, First District, Division 2, California.

Feb. 14, 1944.

1. Limitation of actions ⇐56(2)

Where agreement provided for indemnity against loss and damages as well as against liability, action, brought more than four years after liability had accrued but within four years after payments had been actually made to satisfy liability, was not barred by statute of limitations. Code Civ. Proc. § 337, subd. 1; Civ.Code, § 2778, subds. 1, 2.

2. Courts ⇐91(1)

Decision of Supreme Court was binding on District Court of Appeal in case involving same question.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by the Globe Indemnity Company against Neil E. Larkin on indemnification agreement. Judgment for plaintiff, and defendant appeals.

Affirmed.

Paul A. McCarthy, of San Francisco, for appellant.

Hartley F. Peart and Sylvester J. McAtee, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, having sustained a loss upon two broker's bonds, brought this action against the indemnitors upon certain indemnification agreements given to plaintiff at the time of the issuance of said bonds in 1929 and 1930. The action resulted in judgment in favor of plaintiff and against defendant Neil E. Larkin in the sum of $8,656.11. Said defendant appeals from said judgment.

The sole contention on this appeal is that the action was barred by the statute of limitations, Code of Civil Procedure, § 337, sub. 1. It is therefore necessary to set forth the pertinent portions of the indemnification agreements and the chronological sequence of events.

The indemnification agreements provided in part that the indemnitors agreed "to indemnify the Company from and against any and all liability, loss, costs, damages, attorneys' fees and expenses, of whatever kind or nature, which the Company may sustain or incur by reason, or in consequence of executing said bond or bonds as surety, * * * and which it may sustain or incur * * * in defending * * * any action, suit or other proceeding which may be brought in connection therewith * * * and obtaining a release from liability under said bond or bonds; and to indemnify the Company to the full amount of liability, loss, costs, damages, attorneys' fees and expenses as aforesaid, regardless of any reinsurance that may be carried on said bond or bonds * * *."

Upon default by the broker, three persons instituted actions in Placer County in 1932 against the broker and against the plaintiff herein upon its broker's bonds. On March 10, 1932, plaintiff herein advised defendant of the pendency of said actions and of plaintiff's intention to hold defendant "personally responsible for any loss, cost or expense of any nature whatsoever which we may be called upon to incur by reason of our having become surety on these bonds * * *". The three actions were pending before the superior court in Placer County until January 23, 1937, when the parties thereto apparently worked out an agreement of compromise.

On that day, the broker dismissed its cross-complaints; a stipulation was filed waiving findings; and judgments were entered in favor of plaintiffs in said three actions for a total sum, including interest and costs, of approximately $11,000. On the same day, plaintiff herein paid the sum of $6,850 in satisfaction of all three judgments and a satisfaction of judgment was entered in each case. Plaintiff herein also paid attorney's fees and costs amounting to $1806.11 in the defense of said three actions, said attorney's fees having been paid in September 1936 and February 1937. It is apparently conceded that judgment herein was properly entered against defendant for $8,656.11, being the total of the payments made by plaintiff, provided this action was not barred by the statute of limitations. The defense of the statute of limitations was appropriately raised by demurrer and answer in the trial court.

In support of his contention, defendant argues that the agreement provided for indemnity against "liability"; that "liability" was incurred by plaintiff not later than March 10, 1932; that plaintiff could have brought an action against defendant on the indemnity agreement at any time after said date and even prior to the actual payment of any loss. (Easton v. Boston Investment Co., 51 Cal.App. 246, 196 P. 796; Thomas v. Layer, 48 Cal.App. 199, 191 P. 949), and that as this action was not brought until August 30, 1939, being more than four years after March 10, 1932, the action was barred. In reply, plaintiff argues that the agreement provided for indemnity against "loss" and "damages" as well as against "liability" and that as the action was filed within four years after the loss and damages had been sustained and paid, the action was not barred. Oaks v. Scheifferly, 74 Cal. 478, 16 P. 252.

[1] In making these arguments, the parties discuss the authorities which distinguish between an agreement to indemnify against liability and an agreement to indemnify against loss or damages. See Ramey v. Hopkins, 138 Cal.App. 685, 688, 33 P.2d 443; 13 Cal.Juris. 987; 24 Cal. Law Rev. 193. This distinction is recognized in section 2778 of our Civil Code, which provides in part: "1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable; 2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." But Oaks v. Scheifferly, 74 Cal. 478, 16 P. 252, is the only case in point on the precise question before us and that case fully sustains the contentions of plaintiff. There, as here, the agreement had a dual aspect in that it purported to indemnify against liability as well as against actual damages suffered through payment of the liability; the action was brought more than four years after the liability had accrued but within four years after payment had been actually made to satisfy the liability; and the action was based upon the covenant to indemnify against such damages rather than upon the covenant to indemnify against liability. Contrary to the claim of defendant here, the court there recognized the dual aspect of the agreement and recognized that an action to recover upon the covenant to indemnify against liability could have been brought at any time after the liability had accrued and even prior to the actual payment of any loss. But the court treated the action, based upon the covenant to indemnify against damages, in the same manner as though such covenant had been contained in an agreement separate and apart from the covenant to indemnify against liability and held that the action to recover upon the covenant to indemnify against damages was not barred.

[2] Defendant states that he "must admit that if it were not for the exceedingly bad reasoning of this case (the Oaks case), it might be taken as decisive of the correctness of the lower court's decision here." While we cannot agree with defendant in his criticism of either the rule or the reasoning in the Oaks case, this court would be bound, in any event, by the decision in that case and we are of the opinion that said decision is decisive of the only point raised on this appeal.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

62 Cal.App.2d 824

OSWALD v. NORTHROP AIRCRAFT, Inc.

NORTHROP AIRCRAFT, Inc., v. OSWALD.

Civ. 14164.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1944.

Rehearing Denied March 7, 1944.

Hearing Denied April 7, 1944.

1. Pleading ⇐291(2)

In action for specific performance of option contract to purchase land, wherein copy of letter relied upon as defense was attached to answer which alleged that letter had been mailed to plaintiff, and plaintiff failed within ten days to execute affidavit denying genuineness and execution of letter, testimony that plaintiff had not received such letter was properly excluded. Code Civ.Proc. § 448.

2. Pleading ⇐291(2)

Plaintiff's failure to file an affidavit within ten days denying genuineness of letter relied upon as defense had same effect as if plaintiff had filed stipulation that he had received true copy of original letter which was a genuine document, that it was signed by defendant, and that it was delivered in manner prescribed by law. Code Civ.Proc. § 448.

3. Pleading ⇐376

When a pleading contains allegation of fact which is distinctly admitted, there is no issue as to that fact.

4. Pleading ⇐236(1)

Where plaintiff, who failed to deny within ten days genuineness of letter relied upon as a defense, instead of seeking permission to file affidavit denying genuineness, asked leave to amend his amended complaint by allegation that no letter was ever received, refusal to allow amendment was not an abuse of discretion. Code Civ.Proc. §§ 448, 473.

5. Pleading ⇐236(1)

If statute authorizes trial court to exercise discretion in matters of procedure, justice is measured by statute and by soundness of court's discretion. Code Civ.Proc. §§ 448, 473.

6. Quieting title ⇐39

In action for specific performance of option contract to purchase land, wherein defendant's cross-complaint alleged in conventional form an action to quiet title and cross-answer admitted record title in defendant subject to plaintiff's claim, court properly quieted title in defendant after adjudicating inequity of plaintiff's cause.

7. Quieting title ⇐44(1)

In action for specific performance of option contract to purchase land wherein defendant filed cross-complaint to quiet title, it having been admitted that record title was vested in defendant, burden was upon plaintiff to establish change of status of the title.

8. Pleading ⇐36(1)

A fact admitted by a pleading is equivalent to a finding based upon undisputed evidence and cannot be contradicted and will prevail against a denial in same pleading.

9. Quieting title ⇐39

In action for specific performance of option contract to purchase land, defendant's cross-complaint to quiet title was not required to be treated as a separate case, since there is only one case in equity action however many the parties or pleadings.

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Action by George H. Oswald against Northrop Aircraft, Inc., for specific performance of an option contract for the purchase of land, wherein defendant filed a cross-complaint to quiet title to the land involved. From a judgment denying specific performance and quieting title, plaintiff appeals.

Affirmed.

George D. Blair, of No. Hollywood, for plaintiff, cross-defendant and appellant.

O'Melveny & Meyers, of Los Angeles, for defendant, cross-complainant, and respondent.

MOORE, Presiding Justice.

From a judgment denying plaintiff specific performance of an option-contract for the purchase of a parcel of two acres in the city of Hawthorne, hereinafter referred to as the city, and quieting title thereto in defendant in accordance with the cross-complaint, plaintiff appeals.

Having an option to purchase a tract of some 80 acres from the city, defendant

granted to plaintiff by a writing an option to purchase a parcel of two of the acres. The writing bore date of October 31, 1940. It provided that Northrop should notify Oswald promptly of its exercise of its own option to purchase the tract, and that Oswald should purchase the two acres by paying therefor the sum of $1,000 within a period of three months after Northrop's notice to him that it had acquired the tract under its own option.

By letter dated April 14, 1942, Northrop advised plaintiff that it was at that time engaged in exercising its option to purchase the land from the city. Eighteen days later the purchase was consummated and on the fifth day of May, 1942, Northrop mailed to Oswald a letter which contained the following: "Last Saturday, May 2, we exercised the option which we had under the Lease and Option Agreement of October 25, 1940, between us and the city. In a letter to you dated October 31, 1940, we agreed to notify you promptly of our exercise of this option. Please consider this letter the notice required by the former letter. Reference is made to the letter of October 31, 1940, for the rights which you now have with respect to the purchase of the property involved." Under Oswald's option that letter of May 5 fixed August 5, 1942, as the last day on which he might exercise his option to purchase the two acres.

However, nothing was heard from plaintiff until the 29th of October, 1942, at which time, counsel for plaintiff addressed a letter to defendant in which he stated that he had been advised by Oswald that the latter had not received any information that Northrop had exercised its rights to purchase the land. Concomitant with the delivery of that letter, Oswald's counsel tendered $1,000 to Northrop as the sum "called for under the terms of said letter of October 31, 1940, as payment for said land."

Following the refusal of Northrop to accept the $1,000 and to convey the two acres to Oswald, the latter instituted this action on November 28, 1942, to enforce performance of his option to purchase under the instrument of October 31, 1940. Subsequently, on December 4, 1942, he filed his amended complaint.

Attached to the "answer and cross-complaint" of defendant was a copy of the letter of May 5, 1942, which the answer alleged had been mailed to Oswald on or about its date. At no time after filing the answer and cross-complaint did Oswald ever file an affidavit denying the genuineness or due execution of the letter of May 5, 1942, although his pleading alleged that he had not prior to October 15, 1942, been informed that Northrop had purchased the tract from the city.

In the course of attempting to prove that his tender of the $1,000 was prior to his receipt of notice that defendant had acquired title to the tract, plaintiff was by his counsel asked the following question: "When was the first time, Mr. Oswald, that you were informed or received any information that the Northrop people had exercised their option with the city of Hawthorne in reference to buying the property?"

Objection to this question was sustained on the grounds (a) that there was no issue as to notice of defendant's purchase of the tract; (b) that Northrop had pursuant to its option purchased the tract from the city and had the record title; (c) that on or about May 5, 1942, defendant had informed plaintiff of its purchase; (d) that the genuineness and due execution of the letter written by Northrop to defendant on May 5, 1942, containing such information had not been denied. The court's order in sustaining the objection to the question is assigned as error.

After that objection had been sustained, plaintiff asked leave to file an application for relief under section 473, Code of Civil Procedure, in order that he might still file an affidavit denying the genuineness and due execution of the letter. The court granted leave but when the case was again called on the following Monday, plaintiff declined to make his application but, instead, asked leave to file an amendment to his amended complaint so as to allege that plaintiff was not notified or informed of such purchase until after October 15, 1942, and that 14 days later he tendered the $1,000 to defendant for the purchase of the property.

[1-3] It was not error for the court to sustain the objection to the question propounded to Oswald. The notification letter of May 5, 1942, having been attached to the answer taken with the allegation that it had been mailed to Oswald was conclusive as to the delivery of the notice provided by the option after the lapse of 10 days within which plaintiff failed to

execute and serve an affidavit denying the genuineness and due execution of the letter. Section 448, Code Civ.Proc.; Stoneman v. Fritz, 34 Cal.App.2d 26, 92 P.2d 1035; Sloan v. Diggins, 49 Cal. 38; Gajanich v. Gregory, 116 Cal.App. 622, 3 P.2d 389; Sharp v. Quinn, 214 Cal. 194, 4 P.2d 942, 78 A.L.R. 501; Bank of America Nat. Trust & Savings Ass'n v. Richardson, 29 Cal.App.2d 554, 85 P.2d 139. "Due execution" includes delivery. The failure of plaintiff to file such affidavit had the same effect as if, after the expiration of 10 days following the filing of the answer and cross-complaint, plaintiff had filed a stipulation that he had duly received a copy of the letter; that it was a true copy of the original which was a genuine document; that it was signed by Northrop and that it was delivered in the manner prescribed by law. This rule has been consistently followed since the decision of the Diggins case (1874). When a pleading contains an allegation of fact which is distinctly and unqualifiedly admitted there is no issue as to that fact. Welch v. Alcott, 185 Cal. 731, 754, 198 P. 626. It follows that had the court allowed Oswald to testify that he did not receive the letter such would have required a reversal of a judgment for plaintiff. Stoneman v. Fritz, supra. Having rejected the opportunity to be relieved from the effect of his failure to deny the receipt of the letter, the allegation of having mailed the letter and having attached the copy spelled finality for that issue. The court's ruling was not error.

[4, 5] Neither was there error in the court's refusal to allow plaintiff to amend his pleading. Having failed to deny the letter as required by the Code, Sec. 448, his only recourse for relief was under Section 473. Instead of availing himself of that remedy, he asked leave to amend his amended complaint by an allegation that no letter was ever delivered or received. The allowance of such amendment was discretionary with the court. That the court was not arbitrary in holding that plaintiff's delay in offering the proposed amendment till the second day of trial was unreasonable, is established by appellant's failure to make any showing that would reasonably require the court to grant the order as well as by his refusal to apply for relief from his default. The proposed allegation was irrelevant by reason of the admission of the genuineness and due execution of the letter. For these reasons we cannot say that the court abused its discretion. Knapp v. B. Nicoll & Co., 112 Cal.App. 187, 193, 296 P. 655. Appellant protests loudly that he should have been permitted to amend for justice' sake. If the Code requires of a litigant to make his denials after a prescribed fashion, his justice is measured by the statute, not by the litigant's biased concept of justice. If the Code authorizes the trial court to exercise its discretion with respect to matters of procedure, justice again is measured strictly by the statute and by the soundness of the court's discretion in applying it. As the statute was not observed by plaintiff in conserving his rights so the court was not arbitrary in enforcing the rules therein contained.

[6] Appellant assigns as error the court's order for judgment on the cross-complaint. After the pleadings were settled they all constituted one case. The answer traversed the essential declarations of the amended complaint and plaintiff's declination to deny receipt of the letter entitled defendant to judgment rejecting the demands of plaintiff. The cross-complaint alleged in conventional form an action to quiet title. The cross-answer admitted the record title in defendant subject to plaintiff's claim as alleged in his amended complaint. After plaintiff's claim as asserted in his amended complaint had been decided against him, the title was by that award effectually quieted against plaintiff. Knight v. Whitmore, 125 Cal. 198, 57 P. 891. No number of decrees quieting title against plaintiff would have added potency to the judgment, already awarded to defendant, that plaintiff was not entitled to enforce his claim of right to purchase the two acres from defendant. The advantage of quieting title in a party lies in the fact that it satisfies the conventional yearning of every litigant whose title has once been attacked to have a decree of equity finally defeat all asserted claims. The customary form of a judgment "quieting title" is preferred because of its ubiquitous use and significance.

[7, 8] It having been admitted that the record title was vested in defendant, the burden was upon plaintiff to establish the change of the status of the title. Bell v. Pleasant, 145 Cal. 410, 415, 78 P. 957, 104 Am.St.Rep. 61. This plaintiff failed to do. His admission of the status of the record title and his failure to show a superior

right combined to expunge his name from the chain of title. A fact admitted by a pleading is equivalent to a finding based upon undisputed evidence. It cannot be contradicted. It will prevail against a denial in the same pleading. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 432, 137 P. 21; Birch v. Monroe, 70 Cal. App. 656, 234 P. 125; 49 Cal.Jur. 287, sec. 352.

[9] Plaintiff's attempt to require a treatment of the cross-complaint as a separate case is unavailing. There is only one case in the action in equity, however many may be the parties or the pleadings. The court properly quieted title in defendant after having adjudicated the inequity of plaintiff's alleged cause.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; CARTER, J., dissenting.



RICE v. SCHMID et al.*
Civ. 14218.

District Court of Appeal, Second District, Division 2, California.

Feb. 11, 1944.

Rehearing Denied March 6, 1944.

Hearing Granted April 10, 1944.

1. Appeal and error ⇐1207(3)

Where Supreme Court opinion held that seller of flour elected to terminate contract on designated date, and that damages constituted difference between contract and market price of flour on date of termination of contract, and trial court was directed to determine damages accordingly, trial court was required to calculate difference between contract and market price of undelivered flour on such date.

2. Appeal and error ⇐1198

Any material departure by trial court from explicit directions of Supreme Court remittitur is void.

3. Interest ⇐19(2)

Damages fixed by difference between two market values or difference between market value and a sum specified as selling price of merchandise are "capable of being made certain by calculation" within statute authorizing recovery of interest on damages capable of being made certain by calculation. Civ.Code, § 3287.

See Words and Phrases, Permanent Edition, for all other definitions of "Capable of Being Made Certain by Calculation".

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by R. L. Rice against John Schmid and others for breach of contract to purchase flour from plaintiff, wherein Augusta Schmid, as administratrix of the estate of John Schmid, deceased, was substituted as a party defendant. From a judgment, the plaintiff appeals.

Reversed with directions.

H. M. Lineman, Mab Copland Lineman and Benjamin Lewis, all of Los Angeles, for plaintiff and appellant.

W. W. Wallace and Michael LaVelle, both of Los Angeles, for defendants and respondents.

W. J. WOOD, Justice.

It is the contention of plaintiff that the trial court refused to follow the directions given by the Supreme Court upon the former appeal (Rice v. Schmid, 18 Cal.2d 382, 115 P.2d 498, 499, 138 A.L.R. 589) and that consequently the judgment entered is unauthorized and void.

Plaintiff, a flour merchant, entered into a contract with John Schmid, proprietor of the Eagle Bakery, on July 16, 1937, whereby he agreed to sell to Schmid 6000 barrels of flour, consisting of: 2,000 barrels of "Ravalli" brand at $7.10 per barrel; 2,750 barrels of "Gold Cross" brand at $7.65 per barrel; and 1,250 barrels of "Isis" brand at $7.15 per barrel. According to the contract, shipment was to be made upon instructions from the buyer within ninety days from the date of the contract and the contract was to be automatically extended if, because of the fault of the buyer, not all of the flour was shipped within the ninety-day period unless the seller chose to terminate the contract upon that ground. After a portion of the flour had been delivered Schmid sold the Eagle Bakery to defendants Marik, Dull

* Subsequent opinion 153 P.2d 313.

and Osterman, who assumed the obligations of Schmid's contract. Deliveries of the flour continued to Eagle Bakery under the contract until a total of 3,245 barrels had been delivered. Thereafter defendants refused to furnish any further instructions for deliveries and on December 2, 1938, plaintiff notified the new proprietors of the bakery of his election to terminate the contract and to hold them liable in damages for the breach thereof.

John Schmid died after the commencement of the action and Augusta Schmid has been substituted as administratrix of his estate.

The contract contained a provision for liquidated damages and in one of several counts of the complaint plaintiff sought to recover damages under this provision. In a separate count he sought recovery for the actual damages suffered. The trial court held that the liquidated damages provision was invalid, fixed actual damages in the sum of $712.45 and entered judgment accordingly. In arriving at this sum the trial court awarded to plaintiff the difference between the price he had agreed to pay to a milling company for the flour and the price defendants had agreed to pay to him for the purchase of the flour.

Plaintiff appealed from the judgment in his favor for $712.45. The Supreme Court ruled that the finding of the trial court that it was not impracticable or extremely difficult to fix the actual damage was supported by the evidence and consequently sustained the ruling of the trial court that the provision for liquidated damages should not govern. The Supreme Court also ruled that the judgment should be reversed because an improper measure of damages had been applied. We quote from the opinion of the court: "On December 2, 1938, plaintiff notified the new proprietors of the Eagle Bakery of his election to terminate the contract and to hold him liable in damages for breach of the contract. * * * The contract by its terms was automatically extended despite the defendants' failure to give further shipping instructions, and since there was no repudiation of the contract by them, their obligation to accept the goods continued until the plaintiff exercised his option to terminate the contract. Therefore, the damages should be the difference between the contract price and the market price on the date of final termination of the contract. * * * Here plaintiff's only obligation was to procure flour of the specified brands, whether from the miller or on the market, for delivery in accordance with shipping instructions to be furnished him by the defendants. He was free to enter into a contract with a manufacturer to protect himself or to speculate upon a decline in the market before delivery would be required. * * * The possibility that the plaintiff may make a large profit is a result of the decline in the market price and is not a sufficient reason for allowing the defendants to escape the obligations of their contract. * * * The judgment is reversed with directions to the trial court to determine the damages in accordance with the rules herein set forth and thereafter to enter judgment in favor of plaintiff."

Upon the going down of the remittitur, plaintiff filed a motion with the trial court asking that the damages be determined in accordance with the ruling of the Supreme Court and that judgment be entered accordingly for the plaintiff. The court denied this motion and set the matter for hearing at a later date for the purpose of receiving additional evidence. Thereafter the court received additional evidence on points upon which evidence had been received before the first appeal was taken and made and filed a number of new findings in which the court found, in effect, that defendants did not breach the contract at any time; and that on the ninety-first day after July 16, 1937, plaintiff did not have in his possession more than 200 barrels of flour for delivery to defendants. The court further found that on the ninety-first day after the execution of the contract the difference between the market price of the flour and the contract price was $.95 per barrel and: "That on the date that plaintiff should have delivered all of said flour, he had only said 200 barrels for delivery, and that the difference between the market price and the contract price for said 200 barrels on said date was the sum of $190." Judgment was entered in favor of plaintiff in the sum of $190 against all of the defendants except defendant Schmid. No judgment whatever was entered against defendant Schmid.

[1, 2] The opinion of the Supreme Court is clear and unambiguous. It is specifically set forth therein that plaintiff elected to terminate the contract on December 2, 1938, and it is specifically stated that the obligation of defendants to accept the flour "continued until the plaintiff exercised his option to terminate the contract." It is also clearly stated that the damages should be the

difference between the contract price and the market price "on the date of the final termination of the contract." The trial court was directed to determine the damages in accordance with the rules set forth in the opinion and under these rules no course was open to the trial court other than to calculate the difference between the contract price and the market price of the undelivered flour on December 2, 1938, and thereafter to enter judgment against all the defendants for the sum shown to be due by the calculation. No discretion was reposed in the trial court, whose duty it was to specifically carry out the directions of the reviewing court. Any material departure from these explicit directions is unauthorized and void. English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 201, 52 P.2d 267.

The record shows without conflict that on December 2, 1938, the number of barrels undelivered and the market price of the flour which defendants agreed to purchase from plaintiff were as follows: 688 barrels "Ravalli" brand, $3 per barrel; 1593 barrels "Gold Cross" brand, $3.55 per barrel; and 474 barrels "Isis" brand, $3 per barrel. From these figures it is easy to determine that the damages suffered by plaintiff total the sum of $11,319.20. Indeed defendants do not dispute these figures.

[3] Plaintiff is entitled to interest on the amount due him. In section 3287 of the Civil Code it is provided: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *." Damages which are fixed by the difference between two market values or the difference between the market value and a sum specified as the selling price of merchandise are "capable of being [ascertained] by calculation." Brandenstein v. Jackling, 99 Cal.App. 438, 449, 278 P. 880, 885; Olcovich v. Grand Trunk R. Co., 179 Cal. 332, 336, 176 P. 459.

The judgment is reversed with directions to the trial court to enter judgment in favor of plaintiff against all of the defendants in the sum of $11,319.20, together with interest thereon from December 2, 1938, at the rate of seven per cent per annum.

MOORE, P. J., and McCOMB, J., concur.

FORD v. BUTTE COUNTY.

No. 12544.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1944.

Rehearing Denied March 1, 1944.

Hearing Denied March 31, 1944.

1. Waters and water courses ⇐89

Generally, grant or conveyance of land bounded by nonnavigable stream carries with it bed of stream to its center, unless contrary intent is manifest from grant or conveyance itself.

2. Waters and water courses ⇐89

Where possession of land described in conveyance would raise presumption of ownership of land in front of that conveyed to middle of boundary stream, exclusion of such presumption not inclusion thereof, must be evidenced by terms of grant, if grantor has power to include land to middle of stream.

3. Waters and water courses ⇐89

While intent to exclude bed of stream from grant or conveyance of lands bounded thereby will not be presumed, but must be clear from terms of deed as interpreted by surrounding circumstances, question whether conveyance carries title to center of stream depends on parties' intent, to be gathered from description of premises, read in connection with other parts of deed, and by reference to situation of lands and condition and relation of parties to lands and other lands in vicinity. Civ.Code, § 830; Code Civ.Proc. § 2077, subd. 4.

4. Boundaries ⇐10

Maps, plats, and field notes, referred to in grant or conveyance of land, must be regarded as incorporated in instrument and are usually held to furnish true description of boundaries of land conveyed.

5. Boundaries ⇐13

Generally, a meander line cannot be considered a boundary of land, but true boundary is the stream or other body of water on which land borders.

6. Waters and water courses ⇐89

A deed of land on nonnavigable portion of river according to official map, fixing river boundary as meander line at river bank, conveyed title by operation of law, not to meander line, but to thread of stream. Civ.Code, § 830; Code Civ.Proc. § 2077, subd. 4; St.1937, p. 794, § 102.

7. Waters and water courses ⇐98

In action to quiet title to land sold and conveyed by plaintiff to defendant county, evidence was sufficient to support trial court's finding that plaintiff intended to convey land to thread of nonnavigable boundary river, not merely to river bank.

Appeal from Superior Court, Butte County; H. S. Gans, Judge.

Action to quiet title by F. F. Ford against the County of Butte, which filed a cross-complaint. From a judgment for defendant on the cross-complaint, plaintiff appeals.

Affirmed.

Anthony & Rogers, of San Francisco, for appellant.

Jack M. McPherson, of Chico, for respondent.

KNIGHT, Justice.

This is an appeal by plaintiff from a judgment entered in defendant's favor on a cross-complaint in an action to quiet title to real property.

In 1924 plaintiff entered into negotiations with the county of Butte to sell to the county a piece of property on the Feather River. It was understood that the purpose for which the county desired to purchase the property was to erect thereon a veterans' memorial building and to provide for recreational activities in and along the river, such as swimming and boating, for veterans' organizations. The property involved in the negotiations was the eastern portion of Outside Lot 17 of the City of Oroville; and the sale was consummated in 1925. To facilitate the sale plaintiff executed a deed of conveyance, dated July 11, 1924, to the Butte County Title and Abstract Company; and thereafter, to-wit, on April 7, 1925, the title company conveyed the property by deed, as of that date, to the county, and the deed was recorded on April 8, 1925. The county took possession of the property in 1925, and thereafter caused to be constructed upon the southerly boundary thereof, fronting on Montgomery Street, a veterans' memorial building, and further improved the property just north of the levee of the city of Oroville for picnic and recreational purposes by constructing chairs, tables, etc., in and about the south bank of the Feather River, and a swimming pool in the river itself. No question respecting the county's title to any portion of said Outside Lot 17 arose until the year 1940, when the Golden Feather Dredging Company, acting under plaintiff, started dredging operations for gold on the river adjoining the county's recreational grounds. The county notified the company that it was trespassing, and thereupon arrangements were made to impound the gold dredged from the property, awaiting the outcome of this suit, which was filed by plaintiff on December 7, 1940. The question involved was whether the deeds under which the county acquired the property carried title to the thread of the river or only to the south bank thereof.

In 1872 a map of the Town of Oroville was made by one Edmund, which map is known as the Edmund's Survey of 1872. This map fixed the northerly boundary of said Outside Lot 17 at approximately the south bank of the Feather River. A subsequent map of the City of Oroville was made in 1900 by one Jasper, which map is known as the Jasper Survey of 1900. This map platted the north boundary of said lot to the thread of the Feather River, some 608 feet north of the line fixed by the Edmund's Survey. Plaintiff in 1919 received a deed to "All of outside Lot 17 of the City of Oroville, excepting the easterly 54 feet and 8 inches thereof." Plaintiff's deed to the title company described the property in the following manner: "All that certain real property situated partly in the City of Oroville and partly outside of said City, County of Butte, State of California, described as follows: All of Outside Lot Seventeen (17) of the Town, (now City) of Oroville, according to the Official Map thereof, filed in the office of the County Recorder of the County of Butte, State of California, *January 22nd, 1872,* saving and excepting * * *" (here follows exceptions, not here involved). (Italics added) The deed from the title company to the county of Butte used the same description; and the supervisors of Butte county in the resolution accepting said deed also used the quoted description.

Plaintiff claims that he intended to convey, and did by the deed convey no more than to the south bank of the river, according to the line fixed by the Edmund's Survey; that as words of limitation in the de-

scription in the deed, Lot 17 was first restricted to the Town of Oroville, as distinguished from the City of Oroville, and secondly, Lot 17 was defined as according to the official map filed in the office of the county recorded January 22, 1872. The evidence showed that since 1911 plaintiff had been acquiring the river bed for a mile and a half down stream from the Oroville Bridge for the purpose of conducting mining operations in the Feather River, and that he owned the north bank of the river opposite Lot 17. Plaintiff argues that this evidence lends further support to his contention that his intention was proved to be to convey only the land to the south bank of the river, not the river bed. This contention is without merit.

[1–3] The river at the point here involved is non-navigable. Plaintiff makes the contention that the evidence showed that it was navigable; but it seems to be conceded that the disputed area is beyond the point defined as navigable in Section 102 of the Harbors and Navigation Code, St.1937, p. 794, which defines the Feather River as navigable between its mouth and a point fifty feet below the first bridge crossing Feather River above the mouth of the Yuba River, and therefore the rules applicable to non-navigable streams are applicable here. They may be stated generally as follows: "A grant or conveyance of land bounded by a non-navigable stream carries with it the bed of the stream to its center, unless a contrary intent is manifest from the grant or conveyance itself. In such case the stream is regarded as the boundary or monument, and the purchaser takes to the middle of the monument as part and parcel of the grant. * * * Where the possession of land described in a conveyance would raise a presumption of ownership of the land in front of it to the middle of a stream, it is the exclusion of the presumption and not its inclusion which must be evidenced by the terms of the grant, where the grantor had power to include the land to the middle of the stream. The general rule has been held to apply 'although the grant may call for marked corners upon the bank of the stream, and for a line or lines between such corners, which do not correspond with the center of the stream.' * * * And while an intent to exclude the bed of the stream will not be presumed, but must be clear from the terms of the deed as interpreted by the surrounding circumstances, yet the question whether the conveyance carries title to the center of the stream depends on the intent of the parties, to be gathered from the description of the premises read in connection with other parts of the deed and by reference to the situation of the lands and the condition and relation of the parties to those and other lands in the vicinity. In other words, the presumption that the grantee takes to the center of the stream may be controlled by the terms of the conveyance, as interpreted by surrounding circumstances, manifesting an intention to the contrary." 9 C.J. pp. 187–189, secs. 65, 66. And Section 830 of the Civil Code provides: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; *when it borders upon any other water, the owner takes to the middle of the lake or stream.*" And Section 2077 of the Code of Civil Procedure provides: "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: * * * 4. When a road, or stream of water not navigable, is the boundary, *the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance,* except where the road or thread of the stream is held under another title." (Italics added.)

[4, 5] Here the intent of the grantor as appearing from the instrument of conveyance must be held to be by operation of law an intent to convey to the thread of the stream. The instrument of conveyance deeded the property according to the official map of January 22, 1872, which was the Edmund's Survey; and "When maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land." 9 C.J. p. 180, sec. 50; 11 C.J.S., Boundaries, § 24; Anderson v. Trotter, 213 Cal. 414, 2 P.2d 373. Plaintiff concedes that the line fixed by the Edmund's Survey in the map of 1872 was a *meander* line; and as held in Anderson v. Trotter, supra (citing 9 C.J. p. 181, sec. 51), a meander line cannot be considered a boundary (with certain exceptions not applicable here), but the true

boundary is the stream or other body of water on which the land borders. In that case the plaintiffs acquired their titles through patents. The lands were conveyed according to the plat of a survey thereof made by one Tucker in 1875, which describes the lands as extending to and abutting upon the waters of Clear Lake. The Tucker survey ran a meander line, described on the plat as the meander line of Clear Lake, and the plat filed with the United States surveyor-general and in the office of the interior department, shows the water-line of Clear Lake coincident with the meander line of the survey made by Tucker in 1875. Some 50 years later, in 1925, another survey was made by one Thorne, which placed the meander line beyond the line of the Tucker survey and included some 83 acres of land not shown to exist in the Tucker survey. Following the Thorne survey a patent was issued to defendant, including the 83 acres. Plaintiffs brought an action to quiet title, claiming title to the 83 acres. The trial court found against the claim of the defendant, holding that there was no basis for setting aside the Tucker survey, or holding that it was the result of either mistake or fraudulent act, and that under the law the water-line, and not the meander line, constituted the true boundary of the patented lands, and that the subsequent patent based upon a survey made fifty years later conveyed no title. The Supreme court affirmed the judgment, and a writ of certiorari was denied by the United States Supreme Court, 284 U.S. 686, 52 S.Ct. 208, 76 L.Ed. 579. The Supreme Court [213 Cal. 414, 2 P.2d 375] quoting from 9 C.J. p. 189, sec. 69, said: "The general rule adopted by both state and federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey. The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary, the purpose of meander lines being merely for the benefit of the government in ascertaining the quantity of land in the survey for which it requires payment; and the rules adopted in the various states as to the extent of the title of the owner of land bounded on rivers and other bodies of water apply in the case of land bounded on meandered waters."

[6] Therefore the deed in the present case, by operation of law, conveyed title, not to the meander line which cannot be considered a boundary, but to the thread of the stream. See also Hendricks v. Feather River Canal Co., 138 Cal. 423, 71 P. 496, and Kirby v. Potter, 138 Cal. 686, 72 P. 338, both involving lands along the Feather River, wherein it was held that the boundary of the lots involved there was not the meander line established by the government survey lines, along the bank of the river, but that the true boundary of the lots was the thread of the stream. Plaintiff makes the bare statement in his reply brief that "There is a difference between the construction to be given boundary lines of acreage under government surveys, and the construction to be given to private surveys of a city lot, where no government surveys whatsoever are involved as, for example, the instant case." But no authority has been cited in support of the statement, and we can see no reason in view of the language quoted from Anderson v. Trotter, supra, why those rules should be limited to government surveys. See analysis of Anderson v. Trotter, supra, in McLeod v. Reyes, 4 Cal.App.2d 143, 40 P.2d 839.

[7] Moreover, and aside from the wording of the conveyance, there is ample evidence to support a finding that plaintiff's intent was to convey to the thread of the stream. Plaintiff knew that the county purchased the property as a site for a veterans' memorial building and public park and picnic ground. The river at this point contained a deep pond which had been used as a swimming hole for many years. Since plaintiff knew that the land was to be used as a public park, he must also have known that use of the large swimming hole upon which the land fronted would inevitably be a prime feature of the park. In fact he states in his reply brief: "It was the intention of the plaintiff, and the same intention of the defendant, that the county should have all the rights of *boating, swimming* and picnicking along the bank of the Feather River." (Italics added.) In the situation disclosed here, plaintiff must have known that the county wanted and expected to obtain plaintiff's rights in the stream as well as in the land south of the south bank; and he does not claim that he did anything to dispel the public expectation. Nor did he make any claim to the land nor any objection to the county's use of the land or

water, until his dredger began operating there. Under all these circumstances, it would seem that a finding that he intended to convey that portion of the property to the county would not be unwarranted, and that the trial court's judgment that defendant owns to the thread of the river is correct.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.



62 Cal.App.2d 798

In re CARROLL'S ESTATE.

TREMPER v. BURRES.

Civ. 14356.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1944.

Hearing Denied April 7, 1944.

1. Wills ⇐440

To ascertain testatrix' intention, court must look to terms of will itself.

2. Wills ⇐531(1)

Where will discloses intent to give either per capita or per stirpes, the courts will give effect to such intention and there is no need to apply rules of construction.

3. Will ⇐439

If there is a question as to testatrix' intention, effect must be given to will in accordance with rules of construction which have been declared by statute or by the courts.

4. Wills ⇐531(3)

Under devise providing that remainder of testatrix' estate should be left "equally between" her niece and two sons of a named person, residue would be distributed per capita to the three beneficiaries as against niece's contention that use of word "between" indicated testatrix' intention that distribution should be per stirpes.

See Words and Phrases, Permanent Edition, for all other definitions of "Between".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Beulah A. Carroll, deceased. From a portion of the decree of distribution, Pearl L. Tremper, as guardian of the estate of Carole L. Tremper, a minor, appeals, opposed by Walton T. Burres, as guardian ad litem, etc., of Walton T. Burres, Jr., and Billie Jack Burres, minors.

Affirmed.

Stanley M. Arndt, of Los Angeles, for appellant.

John R. Moore, of Los Angeles, and Rutherford, Jacobs, Cavalero & Dietrich, of Stockton, for respondent.

DRAPEAU, Justice pro tem.

The decedent left a will entirely written, dated and signed by her, which is as follows:

"I, Beulah A. Carroll, being of sound and disposing mind, hereby make this my last will and testament as follows:

"I designate John H. Mathews, attorney of 814 Fidelity Building, Los Angeles, California, as my executor and direct that he be required to furnish bond.

"All the rest residue and remainder of my estate of every kind and nature and wherever situated and after the payment of all just claims and bills, I leave as follows:

"Five hundred dollars to Esther Conkle Jones of 10500 Riverside Drive, North Hollywood, California.

"My blue white solitaire diamond ring to my niece, Alvina Rodgers of R. D. 5, Box 142, Stockton, California.

"All other jewelry to go to my sister, Mrs. Pearl Louise Tremper living at 1721 Stanford Avenue, Stockton, California.

"The remainder of my estate is to be left equally between my niece, Carole Tremper, residing at 1721 Stanford Avenue, Stockton, California and to the sons of Walton T. Burres of 826 East Fourth Street, Stockton, California, the same to be held in trust by Walton T. Burres until the said sons shall have reached the age of twenty-one (each child to receive his share when he reaches twenty-one years) and to be used during the period of the trust for their education.

"In the event that any of the above bequests lapse by reason of the death of the named devisee, the bequest that otherwise would have gone to the deceased devisee,

had he or she lived, shall go in equal shares to the remaining devisees.

"Written and signed at Beverly Hills, California, all in my own handwriting, this twenty-second day of July, 1942."

"Beulah A. Carroll."

The three persons, the niece and the two boys, mentioned in the remainder clause are all of tender years.

The sole question in this case has to do with the determination of the shares to go to these three children. Was it the intention of the testatrix that the residue of her estate should go one-third each to her niece and to the two sons of Walton T. Burres, or was it her intention that the residue should go one-half to the niece and the other one-half to the two boys? The probate court held that the residue should be distributed in equal thirds to the three persons designated in the will. From this portion of the decree of distribution the niece has appealed.

Appellant's argument is based upon the contention that the word "between" as used in the will applies to two persons only; that the writer was a person of culture and education, and if she had desired the residue of her estate to go to more than two persons she would have used the word "among"; and that, therefore, the very language involved requires the estate to go one-half to the niece and the other one-half to the two boys. This argument is interesting and persuasive.

On the contrary, the respondent argues that the word "between" in popular usage may, and very often does, apply to more than two persons or things, and that the word "equally" qualifying the word "between" makes the construction given to the will by the probate court the only possible one that could have been given. That argument likewise is interesting and persuasive.

[1-3] To ascertain the intention of a testator we must look to the terms of the will itself. Courts are not to look for "some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used." In re Estate of Spreckels, 162 Cal. 559, 567, 123 P. 371, 374; In re Estate of Young, 123 Cal. 337, 55 P. 1011. When the instrument discloses the intent to give either per capita or per stirpes, the courts will give effect to such intention and there is no need to apply rules of construction. If there is a question as to the testator's intention, effect must be given to the will in accordance with rules of construction which have been declared by statute or by the courts.

[4] The rules here to be applied are well settled by at least two California cases. The first, and most nearly similar, is In re Estate of Morrison, 138 Cal. 401, 404, 71 P. 453. In that case the residue of the estate was "to be divided between my sister Mrs. Wann and her daughters and my brother Edward Stettinius." Our Supreme Court held the intention of the testator was to divide the estate per capita among the four persons mentioned. In the will now under consideration the testatrix used the word "equally", while in the Morrison case the court comments upon the fact that there were no qualifying words in the will such as "Share and share alike". Concerning the weight to be given to the word "between" in determining the intention of a testator, the Court observes: "As applied to persons and things, the word 'between' primarily refers to two, though Webster gives 'among' as a synonym, and a large number of cases the word is used in wills where a per capita devise or legacy was to more than two. As to the weight to be given to the word 'between,' it was said in Haskell v. Sargent, 113 Mass. 341, 343: 'The use of the word "between," strictly implying but two parties to the division, is a slight circumstance favoring the construction to which we incline, though not of much weight in itself independently of the other considerations mentioned.' In the case at bar, the use of 'between,' in its strictly technical sense, would require that 'Mrs. Wann and her daughters' should be regarded as a class, in order to make a division between two, since Edward, under such construction, must be entitled to one-half the residue. 'If a gift be to A and B and their children, or to a class and their children, every individual coming within the terms of the description, as well children as parents, will take an equal proportion of the fund; that is, the distribution will be made per capita.' (Jarman on Wills, star p. 1051, and cases cited in note.) The author adds, however, that 'this mode of construction will yield to a very faint glimpse of a different intention in the context.' Here, however, no 'different intention' is apparent in the will. No bequest was made in any part of the will to Mrs. Wann and her daughters as a class. Mrs. Wann's daugh-

ters' names are Bertha von Quast and Florence Wann [now von Schwerin]. In separate paragraphs the will gave to each by name a bequest of $5,000, to a nephew, Leslie Wann, $2,000, and to each of her brothers Derick and Edward Stettinius $5,000. Her brother Derick died before the codicil was executed, and his bequest was given to two of the children of her niece, Bertha von Quast, 'share and share alike.' Not only were these bequests of specific amounts to persons specifically named, but the amount given to Mrs. Wann and to each of her daughters and her brother, was the same; and having thus given these four persons, as distinct individuals, the same amounts, we may fairly infer that in disposing of the residue she did not intend to disturb that equality, but did intend that they should share equally. Having thus treated the daughters of her sister as distinct persons, not only in the distribution of the money into which the estate was converted, but having given each of them some articles of jewelry, and such equal distribution being at least consistent with the language of the residuary clause of the codicil, we see no reason to change the construction given it by the court below."

The other case establishing a rule which must be here applied is In re Estate of Rauschenplat, 212 Cal. 33, 35, 297 P. 882, 78 A.L.R. 1380. There the testator used the following language: "Secondly, I give, devise and bequeath all of my estate, real and personal, and wherever situate, to Wilhelmina Battie, my sister, of Hamburg, Germany; to all of the living children of my deceased half-brother, Mathias Grayfe, late of Hamburg, Germany, and to Paulina Stairs, daughter of James W. Stairs, of San Luis Obispo, California, share and share alike." In holding that the beneficiaries were to take per capita because the testator used the words "share and share alike", the Supreme Court lays down the rule to be followed: "While the decisions are by no means harmonious, a fair statement of the rule appears in 2 Jarman on Wills (6th Ed.) 205, where it is said: 'Where a gift is to the children of several persons, whether it be to the children of A and B or to the children of A and the children of B, they take *per capita* and not *per stirpes*. The same rule applies where a devise or bequest is made *to a person and the children of another person;* or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation. * * *'" (Emphasis included)

That portion of the decree of distribution appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



62 Cal.App.2d 597

PEOPLE v. WAGNER.

Cr. 2272.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1944.

1. Infants ⇐20

Conflicting evidence sustained conviction of contributing to the delinquency of a minor. St.1937, p. 1033, § 702.

2. Criminal law ⇐747

A conflict between stories of respective witnesses for state and defendant is for jury.

3. Criminal law ⇐516

A "confession" is a person's declaration of his agency or participation in a crime and is restricted to acknowledgment of guilt.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession".

4. Criminal law ⇐409

An admission of a fact, not in itself involving criminal intent, will not be rejected as evidence without preliminary proof required for admission of a confession merely because it may, when connected with other facts, tend to establish guilt.

5. Criminal law ⇐409

When statement of guilty conduct is such that it does not involve a criminal intent, or asserts facts amounting to justification or excuse for defendant's acts, it is an "admission" and is admissible without preliminary proof required of a confession.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

6. Criminal law ⇐409

Where information charged defendant with contributing to the delinquency of minor by committing certain immoral acts, defendant's statement admitting the furnishing of liquors to boys, but denying immoral acts was an "admission", and was admissible without preliminary proof required of a confession. St.1937, p. 1033, § 702.

7. Criminal law ⇐1037(1, 2)

Where defendant did not object to remarks of district attorney in a manner calling for a ruling, and did not ask for an instruction, defendant could not, for first time on appeal, assign such remarks as misconduct.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

John Wagner was convicted of contributing to the delinquency of a minor, and he appeals.

Affirmed.

Joseph A. Murphy, of Oakland, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant was charged in two separate informations with a violation of section 702 of the Welfare and Institutions Code, St. 1937, p. 1033, in relation to two boys aged fifteen and sixteen. By consent the two actions were consolidated for trial to a jury and in both cases a verdict of guilty was returned. Motions for a new trial were denied and the defendant has appealed from the judgments. Though separate clerk's transcripts have been filed, numbered 2272 and 2273, both cases have been briefed and argued as one, and the evidence and rulings are all treated as applicable equally to both cases. Technically our opinion will apply to case number 2272 but it will cover the judgment in case number 2273, 145 P.2d 649, as well. The basis of the charge in each case is that defendant took the two boys on separate occasions to an auto court in Marin County where they stayed over night and where defendant induced the boys to drink intoxicating liquor and endeavored to commit with them certain immoral acts.

The two boys were students in the Piedmont High School in Oakland. The defendant was a frequent visitor at the school and showed an interest in the boys during their participation in school athletics. He was a member and frequent visitor of the Athens Athletic Club in Oakland and the San Francisco Yacht Club at Belvedere, Marin County. He helped organize, or was interested in, a group of boys known as the "Sea Scouts", of which the complaining witnesses were both members, and had formed the practice of taking members of the group individually to Marin County for participation in boating and rowing. Each of the boys testified that on specified dates the defendant drove them to Marin County where he had engaged accommodations at an auto court for the night, that he served them with drinks of intoxicating liquor, and that while they occupied the same bed the immoral practices were carried on. Prior to his trial the defendant admitted to the district attorney that he had frequently given intoxicating liquor to boys who were minors, but denied commission of the acts charged in the information. The district attorney testified to this conversation, and this is assigned as one of the errors of the trial. Assignment of two other errors is made—the insufficiency of the evidence, and the misconduct of the district attorney.

[1, 2] On the question of the sufficiency of the evidence no extended argument is necessary. The appellant does not contend that the evidence of the two boys is not sufficient to sustain the verdicts. His contention is that both were contradicted as to the respective dates when the offenses were alleged to have been committed. Testimony was offered by appellant, including records of the Athens Club and of the Yacht Club, tending to impeach that of the two boys relating to the dates when they were in the company of appellant. In rebuttal the State offered evidence from which the jury could have inferred that the records of the Yacht Club had been altered for appellant's benefit. It also fully discredited the testimony of appellant's witnesses. We have therefore nothing more than the ordinary conflict between the stories of the respective witnesses. The jury elected to give credit to those called by the State, and that ends the controversy so far as this appeal is concerned. 2 Cal.Jur. p. 921.

The assignment of error relating to the admission of the testimony of the district attorney is based upon the claim that he was permitted to testify to a "confession", and that the proper foundation for such testimony had not been laid. In his conversation with the district attorney the appellant steadfastly denied commission of the immoral acts charged, but admitted he had given the boys intoxicating liquor on numerous occasions. He went to the district attorney voluntarily on the day following his arrest, for what purpose is not disclosed. But it does appear that he requested the district attorney to act as his attorney.

[3-5] The point is languidly briefed by both parties. The appellant cites no authorities in support of his argument, while this argument is mainly a general discussion of the convincing weight of the testimony because of the reputation and official position of the witness, rather than a discussion of its admissibility. The respondent relies upon People v. Ammerman, 118 Cal. 23, 50 P. 15, and People v. Stokes, 5 Cal. App. 205, 89 P. 997, both to the general purport that statements of an accused which do not involve guilt are treated as admissions and do not require the preliminary proof necessary for the admission of a confession. The real question involved here is whether when several acts are charged as constituting one crime—here the contributing to the delinquency of a minor—the statement of the accused admitting the commission of some of the acts on other occasions, and in relation to persons other than those for which he is on trial, but denying commission of the acts as charged, is to be treated as a confession of guilt or as an admission of the facts related. The question is answered by the rule stated in People v. Velarde, 59 Cal. 457, 461, where the court says: "Speaking of confessions, the Court in People v. Parton, 49 Cal. [632], 637, 638, says: * * * 'A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt. An admission of a fact, not in itself involving criminal intent, is not to be rejected as evidence (without the preliminary proof) merely because it may, when connected with other facts, tend to establish guilt.' And in People v. Strong, 30 Cal. [151], 157, it is said that 'a confession, in criminal law, is the voluntary declaration made by a person who has committed a crime or misdemeanor to another, of the agency or participation he had in the same.'" And in People v. Herrera, 61 Cal. App. 13, 14, 214 P. 254, where the court says: "When the statement of guilty conduct is such that it does not involve a criminal intent, or where it constitutes facts amounting to justification or excuse for the defendant's acts, it is an admission rather than a confession. People v. Weston, 169 Cal. 393, 146 P. 871; People v. Fowler, 178 Cal. 657, 174 P. 892; People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Le Roy, 65 Cal. 613, 4 P. 649. The statement attributed to Herrera does not involve a criminal intent." See also People v. Chan Chaun, 41 Cal.App.2d 586, 593, 107 P.2d 455. See 20 Am.Jur. p. 472.

[6] Here the appellant admitted generally that he had given a number of boys intoxicating liquors to drink. He did not admit the charges found in the informations but specifically denied them, and, when informed that it was contrary to the Welfare and Institutions Code to give intoxicating liquor to boys of that age, answered: "I never thought of that." Hence the statements made to the district attorney were not a confession of guilt of any of the crimes charged in the informations, and the preliminary proof necessary for the admission of a confession was not required.

[7] The appellant assigns as misconduct two instances occurring in the closing argument of the district attorney. Without saying that either was unjustified or prejudicial, it is sufficient to state that the question is not properly raised here as appellant did not object to the remarks in a manner calling for a ruling and did not ask for an instruction. People v. Hanks, 35 Cal. App.2d 290, 301, 95 P.2d 478.

The judgment and the order are affirmed.

STURTEVANT and SPENCE, JJ., concur.

62 Cal.App.2d 981

PEOPLE of the State of California, Plaintiff and Respondent, v. John WAGNER, Defendant and Appellant.

Cr. 2273.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1944.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Joseph A. Murphy of Oakland, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The judgment and the order are affirmed for the reasons given in 145 P.2d 646.



62 Cal.App.2d 687

BULLER v. BULLER et al.

Civ. 14251.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1943.

Rehearing Denied Feb. 25, 1944.

1. Divorce ⇐322

Where final divorce decree makes no disposition of community property, the parties become tenants in common, and, if cause of divorce was neither cruelty nor adultery, each will thereafter be owner of an undivided one-half of community property without further order of the court. Civ.Code, §§ 146, 147.

2. Divorce ⇐322

Where divorce decree for habitual drunkenness made no disposition of community property, and former wife subsequently brought action to determine her interest in allegedly community property, court was without power to award plaintiff a parcel of land rather than an undivided half thereof. Civ.Code, §§ 146, 147.

3. Divorce ⇐322
Vendor and purchaser ⇐244

In action by former wife to determine her interest in allegedly community property, evidence showed that former husband owned an undivided one-half interest in certain realty involved, and that another person was an innocent purchaser for value of such interest.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Claire M. Buller against John J. Buller and others for determination of plaintiff's interest in allegedly community property. From a judgment for plaintiff, defendant Marcus L. Roberts appeals.

Judgment reversed and cause remanded for further proceedings in accordance with opinion.

Marcus L. Roberts, of Los Angeles, in pro. per., for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an action for the determination of plaintiff's interest in community property which, the complaint alleges, consists of Lot 62 of Chancellor's Tract No. 1 (also herein referred to as Chanslor Tract No. 1), situated in Riverside County, "together with a certain number of cattle, located on a ranch in Riverside County, California, an automobile, an interest in certain ranch property located in Riverside County, California, certain bales of cotton, honey, alfalfa seed * * *."

The complaint also alleges that no disposition was made of said community property in that certain divorce action brought by plaintiff against defendant John J. Buller (on the ground of habitual intemperance) on the 16th day of September, 1933; that the interests of the plaintiff and of defendant John J. Buller in and to said property have never been determined; that said defendant has received all of the value of the cattle, cotton, honey, alfalfa seed and the automobile, and the value of all other community property of said parties except: Lot 62 of "Chancellor's" Tract No. 1; that this action is brought for the purpose of having determined the interest of plaintiff and defendant John J. Buller, in the community property of the parties here-

to, and for the purpose of quieting the title of the plaintiff in and to such portion of the community property that the plaintiff is entitled to receive.

The complaint further alleges that Elizabeth B. Atwill and Marcus L. Roberts claim some right, title and interest in and to some of the community property of the plaintiff and of the defendant John J. Buller, which claims are subordinate to the right, title and interest of plaintiff therein.

Plaintiff then prays that the court determine the community property interests of the plaintiff and defendant John J. Buller, and award one-half thereof to her, and that the claims of Atwill and Roberts be adjudged subordinate and subject to the right, title and interest of plaintiff herein to her proportionate share of said community property.

Defendants John J. Buller and Elizabeth B. Atwill filed herein disclaimers in and to any right, title, interest or estate in the property involved.

At the conclusion of the trial, the court found that defendant John J. Buller "has received all of the value of the cattle, cotton, honey, alfalfa seed and the automobile, all of which are community property" of himself and plaintiff, and that said defendant "received and took into his possession the whole of said community property of said parties, except Lot 62 of the Chancellor's Tract No. 1 * * * that the plaintiff is entitled to receive as her share of the community property * * * Lot 62 of Chancellor Tract No. 1 * * * free and clear of any claim of the defendants, J. J. Buller, Elizabeth B. Atwill and Marcus L. Roberts * * *."

The court also found that defendant John J. Buller, "for a nominal consideration, did on or about March 2, 1937, attempt to convey to Elizabeth B. Atwill, all of his right, title and interest in and to said property. That at said time, the said Elizabeth B. Atwill had full knowledge of the fact that the plaintiff herein was claiming said property as her share of the community property. That said Elizabeth B. Atwill was not a bona fide purchaser of said property for value. * * * that on or about the 6th day of December, 1940, Elizabeth B. Atwill for a nominal consideration attempted to transfer whatever right (she) had in and to said property to the defendant Marcus L. Roberts * * * (who) took said property with full knowledge of the fact that said Elizabeth B. Atwill had not paid a consideration therefor, and with full knowledge of the fact that plaintiff herein claimed said property as her share of the community property and with knowledge * * * that the community rights of the plaintiff and the defendant John J. Buller in and to their community property had not been determined by a court of competent jurisdiction and that the said Marcus L. Roberts was not a bona fide purchaser for value. * * * That on or about the 10th day of December, 1940, John J. Buller for a nominal consideration, conveyed to Marcus L. Roberts all of his right, title and interest in and to said property * * * that by reason of said deeds, the said defendant Marcus L. Roberts obtained no other or different title than had theretofore vested in the defendant, John J. Buller, and took said property subject to all of the claims and equities in favor of the plaintiff herein and against the defendant John J. Buller."

From the judgment which was thereafter entered pursuant to said findings, defendant Marcus L. Roberts prosecutes this appeal.

Appellant urges (1) that the findings are not supported by the evidence; and (2) that he is the owner of an undivided one-half interest in said Lot 62. He traces his ownership thereto as follows:

(1) That no disposition was made of the community property of the plaintiff, Claire M. Buller, and the defendant, John J. Buller, in either the interlocutory decree of October 25, 1934, or the final judgment of divorce entered on October 30, 1935;

(2) That on March 2, 1937, by quitclaim deed, defendant John J. Buller conveyed said lot to his sister, defendant Elizabeth B. Atwill;

(3) That on August 14, 1937, said lot was sold to the Palo Verde Irrigation District on account of delinquent water assessments, and said district by deed dated September 28, 1940, conveyed said lot to defendant Elizabeth B. Atwill, who by quitclaim deed dated December 6, 1940, conveyed said lot to appellant;

(4) That in the meantime, on January 27, 1940, plaintiff caused a writ of execution to issue in the aforesaid divorce action by virtue of which she levied upon all of the interest of defendant John J. Buller in said lot. In that proceeding the lot was sold and plaintiff purchased it at the execution sale;

(5) That on December 10, 1940, John J. Buller quitclaimed his interest in said lot to appellant, and said appellant, in conformity with section 702 of the Code of Civil Procedure, redeemed said lot from plaintiff on January 27, 1940, and received a certificate of redemption from the Sheriff of Riverside County;

(6) That on January 23, 1941, William H. Atwill, husband of Elizabeth B. Atwill, quitclaimed all of his interest in said lot to appellant.

This case and the case of Buller v. Buller et al., 145 P.2d 653, this day decided, were consolidated for trial, and separate appeals have been perfected from the judgments rendered therein.

At the trial of said consolidated cases, only two witnesses were produced, i. e., the plaintiff and the County Recorder of Riverside County. The plaintiff testified as follows:

"Q. Now, in 1933, when you filed your action for divorce, will you tell the court what property you had at Blythe? A. By that time we had proved up on our homestead. Then we had the Chancellor Tract, Lot 62, near Blythe. That is real property. Was that all you wanted?

"Q. I want to know what personal property you had. A. He had alfalfa seed.

"Q. Will you tell us approximately how much? A. I would say about $1200 worth. He had approximately 50 cases of honey.

"Q. Do you know what the honey was worth at that time? A. I would say along about $500; he had five bales of cotton, and I think he was given about $500. I think it was about $100 a bale at that time. The rest of the property that he had I wouldn't know how much he got.

"Q. Did he have any cattle? A. He had cattle; I would say along about 65 head of cattle. It may have been more, or it may have been less. He had hogs, he had chickens, turkeys, ducks, guinea hens.

"Q. Did he have wagons? A. He had several wagons, plows, cultivators, tractors and a truck, a Ford truck; he had all kinds of implements of all kinds.

"Q. Did you receive any portion of this personal property? A. No.

"Q. Did Mr. Buller take possession of all of it? A. He had it all.

"Q. Has he ever accounted to you for any proceeds of this personal property? A. Never has.

"Q. You have received, of the personal property between yourself and your husband, up to the present time, no part of it, is that right? A. Not a bit, no.

"Q. Although you have had possession of the Chancellor Tract lot? A. Yes, that home I have had. * * *

"Q. (Mr. Wood) Do you recall having given a quitclaim deed to Mr. Quick and he put certain money in escrow? A. Oh, yes, yes; but I didn't receive any of that money.

"Q. No, not yet. But outside of that, you never conveyed away any interest in that homestead? A. No.

"Q. Do you know whether or not your husband ever conveyed any interest in that homestead other than at that time? A. No. * * *"

Cross-examination:

"Q. Getting back to your son Freddie, it was prior to the interlocutory decree that Freddie went to live with your former husband, is that correct? A. I don't remember.

"Q. In other words, he was supporting him for many months prior to the time you obtained your interlocutory decree, isn't that correct? A. Against my wishes. * * *

"Q. (Mr. Roberts) Then at the time the interlocutory decree was entered, no order of the court was made requiring him to pay you any further money for the support of minors, was there.

"Mr. Wood: We will stipulate that was not. We will stipulate that she supported the children all the time.

"Mr. Roberts: I won't stipulate as to that.

"Q. Now, ever since the interlocutory * * * from the time Freddie went to live with your former husband and up until the time of his death, he was entirely supported by your husband, is that not a fact? A. No * * * Freddie worked.

"Q. Did you contribute anything toward his support? A. No. * * *

"Q. Do you know that Freddie and your former husband lived with Mrs. Atwill for about six months—do you not? Do you know that was true? A. I wouldn't say. I don't know.

"Q. Don't you know where Freddie was during this period? A. I do.

"Q. Isn't it a fact he lived with Mrs. Atwill? A. Whether he lived there or not, I couldn't say * * * when he first went out to work at this hotel, he lived—he stayed at Mrs. Atwill's. * * * I do know he was with Mrs. Atwill; but how many months—it wasn't very long * * *."

Upon the uncontradicted evidence of plaintiff Claire M. Buller, and despite the prayer in the instant case, that said plaintiff be awarded one-half of the community property, the trial court found that the former husband, John J. Buller, "has received all of the value of the cattle, cotton, honey, alfalfa seed and the automobile, all of which were community property * * * and that, said defendant received and took into his possession the whole of said community property * * * except Lot 62 of the Chancellor's Tract" No. 1, and that said plaintiff "is entitled to receive as her share of the community property * * * Lot 62 of the Chancellor's Tract No. 1 * * *."

The complaint in the divorce action alleged that "plaintiff and defendant during the period of their married life accumulated * * * Lot 62 * * * That said plaintiff and defendant have certain cattle located on a ranch in Riverside County, California. That *plaintiff* (defendant) is now possessed of certain bales of cotton, honey and alfalfa seed, all of which is community property of plaintiff and defendant." While the court in the divorce action found "that all of the allegations of the plaintiff's complaint are true", no disposition was made of any of said community property.

[1] As stated in the opinion in the companion case of Buller v. Buller, supra, quoting from Brown v. Brown, 170 Cal. 1, 3, 147 P. 1168: "Where the final decree of divorce makes no disposition of the community property, the parties become tenants in common of such property. If the cause of divorce was neither cruelty nor adultery, each will thereafter be the owner of an undivided one-half of the community property without further order of the court * * *." See, also, sections 146 and 147, Civil Code.

Therefore, the question for decision is whether the trial court in the instant case had power to award to plaintiff as her share of the community property a particular parcel of land rather than an undivided one-half thereof.

In a discussion of the matter of divorce without a division of the community property in McKay on the Law of Community Property, Second Edition, page 864, the following appears: "When there is no allegation as to community property and no decree or judgment on the point, the decided weight of authority is that the former spouses hold the community property as tenants in common, subject, of course, to the payment of the community debts. An action equitable in character, as that term is used in the common law, may be brought by either party to settle the affairs of the late community and divide its property. *The court in this action will not, however, possess those special powers as to division that are sometimes conferred on courts in divorce actions to depart from a mathematically equal division.* * * *" Citing De Godey v. Godey, 39 Cal. 157; Tabler v. Peverill, 4 Cal.App. 671, 88 P. 994; Biggi v. Biggi, 98 Cal. 35, 32 P. 803, 35 Am.St. Rep. 141. (Emphasis added.)

[2] In view of the foregoing, it appears to have been error on the part of the trial court to award to plaintiff any more than an undivided one-half interest in the lot in question.

[3] The evidence adduced at the trial of the consolidated cases does not support the court's findings that appellant took title with knowledge that plaintiff claimed said lot as her share of the community and that he was not a bona fide purchaser thereof for value. In the circumstances presented by the instant litigation, through the mesne conveyances hereinbefore shown, appellant became the owner of an undivided one-half of said Lot 62 as the successor in interest of defendant John J. Buller. Reference is hereby made to the opinion in the companion case of Buller v. Buller, supra, for a discussion of the efficacy of a quitclaim deed to pass title to whatever interest is then owned by the grantor therein.

For the reasons stated, the judgment is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.

62 Cal.App.2d 694

BULLER v. BULLER et al.

Civ. 14252.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1943.

Rehearing Denied Feb. 25, 1944.

1. Vendor and purchaser ⇐244

In action by divorced wife to quiet title and determine ownership of sum of money, findings that former husband had attempted to transfer property represented by proceeds, but that no consideration was paid therefor by grantee who took with knowledge that it was community property, and that grantee had no interest in proceeds, were not supported by the evidence.

2. Divorce ⇐322

Where final divorce decree does not adjudicate rights of parties in or make any disposition of community property, the parties become owners of such property as tenants in common.

3. Tenancy in common ⇐35, 43

A tenant in common has the right to dispose of his own undivided share, but he may not sell the whole property nor any portion thereof except his own, and if he undertakes to dispose of any larger interest his co-owners are not bound thereby.

4. Deeds ⇐25

Real estate or an interest in real estate can be alienated or assigned by a quitclaim deed.

5. Deeds ⇐25, 121

A "quitclaim deed" is closely related to a simple release, but has come to be recognized as a distinct form of conveyance and operates like any other deed to the extent of transferring whatever title or interest the grantor has, but none other.

See Words and Phrases, Permanent Edition, for all other definitions of "Quitclaim Deed".

6. Divorce ⇐322

Where divorce decree did not adjudicate rights of parties in or make any disposition of community property, the parties became tenants in common and a quitclaim deed by former husband conveyed his undivided one-half interest therein.

7. Appeal and error ⇐909(1)

Where record on appeal in action by former wife to quiet title and determine ownership of proceeds of certain real property did not disclose date of judgment upon which writ of execution for payment of money for support of minor children issued, and no provision for such payment was made in divorce suit, it must be assumed that judgment was not entered until after former husband had conveyed his interest in community property which was not disposed of in divorce suit.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Claire M. Buller against John J. Buller and others to quiet title and determine ownership of a sum of money. From a judgment for plaintiff, the defendant Elizabeth B. Atwill appeals.

Judgment reversed and cause remanded for further proceedings in conformity with opinion.

Marcus L. Roberts, of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from a judgment in favor of plaintiff Claire M. Buller, in an action to quiet title and determine the ownership of a sum of money.

The facts which form the background of this action briefly are as follows:

Claire M. Buller and John J. Buller were formerly husband and wife, and during their marriage they accumulated certain personal property together with two parcels of real property situate in Riverside County, to-wit:

(1) Lot 62 of the Chancellor Tract No. 1, also referred to throughout the record as Chanslor Tract No. 1;

(2) The northeast quarter of section 34, township 8 south range 22 east, S.B.B.&M., referred to in the record as the government "homestead" property.

On September 6, 1933, said Claire M. Buller brought an action for divorce against said John J. Buller upon the ground of habitual intemperance, alleging in her complaint: "VI. That plaintiff and defendant, during the period of their married life, accumulated a certain parcel of land located in the County of Riverside, State of Cali-

fornia, and described as: Chancellor Lot No. 62, located in or near the City of Blythe, State of California. That said plaintiff and defendant have certain cattle located on a ranch in Riverside County, California. That plaintiff is now possessed of certain bales of cotton, honey, and alfalfa seed, all of which is community property of plaintiff and defendant." But no mention was made in the complaint of the homestead property. The prayer of the complaint was to the effect that "all of the community property * * * be awarded to plaintiff." Although the trial court found in the divorce action "that all of the allegations of plaintiff's complaint are true", no disposition was made of any of the community property in either the interlocutory decree of October 25, 1934, or the final judgment of divorce entered on October 30, 1935.

On March 2, 1937, defendant John J. Buller quitclaimed all his interest in both parcels of real property to his sister, Elizabeth B. Atwill, the appellant herein.

Thereafter, in 1939, the homestead property was sold to E. E. Quick, who received a grant deed therefor from John J. Buller, a quitclaim deed from Elizabeth B. Atwill and her husband, William H. Atwill, and also a quitclaim deed from Claire M. Buller covering said property. The purchase price of $762.50 was deposited by Mr. Quick with the Riverside Title Company, whereupon on November 16, 1939, Claire M. Buller caused an execution to issue out of the aforesaid divorce action directed to the said title company on account of money in the amount of $983 which had accumulated and was unpaid by John J. Buller to said Claire M. Buller for the support of the couple's minor children. The title company made its return to the execution to the effect that it had no knowledge as to whether John J. Buller, Claire M. Buller or Elizabeth B. Atwill was the owner of the whole or any part of the deposit of $762.50. Shortly thereafter, the instant action was instituted by Claire M. Buller "for the purpose of having the title to said sum of $762.50 now held by the Riverside Title Company, determined, and her interest therein quieted, and the interest of said John J. Buller paid over under and pursuant to the terms of the Writ of Execution heretofore issued out of the above entitled Court." The Riverside Title Company interpleaded and deposited said sum of $762.50 with the Clerk of the trial court, and the instant action was dismissed as to said company.

The instant case and that of Buller v. Buller et al., 145 P.2d 649, this day decided, were consolidated for trial, and at the conclusion thereof, the court found as to this case that John J. Buller attempted to transfer to Elizabeth B. Atwill the "real property sold, of which said money is the proceeds", but that Elizabeth B. Atwill paid no consideration therefor and took the same with full knowledge of the fact that Claire M. Buller claimed said property as community property and was entitled to the proceeds therefrom, and that said Elizabeth B. Atwill had no interest in the said sum of $762.50 on November 16, 1939 (the date when the writ of execution issued), nor at any time prior or subsequent thereto. That at all times subsequent to November 16, 1939, Claire M. Buller was entitled to the whole of said $762.50 "by reason of the ownership of a one-half interest in and to said property, of which said sum is the proceeds, of the community property of plaintiff and defendant John J. Buller, which said property was not disposed of at the time of the divorce * * * and at all times subsequent to November 16, 1939 (plaintiff) was entitled to the remainder of said $762.50 by reason of the writ of execution hereinabove referred to."

Appellant urges that the finding of the court that Elizabeth B. Atwill "paid no consideration for said transfer and took said property from the defendant John J. Buller with full knowledge of the fact that the plaintiff Claire M. Buller claimed said property as community property and was entitled to the proceeds thereof"—has no support in the evidence.

An examination of the reporter's transcript reveals that the only witnesses produced at the trial of the consolidated cases were the plaintiff and the County Recorder of Riverside County, and that during his cross-examination of the plaintiff, counsel for appellant made the following statement: "We have a deed here of Mr. Buller to Mrs. Atwill, and I am going to show that they lived there for a year and a half. Mr. Buller and the boy lived there together for six months, paying no board. Then Mr. Buller took a job elsewhere, leaving his son there for another year, and the boy was entirely supported, and that is a consideration for the deed." Accordingly, the following uncontradicted evidence was elicited by said counsel from the plaintiff:

"Q. Do you know that Freddie and your former husband lived with Mrs. Atwill for about six months—do you not? Do you know that is true? A. I wouldn't say. I don't know.

"Q. Don't you know where Freddie was during this period? A. I do.

"Q. Isn't it a fact he lived with Mrs. Atwill? A. Whether he lived there or not, I couldn't say * * * when he first went out to work at this hotel, he lived—he stayed at Mrs. Atwill's. * * * I do know he was with Mrs. Atwill; but how many months—it wasn't very long * * *."

The final decree of divorce was entered on October 30, 1935; John J. Buller quitclaimed his interest in the two parcels of real property to Mrs. Atwill in March of 1937, and the property here involved was not sold to Mr. Quick until 1939. Mrs. Buller made no claim in her complaint for divorce that the homestead was community property and the record does not disclose any evidence tending to prove that plaintiff ever made such claim.

[1] From this it would appear that the findings of fact complained of are not supported by any competent evidence.

[2] The particular piece of community property here in question was neither mentioned in the complaint nor disposed of in the action for divorce, and it is conceded by respondent that "the rule of law in this state is settled beyond controversy that when a final decree of divorce is granted and does not adjudicate the rights of the parties in, or make any disposition of the community property, the parties become owners of such property as tenants in common." See 3 Cal.Jur.Supp. 673, and cases there cited, including McBride v. McBride, 11 Cal.App.2d 521, 54 P.2d 480; Deacon v. Deacon, 101 Cal.App. 195, 281 P. 533; Tarien v. Katz, 216 Cal. 554, 15 P.2d 493, 85 A.L.R. 334; In re Estate of Brix, 181 Cal. 667, 186 P. 135; 5 R.C.L. 861; and 85 A.L.R. 340.

In the case of Brown v. Brown, 170 Cal. 1, 3, 147 P. 1168, 1169, it is stated: "Where the final decree of divorce makes no disposition of the community property, the parties become tenants in common of such property. If the cause of divorce was neither cruelty nor adultery, each will thereafter be the owner of an undivided one-half of the community property without further order of the court, but, if given for either of said causes, the respective interests of the parties in the community property left undisposed of is subject to the determination of a court of competent jurisdiction in a subsequent action or proceeding. (Citing authorities.)"

[3] It is well settled that "a tenant in common property has the right to dispose of his own undivided share, but he may not sell the whole property, nor any portion thereof, except his own, and if he undertakes to dispose of any larger interest his coowners are not bound thereby." Payne v. Callahan, 37 Cal.App.2d 503, 517, 99 P.2d 1050, 1056, citing 7 Cal.Jur. 357.

[4] "It has long been the accepted rule in this state that real estate, or an interest in real estate, can be alienated or assigned by a quitclaim deed. Graff v. Middleton, 43 Cal. 341–344. Such a deed is good as against even an unrecorded grant, bargain, and sale deed. Dunn v. Carroll, 101 Cal.App. 209, 281 P. 506, and cases cited." Beach v. Faust, 2 Cal.2d 290, 293, 40 P.2d 822, 823.

[5] In 9 Cal.Jur. pp. 99, 204, 205, the following statements appear: "A quitclaim deed is closely related to a simple release, but has come to be recognized as a distinct form of conveyance, and operates like any other deed to the extent of transferring whatever title or interest the grantor has, but none other. * * * In California from the earliest times, the quitclaim deed has been in every-day use for the purpose of transferring title to land (citing authorities), and has been considered as effectual for that purpose as deeds of bargain and sale, or any other form of deed. * * * A quitclaim deed, however, purports and operates to transfer only such interest as the one executing it then has, and hence does not carry an after-acquired title."

[6, 7] According to the foregoing principles of law, appellant Elizabeth B. Atwill, by virtue of the quitclaim deed from defendant John J. Buller, acquired title to whatever interest the latter then owned in the "homestead" property, to-wit, an undivided one-half interest. Moreover, the record does not disclose the date of the judgment, upon which the writ of execution issued on November 16, 1939, for the payment of money for support of the minor children, and since no provision for such payment was made in either the interlocutory or final decrees of divorce, it must be

assumed that such judgment was not entered until after title to the half-interest in the "homestead" property vested in appellant. As a result, appellant is entitled to receive one-half of the proceeds from the sale of said property to Mr. Quick.

For the reasons stated, the judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.



62 Cal.App.2d 817

PEOPLE v. KESSLER.

Cr. 3751.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1944.

1. Criminal law ⇐552(3)

Where the evidence relied upon for conviction was purely circumstantial, all doubts were to be resolved in favor of defendant and there could be no conviction unless the facts proved were not only entirely consistent with theory of guilt but were irreconcilable with any other rational conclusion.

2. Criminal law ⇐1159(6)

Where circumstantial evidence reasonably justified verdict of guilty, reviewing court could not interfere.

3. Arson ⇐31
Criminal law ⇐409

In prosecution for arson and for burning insured property, evidence concerning former fires was admissible and jury had right to accord some weight to defendant's denials and reluctant admissions of former fires as tending to show a consciousness of guilt, although there was no proof that other fires were of incendiary origin. Pen.Code, §§ 448a, 450a.

4. Arson ⇐37(3)

Where the crime of burning property has been proved, fact that the property was over-insured, especially when coupled with deceitful statements of accused tending to show a consciousness of guilt, is sufficient to sustain a conviction of arson or allied offenses. Pen.Code, §§ 448a, 450a.

5. Arson ⇐37(3)

In prosecution for arson and for burning insured property, where it was conceded that fire was of incendiary origin, evidence that property was over-insured, that defendant had other fires which were profitable, coupled with deceitful statements and absence of evidence that fire was set by anyone else, was sufficient to sustain conviction. Pen.Code, §§ 448a, 450a.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Christian N. Kessler was convicted of arson and of burning insured property, and he appeals.

Affirmed.

Joseph W. Ryan and Theodor Ira Kowan, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Appellant was accused by separate counts of an information of setting fire to a shop building and to goods, wares, and merchandise contained therein, with intent to defraud the insurer of the personal property, Rhode Island Insurance Company. He was found guilty by a jury and was sentenced on each count. He appeals from the judgments and from the order denying his motion for a new trial. A reversal is sought as to each conviction upon the sole ground of insufficiency of the evidence.

Defendant was 75 years of age and had followed the business of tailor, bushelman and clothes cleaner for many years. He came to Los Angeles in January, 1942, and in the following March bought a well equipped tailor shop in a rented store room, for the sum of $1,000. He moved into the place household furniture and equipment which he had brought from Philadelphia and which was contained in three large barrels and two or three trunks. He took out some of his household possessions when he set up housekeeping and left the remainder in a rear room of his shop. He was called on by an insurance solicitor and insured his tailoring equipment and fixtures

for $2,000, and his personal belongings for $1,500. This latter policy was changed to maintain coverage of the insured goods as they were transferred to defendant's residence, until at the time of the fire the coverage in the shop was only $500. Defendant had requested the elimination of this $500, but the request had not been acted upon by the company. The amount of $2,000 on the shop equipment was suggested by the solicitor as his estimate of what it would cost to reproduce it. Defendant lived in a small apartment with his housekeeper, a Mrs. Williams, who had been with him in that capacity for 16 years. At the time of the fire Mrs. Williams was working in an aircraft plant on the midnight shift. Defendant did not drive a car and it was customary for Mrs. Williams, when returning from work in the morning, to drive defendant to his work. They were the only ones who had keys to the shop. Defendant was paying $30 a month rent for the shop and was not in arrears. After purchasing the shop he had $1,750 in bank and his daughter owed him $250 which he had loaned her. Defendant testified that he did not keep any books, that he paid his bills as they fell due, that he was making a living and was not going into debt, but he did not testify at the trial as to his earnings in the shop. He testified that he was at home with Mrs. Williams on the night of the fire until she left for work at about 11:30, and alone until she returned the following morning.

Firemen arrived at defendant's shop about 7:30 in the morning. In the rear room, which was separated from the front by a partition with a draped opening, were a work bench, a couch, a night stand, a wooden table next to the couch, and three barrels containing papers that had been saturated with a liquid that gave off the odor of kerosene. This rear room was approximately 10 feet by 15 feet in size. The firemen were forced to break open the front door, which was locked, and found the room full of smoke, with a small smoldering fire in the rear room, which they extinguished. They also forced open a locked window in the rear of the shop, after breaking the glass. There were no other openings in the rear. Two separate fires had been started in kerosene soaked papers contained in wooden barrels, from which waxed twine had been extended to the work bench, on which other kerosene soaked papers had been placed. Holes had been burned through the work bench but no extensive damage had been done. Defendant concedes that the fire was of incendiary origin.

Investigators of the arson squad of the fire department met defendant outside of the shop about 9 o'clock on the morning of the fire. One of them testified as to conversations that he had with defendant to the following effect: That defendant said he had never suffered any other fires throughout the United States and that he did not know how much insurance he carried on the contents of the store; that his insurance policies were at home and that he did not know when he had last seen them; that he, defendant, was the only one who had a key to the shop; that the rear window was always locked and that he had locked the front door the previous night; that he had no enemies in the neighborhood and got along well with his competitors; that he kept no kerosene in the place; that the investigators went with defendant to his home and sat in the living room while defendant went to a small closet to find his insurance policies; that one of the investigators called defendant's attention to three insurance policies lying on a writing desk and asked him if they were the ones he was looking for and defendant said they were and that he had been looking at them the previous night because some of them had to be renewed. In a later conversation the investigators asked defendant why he did not remember various things and defendant replied: "If you find out various things I will tell you about it; otherwise I won't." Later on defendant stated that he had recalled that Mrs. Williams also had a key to the shop. In a later conversation defendant admitted having had a fire while living in Philadelphia, which he said had been caused by a young boy, and that he received some insurance money for the loss. After stating that this was the only fire he had ever had, defendant told of another fire he had had near Philadelphia, from which he had received some $250 in insurance. This fire, defendant stated, had been caused by a defective water heater. After persistent questioning, he admitted that he had had another fire in Lansdale, Pennsylvania in May, 1941; that he had purchased a home there for $1,500, insured it for $3,500, the contents for $1,500, and that the place had burned to the ground; that he received $5,000 insurance money, paid off some bills and had $3,500 left when he came to Los

Angeles. One of the investigators testified that defendant stated he had been making between $7 and $12 a week in his tailor shop.

[1, 2] The evidence upon which the People relied for a conviction was purely circumstantial. It was the duty of the jury to weigh it under the rules that all doubts were to be resolved in favor of defendant, and that there could be no conviction unless the facts or circumstances proved were not only entirely consistent with the theory of guilt but irreconcilable with any other rational conclusion. No complaint is made that the jury were not properly instructed as to their duties under these principles of law. Our consideration of the contention that the evidence was legally insufficient to support the convictions is limited to determining whether there was a reasonable basis for the findings of guilt. If the circumstances reasonably justified the verdicts we would not be warranted in interfering with the determinations of the jury for the reason that we might believe those circumstances reasonably pointed to the innocence of the defendant. People v. Newland, 1940, 15 Cal. 2d 678, 104 P.2d 778; People v. Stark, 1936, 16 Cal.App.2d 467, 60 P.2d 595. Defendant, while admitting that the fire was of incendiary origin, insists that there was no evidence from which it could reasonably be inferred that it was started by him and not by someone else. He places great reliance upon the absence of evidence that he was in or about the premises shortly before the fire, the fact that the kerosene and waxed twine were not traced to him, and to the fact that the property was not insured for more than it was worth, from which it is argued that he was not shown to have had a motive for destroying the property by fire. These arguments were no doubt made to and given due consideration by the jury. But there were other facts against which they had to be weighed and which we believe furnished reasonable support for the findings of guilt. It was shown without conflict in the evidence that there were two entrances to the store room, the front door and the rear window. The door was locked and the window was securely fastened when the firemen arrived and both had to be forced open. A reasonable inference would be that the author of the fire entered the store room in the night time with a key, carefully set the scene for the fire, started it, and locked the door upon leaving. Defendant and Mrs. Williams had keys to the door and it was not shown that anyone else had one. No one was observed entering or leaving the building shortly before the fire and it would have been as easy for the defendant as for anyone else to enter and leave without detection. There was slight evidence as to the value of the equipment which had been insured for $2,000; it consisted only of the statement of the defendant as to the price which he had paid for it and the testimony of the insurance solictor that he had estimated the replacement value at $2,000. There was no evidence as to the value of the household goods and personal belongings of defendant which still remained in the room, carrying $500 of the original coverage of $1,500. As defendant had paid only $1,000 for the equipment he would have profited to the extent of $1,000 if he had collected the face of the policy. He had not offered the property for sale and there was no evidence as to what he considered to be its value or whether he believed it to be worth any more than he had paid for it. In considering whether defendant had a motive for destroying the property, the jury could reasonably have believed that the price paid for the property was more convincing evidence of its value than the estimate placed upon it by the solicitor as the insurable value, and that the prospect of collecting from the insurance company $2,000 for property which had cost him only half that amount provided a motive for the commission of the crimes. The jury were justified in believing, and no doubt did believe, that defendant had made false statements to the fire department investigators. It is true that he denied some of these statements and offered explanations with reference to others, but no doubt the jury resolved these conflicts against him. If so, they believed that he had endeavored to conceal the fact that he had experienced other fires and that he made a false statement regarding his insurance policies in telling the investigators that he did not know how much insurance he carried. Other significant circumstances were that he pretended to look in a closet for the policies while they were in plain sight on his writing desk and that he admitted having looked them over the evening preceding the fire.

[3-5] The evidence concerning the former fires came in without objection, and it is now urged that as there was no proof that those fires were of incendiary origin,

the evidence concerning them had no tendency to prove any fact in the case. But the jury had the right to accord some weight to defendant's denials and reluctant admissions of former fires as tending to show a consciousness of guilt. People v. Miller, 1940, 41 Cal.App.2d 252, at page 256, 106 P.2d 239. Furthermore, it would have been reasonable to believe that defendant had not entirely forgotten that his latest insurance investment in Pennsylvania had proven highly profitable. The fact that he might have profited from the Los Angeles fire, as he had profited from the last Pennsylvania fire, by the collection of insurance far in excess of the value of the property destroyed, may have been a coincidence, but if so, defendant's attempted concealment of the fact that he had suffered that particular fire in Pennsylvania would indicate that he realized that it would be regarded as a suspicious circumstance. As already stated, defendant kept no records as to the amount of his total earnings in the shop. The testimony as to his statement that he made from $7 to $12 a week in the shop, if believed, and his advanced age, which was admitted, would have tended to show that he had little to gain by continuing in the business which he had operated with so little success for a period of more than a year. In addition to all of this, no one other than defendant was even suspected of having caused the fire, and we think the jury would have been unable to find in the evidence any reasonable basis for believing that it was started by someone other than defendant. The evidence of defendant's guilt was by no means conclusive, but crimes which are committed by setting fire to property are usually planned and executed with stealth and secrecy. Where the crime of burning property has been proved, the fact that the property was overinsured, as it was in the instant case, especially when coupled with deceitful statements of the accused tending to show a consciousness of guilt, has frequently been held to be sufficient to sustain a conviction of arson or allied offenses. People v. Patello, 1932, 125 Cal.App. 480, 13 P.2d 1068, and cases there cited. If the jury were satisfied beyond a reasonable doubt that defendant had set the fire they could scarcely have concluded that he had not done so wilfully and maliciously, which was essential to his guilt of violating section 448a of the Penal Code, as charged in the first Count, and with intent to defraud the company by which he was insured, which was an element of the crime charged in the second Count—violation of section 450a of the Penal Code.

The judgment as to each count and order denying motion for new trial are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



62 Cal.App.2d 885

WOOD et al. v. DAVIDSON et ux.

Civ. No. 12541.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1944.

Hearing Denied April 13, 1944.

1. Waters and water courses ⇐127

An adverse claim to waters asserted in good faith in mistaken belief that waters belonged to landowners may ripen into title.

2. Adverse possession ⇐31, 33

To establish an adverse claim, record owner must have actual notice of claim, or possession must be so open, visible and notorious that it will raise presumption of notice of adverse claim.

3. Adverse possession ⇐31

Open, notorious and visible possession is equivalent of actual knowledge, and if adverse claimant is in such possession of property true owner is charged with knowledge thereof.

4. Trial ⇐28(1)

In determining right to waters by adverse possession, what the trial judge saw on visiting the premises constituted evidence.

5. Waters and water courses ⇐152(8)

Evidence that defendants in summer months used entire flow of spring for beneficial purposes, and that defendants' ditches leading from spring were visible from adjacent road, warranted finding that defendants' possession of waters was open, notorious and visible and that plaintiffs had constructive notice of such possession.

Appeal from Superior Court, Modoc County; A. K. Wylie, Judge.

Action by David A. Wood and another against Joseph Davidson and another to quiet plaintiffs' title to all of the waters located upon the adjoining lands of defendants, wherein defendants filed a cross-complaint claiming title to the waters by adverse possession. From a judgment, plaintiffs appeal.

Affirmed.

F. Eldred Boland, J. W. Radil, Knight and Boland & Riordan, all of San Francisco, for appellants.

C. S. Baldwin, of Alturas, for respondents.

PETERS, Presiding Justice.

Plaintiffs brought this action to quiet their title to all of the waters of Robinson Spring, which is located upon the adjoining lands of defendants. Defendants denied the existence of title in plaintiffs, and, by cross-complaint, claimed title to the waters by adverse possession. By its judgment the trial court provided that defendants have gained a limited title to the waters by adverse possession, that is, that defendants own and have the first right to use all of the waters of the spring for irrigation, stock and domestic purposes from April 1st to September 10th of each year, and that for the balance of the year defendants have the right to use one and one-half miner's inches of the flow of the spring measured under four-inch pressure, and that plaintiffs have the right to all over that quantity. From this judgment the plaintiffs appeal.

The parties claim title to their respective lands through a common grantor by mesne conveyances. Plaintiffs own 880 acres, defendants the 480 acres adjoining. When the common grantor, Kirkpatrick, conveyed the land upon which the spring is located to defendants' predecessor in 1905 the deed contained the following provision: "Together with all the right, title and interest of the party of the first part, by use or otherwise, to all the waters flowing on said tract, and especially from Pleasants Canyon which puts onto said tract from the east. Also one-fourth (¼) of the waters of a spring known as 'The Robinson Spring' situated near the center of the southwest quarter of section twenty-four (24), Township Forty-seven (47) North, Range Fourteen (14) East M. D. M." It is plaintiffs' theory that thereby Kirkpatrick reserved ¾ of the waters of the spring as an appurtenance to the land which he retained and which plaintiffs now own, and that such water right is appurtenant to their ownership. Although, in their complaint, they claimed the right to the flow of all the waters of the spring over and across their property, they now concede that since their right depends on this instrument it cannot extend to more than ¾ of the waters of the spring.

Plaintiffs' claim is entirely predicated upon record title to ¾ of the waters of the spring—that is, plaintiffs claim as record title owners of the land to which they claim the ¾ water right is appurtenant. The various deeds in plaintiffs' chain of title leading back to Kirkpatrick's deed did not refer expressly to a right in the flow of Robinson Spring, but did purport to convey "appurtenant" water rights, without expressly describing them. For the purposes of this opinion, inasmuch as defendants have not appealed, it may be assumed that the deeds introduced by plaintiffs show record title in plaintiffs to the full interest in the lands to which they claim ¾ of the waters of the spring are appurtenant, although an examination of those deeds tends to indicate that plaintiffs have record title only to an undivided one-half interest in such lands.

[1] The defendants became the owners of the land upon which the spring is located by deed dated April 23, 1931. The ¼ provision relating to the waters of Robinson Spring above quoted from the 1905 deed, was not included in any of the numerous subsequent deeds to defendants' predecessors in interest. The deed to defendants purported to convey all water and water rights appurtenant to the land. The various instruments in the chain of title were recorded, but defendants had no actual knowledge of the ¼ provision in the 1905 deed. Defendants testified that they believed in good faith that ownership of the lands carried with it ownership of all of the waters of the spring, and that they purchased the property with that thought in mind. The only other water on defendants' property was such as flowed across the road from the Pleasant's ranch on the east—apparently, an insignificant quantity. As already pointed out, the trial court found that defendants, during the irrigation season, had gained the right to the entire flow of the spring

by adverse possession. The adverse claim was one asserted in the good-faith belief that the water belonged to defendants. Such a claim may ripen into title. A claim of right does not cease to be adverse because asserted under mistake. Park v. Powers, 2 Cal.2d 590, 42 P.2d 75.

The lands of defendants are, for the most part, semi-arid grazing lands. The defendants acquired title to their land in 1931, as above noted, and have resided continuously on the land since 1932. Their son has lived on the property in a separate house close to the spring since 1931. The evidence shows that since 1932 or 1933 the defendants, in the summer months, have used practically the entire flow of the spring for domestic purposes, for the watering of their stock, and for irrigation. Both the defendants and their son have good-sized garden plots which have been irrigated by the spring, and a few acres of alfalfa are likewise so irrigated. The flow of the spring is quite small, averaging but two miner's inches in the summer months, and averaging about six miner's inches in the wintertime.

The trial court found, and the finding is amply supported by the evidence, that when defendants went to live upon the property the land near the spring was so trampled by live stock as to form a considerable bog or mudhole in which the waters of the spring became diffused, and that, even at that time, no appreciable portion flowed beyond the lands of defendants onto plaintiffs' land. Defendants cleaned out the spring, the court found, and dug a ditch extending westerly and northwesterly across their lands, through which they diverted all waters of the spring during the entire irrigation season of each year commencing with 1933 and continuing to the commencement of this action on July 19, 1939. By means of this ditch they conveyed all waters of the spring not required for their stock or for their domestic use to their lands lying westerly and northwesterly of the spring "for the irrigation of said lands, and for the growing and maturing of gardens and other crops thereon * * *."

The court made general findings as to defendants' use being open, notorious, continuous, uninterrupted and adverse. The court viewed the property. In a state of nature, the court found, the waters of the spring would flow southwesterly onto plaintiffs' lands, rather than in the northwesterly direction they were carried by defendants' ditch. In an opinion filed by the judge he referred to the fact that a public highway adjoined the defendants' property on the east, about one hundred feet from the spring, and stated that during the irrigation season the waters of the spring could be easily seen flowing in defendants' ditch or ditches onto their gardens and crops.

There was little showing as to the use of either plaintiffs' or defendants' lands prior to defendants' entry except for the testimony of defendant Davidson that Farleigh, defendants' immediate grantor, had been in possession of both plaintiffs' and defendants' lands immediately prior to the 1931 conveyance to defendants. In 1934 plaintiffs leased their lands to one Miller who has resided on those lands continuously from 1935. Miller was the only witness to testify for plaintiffs. Apparently some water ran down from defendants' upper lands during his occupancy which he used for irrigation. Whether this water was Robinson Spring water, or was water that came across the road from the Pleasant's ranch does not appear. The evidence supports the findings that for more than five years defendants used practically the entire flow of the spring for beneficial purposes, and that such use was open, notorious, continuous, uninterrupted and adverse, and that defendants paid all taxes levied against their property, the water right not being separately assessed. Plaintiffs do not seriously challenge the sufficiency of the evidence on these issues, but they urge that it was indispensable for defendants to show that plaintiffs had knowledge or notice of defendants' adverse use, and contend that there is no evidence to show that plaintiffs ever knew that defendants' use was adverse. It is true that there is no evidence that plaintiffs had actual notice that defendants were using the water. The facts show that defendants simply used all of the water from the spring in the summer months in the honest belief that the water was theirs, and that at no time did they discuss the problem with plaintiffs or with plaintiffs' tenant.

[2, 3] There is no requirement in the law that the record owner must have actual knowledge of the claims of the adverse claimant. The rule approved by all of the authorities is that either the record owner must have actual knowledge or the possession must be so open, visible and notorious that it will raise a presumption of notice to

him of the adverse claim. Thus in Pabst v. Finmand, 190 Cal. 124, 130, 211 P. 11, 13, the rule is stated as follows: "We do not mean to hold that a right may not be gained by an upper riparian proprietor by prescription, but to do so it must be clearly shown either that actual notice of the adverse claim of such owner has been brought home to the other party, or that the circumstances are such, as, for instance, the use of all of the water of the creek, that such party must be presumed to have known of the adverse claim." Open, notorious and visible possession is the equivalent of actual knowledge. If the adverse claimant is in open, notorious and visible possession of the property involved, and the true owner fails to look after his interests and remains in ignorance of the claim, it is his own fault. (See many cases collected 2 C.J.S., Adverse Possession, p. 554, § 41, et seq.) In Myran v. Smith, 117 Cal.App. 355, 362, 4 P.2d 219, 222, the rule is stated as follows: "As has been said in some of the earlier cases, among which may be cited Curtis v. La Grande Hydraulic Water Co., 20 Or. 34, 23 P. 808, 810, 25 P. 378, 10 L.R.A. 484, to acquire the right by prescription to the lands of another, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner. To effect that result the possession taken must be open, hostile, and continuous—'"he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest."'" See, also, Scott v. Warden, 111 Cal.App. 587, 296 P. 95; Sheehan v. All Persons, etc., 80 Cal. App. 393, 252 P. 337; Huling v. Seccombe, 88 Cal.App. 238, 263 P. 362; Goodrich v. Mortimer, 44 Cal.App. 576, 186 P. 844; Hibberd v. McCosker, 55 Cal.App. 568, 203 P. 810; Mattes v. Hall, 28 Cal.App. 361, 152 P. 436; Pacific Gas & E. Co. v. Crockett L. & C. Co., 70 Cal.App. 283, 233 P. 370. There is nothing in Clarke v. Clarke, 133 Cal. 667, 668, 66 P. 10, or Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383, relied upon by plaintiffs, contrary to the views expressed herein. Both cases involved claimed rights of way over the lands of another. In both cases the nature of the use was held not to have been so open, visible and notorious as to give constructive notice to the owner. The use in those cases was in no way similar to the exclusive use shown by the evidence in the instant case.

[4, 5] The evidence in the present case meets the requirements of the cases referred to above. The defendants, in the summer months, used the entire flow of the spring for beneficial purposes. The natural slope of the defendants' lands from the spring was toward plaintiffs' lands. Defendants, by means of ditches, artificially conveyed the water to their various irrigation projects away from the course it would have taken in a state of nature. While it is true that there is evidence that the spring was not visible from the public road bordering the property, there was also evidence that the ditches leading from the spring were visible from the road. The trial judge, by stipulation, visited the premises. What he saw is, of course, evidence. Under such circumstances, the trial court was certainly justified in finding that the possession of defendants was obviously open, notorious and visible, and that, under such circumstances, plaintiffs had constructive knowledge of the adverse use.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.



MAZZOTTA v. LOS ANGELES RY. CORPORATION et al.*

Civ. 14198.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1944.

Hearing Granted April 7, 1944.

1. Appeal and error ⇐1015(1)

Where evidence as a whole would be insufficient as a matter of law to support verdict in favor of moving party, an order granting a motion for new trial cannot be sustained.

2. Automobiles ⇐245(15)

Evidence failed to establish as matter of law that motorist who collided with bus traveling in same direction when motorist attempted to enter parking space was guilty of negligence, so as to render motorist

* Subsequent opinion 153 P.2d 338.

liable for injuries sustained by bus passenger in the collision.

3. Appeal and error ⇐933(1)

All intendments are to be indulged in to support trial court's action in passing upon motion for new trial.

4. Appeal and error ⇐977(3)

Unless trial court's action in granting motion for new trial constitutes an abuse of discretion, appellate tribunal is without power to interfere.

5. New trial ⇐6

Although "judicial discretion" in granting a new trial is broad and inclusive, it is a legal discretion and must be exercised in consonance with fixed legal principles.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Discretion".

6. Negligence ⇐4

"Negligence" is the opposite of "ordinary care".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence" and "Ordinary Care".

7. Trial ⇐253(1), 296(8)

A so-called formula instruction must contain all the elements essential to a recovery, and the absence of any one element may not be compensated for nor cured by reference thereto in other instructions correctly and fully stating law.

8. Trial ⇐253(1)

An instruction that if jury should find that defendant automobile owner could have avoided accident by ordinary care in using his senses of sight and hearing to discover presence of bus and in preventing his automobile from colliding with the bus, then jury should find for plaintiff and against automobile owner, was not a "formula instruction" and, hence, it was not necessary that all of the elements essential to recovery by plaintiff be set forth therein. Civ.Code, § 1714.

See Words and Phrases, Permanent Edition, for all other definitions of "Formula Instruction".

9. Damages ⇐173(2)

In determining amount of damages for loss of earning capacity in personal injury action, jury was entitled to consider manner in which plaintiff employed her time prior to the accident and therefrom to decide what she was reasonably certain to have lost because of her injuries.

10. Damages ⇐173(1)

Though one may not work steadily at all times, damages for loss of earning capacity may be predicated upon proven ability of one to earn money rather than upon what such person is either earning or has actually earned in the past.

11. Damages ⇐187

Woman who was injured in automobile accident was entitled to recover damages for impairment of her ability to work, even though evidence merely showed that she kept house for herself and her children and was silent as to her following any gainful occupation, business or profession.

12. Damages ⇐216(8)

In personal injury action, an instruction on measure of damages as to loss of earning capacity was authorized by evidence.

13. Appeal and error ⇐1170(9)
Damages ⇐216(9)

In personal injury action, an instruction in regard to plaintiff's right to recover for treatment "reasonably certain to be required, and to be given, in her future treatment, if any", though erroneous in that there was no evidence of any future care being required, was not prejudicial, where jury was not misled. Code Civ. Proc. § 475; Const. art. 6, § 4½.

14. New trial ⇐41(3)

The giving of questioned instructions, even though instructions were erroneous, would not authorize granting of a new trial, unless court would be warranted in saying that a different verdict would probably have been rendered had such errors not occurred. Code Civ.Proc. § 475; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Georgie P. Bullock, Judge.

Action by Jane Mazzotta against Los Angeles Railway Corporation and Samuel Finkelstein for injuries sustained in a collision between a bus operated by the defendant Los Angeles Railway Corporation on which plaintiff was a passenger and an automobile of the individual defendant. From an order granting the individual de-

fendant a new trial, following a verdict in favor of the plaintiff, the plaintiff appeals.

Reversed.

Russell Hardy and Eugene E. Sax, both of Los Angeles, for appellant.

Parker & Stanbury and Harry D. Parker, all of Los Angeles, for respondent.

WHITE, Justice.

By her amended complaint filed herein plaintiff alleged that she was a passenger on a motor bus operated by defendant Los Angeles Railway Corporation; that defendant Samuel Finkelstein was operating an automobile along the same highway upon which the motor bus was traveling and in the immediate vicinity of the latter. That both defendants so negligently and carelessly operated their respective motor vehicles as to cause a collision between them, resulting in plaintiff being violently thrown from her seat in the bus and severely injured.

By their answers defendants respectively denied any negligence on their part and each defendant set up as affirmative defenses (a) that the accident was caused solely through the negligence of the other defendant; and (b) that plaintiff was guilty of contributory negligence.

With the issues thus framed the cause proceeded to trial before a jury. During the course of the trial both defendants withdrew their affirmative defense of contributory negligence. The jury returned a verdict in favor of plaintiff and against both defendants in the amount of $5,000. Thereafter both defendants moved for a new trial on all statutory grounds. The motion of defendant Los Angeles Railway Corporation was granted on the grounds of insufficiency of the evidence to justify the verdict and errors of law occurring at the trial which were excepted to by said defendant. The motion of defendant Samuel Finkelstein was granted on the ground of errors of law allegedly committed in the giving of certain instructions to the jury.

This appeal is prosecuted solely from the order granting a new trial to defendant Samuel Finkelstein.

Because the issues presented on this appeal involve the question of whether, had a verdict been rendered in favor of defendant Finkelstein, such a verdict would find support in the evidence, a review of the evidence becomes necessary. After such review, we epitomize the evidence as follows: The accident involved in this litigation occurred about 11 o'clock in the morning on a clear day, with the sun shining, on the north half of Florence Avenue and midway between Makee Street and Compton Avenue in the City of Los Angeles. At the point where the accident occurred Florence Avenue extends in an easterly and westerly direction, is 74 feet wide and has three traffic lanes on the north half thereof. The block from Makee Street to Compton Avenue on Florence Avenue is 351 feet in length. Along the curb at the north side of Florence Avenue between Makee Street and Compton Avenue there were only two places marked for the parking of automobiles. These two places were adjacent to each other at the north curb and were located approximately in the middle of the block. The proper authorities had caused lines to be painted on the pavement at this point, such lines being drawn diagonally, so that it was necessary for automobiles to park at an angle in these two places and, after so parking, the vehicles would be heading in a northwesterly direction while parked there.

The motor bus in which plaintiff was a passenger was westbound in the second lane of traffic. The automobile driven by defendant Samuel Finkelstein was likewise westbound, but in the center lane of traffic immediately to the left of the bus. On reaching Makee Street the automobile passed the motor bus on the left side of the latter. The evidence reveals that the motor bus was being driven by a student driver who was an employee of defendant Los Angeles Railway Corporation, and was just learning to drive the vehicle. An instructor was sitting directly behind the bus driver at the time of the accident. Defendant Finkelstein was a salesman and was intending to make a business call on a customer whose place of business was situated on the south side of Florence Avenue between Makee Street and Compton Avenue. Said defendant intended to park his car in one of the only two parking spaces designated at the north curb for parking in this block. He was familiar therewith and, according to his testimony, had frequently parked there before.

There is evidence that after proceeding a short distance beyond the bus, defendant Finkelstein looked in his rear view mirror and saw the bus in the lane of

traffic to his right and about 50 feet to his rear. He then proceeded a distance of about 40 feet and when he turned from the center lane of traffic diagonally in a northwesterly direction, across the path and immediately in front of the approaching motor bus, the collision resulted. Several witnesses testified that defendant Finkelstein turned his automobile in front of the bus when the latter was but 15 to 20 feet behind the automobile. There is testimony that when defendant Finkelstein was about 70 feet east of the parking spaces he gave an arm signal for a right turn but did not sound his horn. One witness testified, "The car pulled on west ahead of the bus, and all of a sudden, he pulled this car directly in front of the bus, and made an effort to park". Other witnesses testified that the automobile was in motion at the moment of impact and had not yet reached the curb; that the bus was traveling about 20 miles per hour and the automobile 20 to 25 miles per hour. One witness was asked on cross-examination "When the automobile reached the point about 15 to 20 feet ahead of the bus, it suddenly turned to the right and into the bus, is that right?" to which she answered "Yes". Another witness testified that when he saw the automobile after it had turned to the right, it was three or four feet in front of the bus.

The only testimony given in contradiction of the foregoing and other evidence corroborative thereof, was the testimony of the defendant Finkelstein who testified that when he arrived at a point about 70 feet from the parking space where he intended to park his car he gave a proper arm signal indicating his intention so to do and that he continued to give such signal until his vehicle had entered the parking space. This defendant further testified that he had last seen the bus prior to the impact when he looked in his rear view mirror at which time his vehicle was at a point about 15 or 20 feet east of the place where he intended to park, and at that moment he judged the bus to be from 50 to 60 feet in the rear of his automobile and that the bus did not appear to be traveling very fast. The last-named defendant further testified that after observing the bus at the point just indicated he looked only ahead and did not thereafter see the bus until after the collision had occurred. This defendant testified, contrary to the testimony of all the other witnesses, that the impact did not occur until he had parked his automobile and had alighted from it, at which time, according to his testimony, the bus collided with the rear portion of his parked vehicle.

[1, 2] We must first determine whether the evidence, as a matter of law, would have supported a verdict in favor of respondent Samuel Finkelstein, for, if as contended by appellant, the respondent was, as a matter of law, guilty of negligence which proximately contributed to the former's injury, then a reversal must ensue, for it is well settled that where the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of the moving party, an order granting a motion for a new trial cannot be sustained. Henderson v. Braden, 35 Cal.App.2d 88, 91, 94 P.2d 625. All of the witnesses, other than respondent himself, gave testimony to the effect that he turned directly into the path of the motor bus at a time and in a manner when to an ordinarily prudent person it would have been apparent that he could not make the movement in safety. However, the record does contain respondent's testimony that after passing the bus and when he arrived at a point about 70 feet from his intended parking space, he gave a proper arm signal, and that he continued to give such signal until his vehicle had entered the parking space. That he last observed the bus through his rear mirror when he was about 15 or 20 feet east of the place where he intended to park, and at which time the bus, to him, appeared to be some 50 or 60 feet to the rear of his automobile, and did not appear to him to be traveling fast. Respondent also testified that he made the turn into the parking space in safety; that he had already parked his vehicle and had alighted therefrom before the bus struck it. Undoubtedly, if such testimony was believed by the jury, it would, as a matter of law, support a verdict in his favor. By returning a verdict against him it is manifest, of course, that the jury did not adopt respondent's version of how the accident occurred, and seemingly the court was not impressed with the verity of respondent's testimony, for a new trial was not granted as to him on the ground of insufficiency of the evidence as was the case in granting the motion of his codefendant. However, it cannot be said, under the circumstances here present and the testimony of respondent just narrated, that as a matter of law, the evidence as a whole would be insufficient

to support a verdict in his favor, and we must therefore determine whether certain challenged instructions were erroneously given and whether the giving of such instructions prejudiced respondent's substantial rights and prevented him from having a fair trial.

[3-5] It is now settled law in this state that in a reviewing court all intendments are to be indulged in to support the action of the trial court in passing upon a motion for a new trial. When the question of the propriety of the trial court's ruling on the motion is open to debate, it will not be disturbed. Koyer v. McComber, 12 Cal.2d 175, 183, 82 P.2d 941. Unless the action of the trial court in granting the motion for a new trial constituted an abuse of discretion, the appellate tribunal is without power to interfere. Hall v. Desser, 8 Cal.2d 29, 30, 63 P.2d 809. While, as respondent asserts, courts have often held that judicial discretion is broad and inclusive, nevertheless it is a legal discretion, and must be exercised in consonance with fixed legal principles. Judicial discretion is neither capricious nor arbitrary. As was said in Bailey v. Taaffe, 29 Cal. 422, 424, "It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice." The phrase "judicial discretion" implies the use of discriminating judgment within the bounds of reason and bridled by legal principles, the application of which will tend to promote justice and equity. In the light of what has just been said, we now proceed to a consideration of the instructions given, and the giving of which, respondent urges, entitles him to a new trial.

In defendant Finkelstein's motion for a new trial before the trial court, the first instruction complained of was as follows: "If you find from the evidence that the defendant Sam Finkelstein could have avoided this accident by exercising ordinary care in using his senses of sight and hearing to discover the presence of the Los Angeles Railway bus and in preventing his automobile from colliding with the bus, then you must find for the plaintiff Jane Mazzotta and against the defendant Sam Finkelstein."

[6] Defendant Finkelstein in the trial court and as respondent in this court bases his attack on this instruction upon the ground that, concluding as it did with a mandate to find for the plaintiff and against the defendant, it was a "formula" instruction; and as such, in order to be a valid admonition to the jury should have contained every element necessary to support a verdict thus directed. In the trial court it was urged by defendant Finkelstein and is here argued that as given the instruction does not require a finding of negligence, proximate cause or damage. A reading of the instruction persuades us that as a prerequisite to a finding against defendant, the language "by exercising ordinary care in using his senses of sight and hearing" envisages the presence of negligence in the conduct of defendant. "Negligence" is the opposite of "ordinary care". Contending, as respondent did in the trial court and now does in this court, that the instruction is a formula instruction, manifestly then, whether his argument stands or falls depends upon whether his premise is correct and that it was a formula instruction. If it is not a formula instruction, his argument against it is not availing.

[7] We are not unmindful of the holding in Douglas v. South Pacific Co., 203 Cal. 390, 393, 264 P. 237, approved by the Supreme Court in denying a hearing in Mecchi v. Lyon Van & Storage Co., 1940, 38 Cal.App.2d 674, 688, 102 P.2d 422, 104 P.2d 26. In the Douglas case it was said [203 Cal. 390, 264 P. 238]: "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law".

[8] Because of its failure to touch upon the subjects of proximate cause or damage, the instruction complained of might, upon a first reading thereof, be indicted as fatally defective. But can it be said that the instruction was either given to or accepted by the jury as a "formula" instruction? It certainly cannot be considered as a complete statement of the law upon which plaintiff might recover, and appears to us as an instruction amounting only to an exposition of the law, and simply advising the jury that a defendant is never relieved of liability if he has it in his power "by exercising ordinary care in using his senses of sight and hearing" to prevent the injury complained of. Manifestly, if respondent had it in his power, by the exercise of ordinary care, to avoid the accident, then it follows that his negligence in that

regard, if any, must have been a proximate cause of the accident and plaintiff's injury. Constituting, as the instruction does, in our judgment, nothing more than a recital of the legal principle that no one may injure another when, by the exercise of ordinary care he can prevent such injury (section 1714, Civil Code), it was not required that all of the elements essential to recovery by plaintiff be set forth therein. Douglas v. South Pacific Co., supra, 203 Cal. at page 394, 264 P. 237. Furthermore, an examination by us of the record discloses that all of these essential elements of negligence, proximate cause and damage were fully and correctly given to the jury in many other instructions, which were given by the trial judge. It is also noteworthy that in the present case plaintiff was admittedly blameless and the defense of contributory negligence was abandoned by both defendants at the trial. She was a passenger on the motor bus and her conduct was, therefore, not in question so far as responsibility for the collision was concerned. To us it does not appear possible or at least reasonably likely that the jury could have been misled, nor respondent's substantial rights injuriously affected by the instruction of which complaint is made.

Passing from the aforesaid instruction, respondent next asserts, as he did when a defendant in the trial court on his motion for a new trial, that it was prejudicial error to give the following instructions: "The reasonable value of the time lost, if any, by said plaintiff since her injury wherein she has been unable to pursue her occupation. In determining this amount, you should consider evidence of said plaintiff's earning capacity, her earnings, and the manner in which she ordinarily occupied her time before the injury, and find what she was reasonably certain to have earned in the time lost had she not been disabled." "The reasonable value, not exceeding the cost to said plaintiff, of the examinations, attention and care by physicians and surgeons, reasonably required, and actually given, in the treatment of said plaintiff; and reasonably certain to be required, and to be given, in her future treatment, if any".

It is urged that no testimony was introduced at the trial on the subject of what amount of money the plaintiff "was reasonably certain to have earned" and that there was no evidence that she would be required to undergo medical treatment in the future, nor if she should undergo such treatment, what amount of money would reasonably be required therefor. That, therefore, the giving of the last two aforesaid instructions constituted reversible error. Our review of the record impresses us that there was ample evidence to justify the instruction on the measure of damages as to loss of earning capacity. The record discloses uncontradicted testimony that prior to the accident plaintiff was caring for her five-room house, doing the washing, ironing, cleaning and cooking; that she had three children, living with her at the time of the accident, aged 20, 18 and 15 years respectively, for whom, with the aid of her youngest child after the latter's school hours, she did all the cooking and housekeeping; that up to about six or seven months before the accident she had been working for nearly a year stuffing olives at a salary of $16 per week; that she intended to return to the same line of work and, in fact, at the time of this accident she was on her way from an employment office to which she had gone to sign up for work stuffing olives.

[9-12] Respondent's difficulty lies in the fact that he confuses loss of earnings with damage to earning capacity. In determining the amount of damages for loss of earning capacity, the jury was entitled to consider the manner in which appellant employed her time prior to the accident, and therefrom to decide what she was reasonably certain to have lost because of her injuries. Though it may appear that one has not earned money over a period of a month, a year, or any other period of time, nevertheless that person's capacity for work and ability to earn money during such period might not be totally impaired. The rule, therefore, is, that though one may not work steadily at all times, damages may be predicated upon the proven ability of one to earn money rather than upon what such person is either earning or has actually earned in the past. Holmes v. California Crushed Fruit Co., 69 Cal.App. 779, 780, 232 P. 178; Hosman v. South Pacific Co., 28 Cal.App.2d 621, 634, 83 P.2d 88. Even though the evidence merely showed that appellant kept house for herself and her children and was silent as to her following any gainful occupation, business or profession, nevertheless, she was entitled to recover damages for the impairment of her ability to work, for as was said in Davis v. Renton, 113 Cal.App. 561, 564, 298 P. 834, 835: "As held in Gotsch v. Market

Street Ry., 89 Cal.App. 477, 265 P. 268, the impairment of the [ability] of a woman to work is an injury to her personal rights wholly apart from any pecuniary benefit the exercise of such power may bring, and if her injury has lessened this power she ought to be able to recover damages therefor regardless of whether she was engaged in household duties or employed for pecuniary gain."

[13, 14] With reference to respondent's criticism of the instruction in regard to appellant's right to recover for treatment "reasonably certain to be required, and to be given, in her future treatment, if any"; while it is true that there was no direct evidence to support a finding of future medical expense, there was testimony given by two physicians that plaintiff's disability would continue for from one to three more years. Then again, plaintiff urged no claim for medical expenses other than those incurred up to the time of trial. In fact, at the trial she was permitted to amend her complaint to show medical expenses of only $369 which were proven to have been already incurred. In the questioned instruction on damages the jury was clearly advised that appellant could recover for medical care and attention "actually given" and any other such care "reasonably certain to be required". We cannot assume that the jury understood the instruction other than as we do, that appellant could recover only for future treatment and care "if any" necessity or requirement therefor was proven. Respondent concedes there was no evidence of any future care being required and jurors being presumed to be persons of reasonable intelligence could not fail to understand that if there was no proof of future treatment, and the reasonable value thereof, then no recovery could be had therefor. We fail to see wherein the claimed error in this single instruction, if any, prejudicially affected the substantial rights of respondent to a fair trial. A reading of all the instructions given satisfies us that the jury was adequately, correctly and fairly instructed upon all issues tendered by the pleadings or raised by the evidence. To that we might add, under the facts of this case as revealed by the evidence, even though it should be conceded that the giving of the questioned instructions was erroneous, nevertheless, section 4½ of Art. VI of the Constitution and section 475 of the Code of Civil Procedure restrains the granting of a new trial unless the court be warranted in saying that a different verdict would probably have been rendered had such errors not occurred. We have gone over the entire record, and are satisfied that in so far as respondent herein is concerned, the jury reached the only verdict possible under the law and the facts.

For the reasons herein expressed, the order granting the motion for a new trial is reversed.

YORK, P. J., and DORAN, J., concur.



62 Cal.App.2d 836

In re BENSON'S ESTATE.

BENSON v. MOODY.

Civ. 7018.

District Court of Appeal, Third District, California.

Feb. 10, 1944.

Hearing Denied April 10, 1944.

1. Wills ⇐55(1), 166(1)

Evidence sustained order admitting will to probate on ground that decedent was not of unsound mind and had not been unduly influenced.

2. Wills ⇐182

A subsequent valid will revokes a former will by implication when its provisions are wholly inconsistent with the former will. Probate Code, § 72.

3. Wills ⇐182

Where former will gave testator's property to a specified sister and in the event of her death to her children share and share alike without giving the children's names or number and designated an executor, and last will recognized the sister's death and gave testator's property to her four named living children and to two other named individuals share and share alike and nominated a different executor, the wills were "wholly inconsistent" under the Code and former will was revoked. Probate Code, § 72.

See Words and Phrases, Permanent Edition, for all other definitions of "Wholly Inconsistent Wills".

4. Wills ⇐184(1)

A "codicil" does not supersede a former will, but its function is merely to add to, supplement, qualify, modify, or alter a former will in some stated respects, and it contemplates that the former will still exists and that reference to it is necessary for a complete disposal of testator's estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Codicil".

5. Wills ⇐179

One cannot have two independent wills at the same time, each acting upon the same subject matter and professing to make a distinct and full disposition thereof.

6. Wills ⇐179

A valid second will making a complete disposition of testator's property, and which was offered for probate, usually supersedes a prior will whether its terms are inconsistent with those of the prior will in whole or in part. Probate Code, § 72.

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Proceeding in the matter of the estate of Nels Benson, also known as Nils Benson, and also known as N. Benson, deceased, by Martin Benson opposed by Gilbert Moody. From an order admitting to probate decedent's will and alleged codicil, Martin Benson appeals.

Judgment modified and, as so modified, affirmed.

T. L. Christianson, of Oakland, for appellant.

W. Coburn Cook, of Turlock, for respondent.

THOMPSON, Justice.

Martin Benson, nephew of Nels Benson, deceased, has appealed from an order admitting to probate the will and alleged codicil of said deceased. The original will was established by production of a carbon copy thereof, as a lost or destroyed will, under the provisions of Section 350 of the Probate Code. The asserted codicil is a subsequent complete will, disposing of all the property of the testator without reference to the original will. Both instruments were duly executed. Both were admitted to probate. The chief issue urged by the appellant is that the record lacks evidence that the original will was "in existence at the time of the death of the testator."

The testator was a bachelor 80 years of age. He resided at Turlock. January 17, 1938, he executed his will which was duly attested, by the terms of which he gave all of his property to his sister Johanna Johansson in Sweden, and in the event of her death to her children share and share alike. He appointed Harry R. Anderson, a banker at Turlock, as executor. He left that will in custody of Mr. Anderson. About six months later, in company with his nephew Martin Benson, the testator called at the bank and demanded possession of the will which was then delivered to him. On July 20, 1938, he executed a codicil to his will, changing none of its terms, with the exception of appointing A. P. Ferguson as executor in the place of Harry R. Anderson. The remaining terms of the former will were expressly ratified and confirmed. He then delivered the will, together with other documents to Mr. Ferguson, who died October 29, 1939.

In the summer of 1938, on petition of Martin Benson and A. P. Ferguson, the court, under Section 1460 of the Probate Code, appointed guardians of the person and estate of Nels Benson, on the ground that he was incompetent and unable to properly manage his property. December 27, 1940, Nels Benson duly executed another will or codicil, which was admitted to probate with the original will. It was drawn by an attorney and was formally executed and attested by three witnesses. It is in the following language:

"I, N. Benson, also known as Nels Benson, and also known as Nils Benson, make this codicil to my will dated on or about January 17, 1938, revoking the codicil in which A. P. Ferguson was appointed executor, as follows:

"I give all of my estate, share and share alike, to Hartha, Tage, Edith, and Erik who are the living children of my deceased sister Johanna Johansson who lived at Finja, Sweden, to Nils Linderoth, Finja, Sweden, and Jennie Benson, (divorced wife of Martin Benson), who lives at Oakland, California. I give nothing to my nephew Martin Benson.

"I appoint Gilbert Moody, of Turlock, California, to take care of my estate, as executor of said will and this codicil, and

if he is unable to act, then I appoint W. Coburn Cook, also of Turlock.

"Dated, Turlock, California, December 27, 1940.

"N. Benson."

(Attested by three witnesses)

Nels Benson died March 12, 1942. Gilbert Moody, the executor named in the foregoing quoted instrument, petitioned the court to probate the original will dated January 17, 1938, as a lost or destroyed instrument under Section 350 of the Probate Code, and also petitioned to probate the said will or codicil dated December 27, 1940. At the same time Harry R. Anderson, named as executor in the original will, filed his petition to probate that instrument. Martin Benson, nephew of said testator, who was given nothing by the terms of either instrument, filed a contest to both of said wills on the grounds of unsound mind and undue influence, and denied that said original will had been either lost or destroyed. Both petitions were heard together. The court adopted findings favorable to the proponent, Gilbert Moody, determining that both wills were duly executed; that the testator was of sound and disposing mind and free from undue influence at the times of executing both instruments, and that the former will had been lost or destroyed. Both wills were admitted to probate and Gilbert Moody was appointed executor.

Neither unsound mind nor undue influence nor due execution of the wills was an issue at the trial. The foregoing issues were waived and abandoned at the trial by the attorney for the contestant. He stated, in effect, that the only issue to be determined was whether the original will dated January 17, 1938, was in existence at the time of the death of the testator, as required by Section 350 of the Probate Code. The case was tried on that theory. The attorney said: "The sole issue * * * is whether or not there was any will at all. In other words, it is revoked." Again he stated: "We are making no objection as to the mental capacity [of the testator] at the time he made either one of the two [instruments]. The Court: At the time he made the will or either of the codicils? A. That is right."

Moreover, in establishing the validity of the instrument dated December 27, 1940, the proponent offered substantial evidence that Nels Benson possessed testamentary capacity. Fred Carson, one of the witnesses to that instrument, after testifying to intelligent answers of the testator regarding that will and his desire to execute it, definitely stated that he was "of sound mind" and not "acting under menace, duress or fraud." Mr. W. C. Cook, the attorney who drew the instrument last mentioned, and who also signed it as a witness, testified that the testator whom he had known for fourteen years intelligently answered all questions regarding his heirs, the property he was disposing of by will, his knowledge of the nature of that instrument and his desire to have the witnesses attest the will. He said that the testator was emphatic in declaring that he did not wish to leave his nephew Martin Benson "anything". Mr. Cook also stated: "I believed him to be of sound mind." Dr. M. C. Collins, who also signed that instrument as a witness, and who had known the testator for some time, definitely stated in response to the question, "At that time was the testator of sound and disposing mind?" that "He was."

[1] Independently of the abandonment of the issues of unsound mind and undue influence, the findings of the court in that regard are adequately supported by the evidence.

It is true that the proponent of a will who seeks to establish it as a valid lost or destroyed instrument must prove that it was "in existence at the time of the death of the testator." Sec. 350, Probate Code; In re Estate of Flood, 47 Cal.App.2d 809, 119 P.2d 168; In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. It is however not necessary in the present proceeding to determine whether the original will was known to be last in the possession of the testator, or whether the evidence supports the validity of that will as a lost or destroyed instrument, for the reason that it was superseded by the subsequent will dated December 27, 1940, which is in every respect a duly executed, valid will disposing of all of the property belonging to the testator. In re Estate of Shute, 55 Cal.App.2d 573, 131 P.2d 54. It therefore becomes immaterial whether the original will was affirmatively revoked. It was nevertheless void.

[2-5] A subsequent valid will is deemed to revoke a former will by implication when its provisions are *wholly* inconsistent with the terms of the prior will. Sec. 72, Probate Code; In re Estate of Rose,

95 Cal.App. 580, 273 P. 92; In re Estate of Martin, 31 Cal.App.2d 501, 88 P.2d 234; 123 A.L.R. 1397, note; 68 C.J. 804, sec. 494. Some California cases hold that a subsequent will which disposes of all of the property of a testator has the effect of revoking a former will, regardless of whether its provisions are *wholly* inconsistent with the terms of the prior will. In re Estate of Mallon, 28 Cal.App.2d 106, 81 P.2d 992. In the present case we consider the provisions of the subsequent will "wholly inconsistent" with the former will. The former will gave all of the testator's property to his sister Johanna Johansson, and in the event of her death to her children, share and share alike, without giving the names or the number of said children. It designated Harry R. Anderson as executor. The last will recognized the death of the testator's said sister, and gave all of his property to her four named living children, and to two other named individuals, share and share alike. It nominated Gilbert Moody as executor. Regardless of whether the subsequent will is *wholly* inconsistent with the terms of the former will, it constitutes a complete, valid new will of all the testator's property and not a mere modification thereof, and it therefore supersedes the first will and is controlling over it in the disposition of his estate. In re Estate of Shute, supra. It is immaterial that the last instrument contains the statement that "I * * * make this *codicil* to my will dated on or about January 17, 1938." The last instrument is in fact a complete new will which disposes of the entire estate of the testator. A duly executed subsequent instrument which in clear and unambiguous language disposes of all of the property in a manner wholly inconsistent with the provisions of the former will clearly leaves no portion of the original will operative for any purpose. Under such circumstances the subsequent instrument supersedes the former will and constitutes a new will which cannot be aided in any respect by reference to the former one. A codicil does not supersede a former will. Its function is to merely add to, supplement, qualify, modify or alter a former will in some stated respects. It contemplates that the former will still exists and that reference to it is necessary for a complete disposal of the testator's estate. 7 Words and Phrases, Perm.Ed. p. 536. In the Rose case, supra, citing with approval In re Estate of Iburg, 196 Cal. 333, 337, 238 P. 74, it is said, at page 584 of 95 Cal.App., at page 94 of 273 P.: "A man cannot have two independent wills at the same time, each acting upon the same subject matter and each professing to make a distinct and full disposition thereof."

[6] In the Shute case, supra, the court points out the fact that a subsequent will which disposes of all the estate of a testator in exactly the same language used in a former will would supersede the original instrument and be entitled to probate as the "*last* will" of the testator, even though it did not constitute a technical revocation of the former will under the provisions of Section 72 of the Probate Code, because it is not inconsistent therewith. But the court further says that regardless of whether the first will be deemed to have been constructively revoked, because the last instrument disposes of all of the estate of the testator, the subsequent will, under such circumstances "would usually be given effect not because it made a complete disposition of the property, but because it was the *last* will." [55 Cal.App. 2d 573, 131 P.2d 56] The court concludes by saying: "A valid second will making a complete disposition of the property and which is offered for probate usually supersedes a prior will, and this whether or not its terms are inconsistent with those of the prior will in whole or in part."

It follows that the will of Nels Benson, dated December 27, 1940, was properly admitted to probate as the last will of said deceased. The former will was thereby rendered functus officio and void. Its utility was canceled.

The judgment is modified by striking out that portion which admits the former will dated January 17, 1938. As so modified the judgment is affirmed. Respondent may recover his costs on appeal.

ADAMS, P. J., and PEEK, J., concur.

62 Cal.App.2d 808

In re DE LANO'S ESTATE.

PACIFIC GUANO CO. v. WELLER.

Civ. 14217.

District Court of Appeal, Second District, Division 3, California.

Feb. 7, 1944.

Hearing Denied April 7, 1944.

1. Trusts ⇐12

Spendthrift trusts, inalienable by beneficiary and inaccessible to his creditors during his life or for term of years, are valid.

2. Trusts ⇐12

The placing of corpus and income of trust property beyond reach of creditors of beneficiaries is lawful purpose of spendthrift trust.

3. Trusts ⇐12

A "spendthrift trust" is one created for purpose of providing a fund for maintenance of another and at the same time securing it against his own improvidence or incapacity.

See Words and Phrases, Permanent Edition, for all other definitions of "Spendthrift Trust".

4. Wills ⇐674

No set phraseology need be employed to create a spendthrift trust, but it is sufficient if intent is reasonably plain upon a consideration of the will as a whole.

5. Trusts ⇐28

It is not necessary that instrument creating spendthrift trust contain all restrictions and qualifications incident to spendthrift trusts.

6. Trusts ⇐152

In construing instrument purporting to create spendthrift trust, courts will not inquire whether restrictions on use of trust property were necessary for the protection of beneficiary.

7. Wills ⇐674

Where, under will creating spendthrift trust, all sums received by trustee were to be paid to beneficiaries and will disclosed testator's desire that trust estate be preserved for benefit of his daughters to exclusion of their creditors, a valid spendthrift trust was created even though will did not contain specific declaration that trust was created for maintenance, support, and welfare of the beneficiaries.

8. Wills ⇐470

The intentions of testator must be ascertained from consideration of will in its entirety, unless there is uncertainty or ambiguity therein which necessitates resort to extrinsic evidence.

9. Appeal and error ⇐842(8)

Where so-called finding of fact consists only of construction which court places on an unambiguous written document, no question can arise regarding sufficiency of evidence to support the finding.

10. Trial ⇐388(1)

A so-called finding that spendthrift trust was for maintenance and support of beneficiaries was not required to be supported by evidence since it was no more than statement of purpose of testator as court understood it from will.

11. Trusts ⇐119
Wills ⇐487(5)

In absence of any other purpose stated in will or other instrument creating spendthrift trust, presumption exists that it was created for maintenance and support and, in some cases, education of beneficiaries.

12. Trusts ⇐12

The trustor's purpose to make beneficiaries of spendthrift trust secure in their use of property, to extent allowed by law, cannot be defeated by fact that they may not be in actual need nor because trust property may provide funds in excess of their needs nor by fact that trust fund is not so restricted as to make it impossible for beneficiaries to use it for purposes other than their support.

13. Trusts ⇐12

The validity of spendthrift trust depends on sufficiency and legality of expressed purposes of trustor and not on necessities of beneficiaries or the sufficiency of trustor's reasons for creating trusts.

14. Trusts ⇐12

A spendthrift trust may be created for benefit of a married woman.

15. Trusts ⇐152

Where there was no property distributable to testator's daughter in excess of that distributable under spendthrift trust, daughter's creditor had no standing to ob-

ject to executor's request for compensation for extraordinary services.

16. Wills ⇐684(7)

Beneficiaries of spendthrift trust created by testator were entitled to receive income from trust property from date of testator's death, where will creating spendthrift trust was silent on the subject.

Appeal from Superior Court, Los Angeles County; Clarence L. Variel, Judge.

Proceedings in the matter of the estate of F. C. De Lano, also known as Fred C. De Lano, deceased, wherein the Pacific Guano Company filed objections to the account of Frank C. Weller, as executor of the estate of F. C. De Lano, deceased. From an order settling the final account and distributing the estate, the Pacific Guano Company appeals.

Affirmed.

Harry M. Irwin, of Los Angeles, for appellant.

Frank C. Weller, of Los Angeles, in pro. per., for respondent.

SHINN, Justice.

This is an appeal by Pacific Guano Company from an order which settled the final account of the executor of the estate of F. C. DeLano, deceased, and, except for a few small bequests, distributed all of the remaining estate to a trustee for the benefit of decedent's daughters, Grace DeLano Myers and Ruth DeLano Miller, in accordance with the provisions of an olographic will.

Appellant filed objections to the account and petition for distribution, in which it alleged that it held a judgment against Grace DeLano Myers, and that it had caused execution to be levied upon her interest in the estate. By this contest appellant sought to subject Mrs. Myers' interest to the lien of the judgment. The controlling issue at the trial was whether the will created a valid spendthrift trust, and the same question is presented on the appeal.

The trust provisions of the will, from which its nature is to be determined, read as follows:

"8. I also have sixty (60) shares of E. S. Miller Laboratories Inc., FCDeL stock, and contracts for the sale of real estate (one to Bertha and Clyde Austin and one to Fern Q. Zillig) now with El Monte Branch of The Bank of America N. T. & S. Ass'n for collection, and with this stock and do

these contracts, I di hereby create a *spendthrift trust* for the purposes hereinafter to be set forth.

"9. I do give and bequeath unto my two daughters—Grace and Ruth—all the residue of my estate * * *

"Page 2 Fred C. DeLano

share and share alike, and suggest that they divide my household and personal effects between them so far as they desire to do so —the balance to be sold and/or anything useful but unsaleable be given to whom they may decide.

"In the bequests to Grace and Ruth I wish it to be borne in mind that I have advanced to them, and/or to their respective husbands various sums of money at different times, the difference should now be equalized for I love them both equally.

"10. As to the *Spendthrift Trust* mentioned on page 2—item 8 of this instrument, I do hereby give, bequeath, devise, assign and set over unto Frank C. Weller of Los Angeles, Cal. (Atty at law) *as Trustee*, Sixty Shares of the capital stock of E. S. Miller Laboratories, Inc. and those two certain contracts for the sale of real estate to Bertha M. and Clyde E. Austin, and Fern Q. Zillig, which contracts have been heretofore placed with the El Monte branch of The Bank of America N. T. & S. A. for collection, * * *

"Page 3 Fred C. DeLano

in trust, nevertheless, for the purposes herein set forth, towit,—To collect payments when and as due, on sale contracts above mentioned, to collect the dividends, earnings and increase on/of the E. S. Miller Laboratories Inc Stock, if any, and to pay the net proceeds thereof into hands of the beneficiaries of this trust, said beneficiaries being Grace DeLano Myers and Ruth DeLano Miller. * * *

"The purpose of this trust is to prevent the diversion, subrogation or use of the payments, increase, earnings or principal of said sales contracts or shares of stock, by legal process or otherwise, to pay, satisfy or liquidate, any debts, demands, claims or rights of action of any kind or nature, for which I, if living, would not be liable, and my trustee is authorized, empowered and directed to contest and resist any such

action unless or until the court shall otherwise order

"The duration of this trust shall F C DeL not exceed ten (10) years unless it shall appear to the

"Page 4 Fred C. DeLano
Court that it be to the best interests of the beneficiaries to extend said trust and the Court shall so order.

"This trust may be dissolved at any time after one year from date of probate, upon petition of both beneficiaries and the trustee and with the approval of the court.

"Upon the termination of this trust the sales contracts and the shares of stock of any company, or any other assets in the hands of the Trustee, or under his control shall be equally divided between the beneficiaries of said trust after the fees and expenses of the trustee allowed by the court, have been paid."

The court found that the will created a valid spendthrift trust "and that the said trust is a trust for the maintenance and support of the beneficiaries thereunder, and the income therefrom is payable to the beneficiaries from date of death. * * *" The order and decree declared that the purpose of the trust was as stated in Paragraph 10 of the will, as quoted above, and other provisions of the trust were carried into the decree of distribution.

[1] Appellant does not question the statement found in McColgan v. Magee, Inc., 1916, 172 Cal. 182, at page 186, 155 P. 995, at page 997, Ann.Cas.1917D, 1050: "The general doctrine that spendthrift trusts, inalienable by the beneficiary and inaccessible to his creditors during his life or for a term of years, are valid in this state, is well established. Seymour v. McAvoy, 121 Cal. 438, 442, 53 P. 946, 41 L.R.A. 544." See also San Diego Trust, etc., Bank v. Heustis, 1932, 121 Cal.App. 675, at page 684, 10 P.2d 158. Its main contention is that the trust is invalid because it does not specifically provide for the "support, maintenance or welfare" of either of the beneficiaries for any specified term or at all, and has for its sole purpose the defeat of the just claims of the creditors of the beneficiaries.

[2, 3] We think the court did not err in its construction of the trust. All sums received by the trustee on the real estate contracts, as well as dividends, earnings and increase of the corporate stock, were to be paid into the hands of the beneficiaries. The purpose of the testator to place the corpus and income of the trust property beyond the reach of the creditors of the beneficiaries was expressly stated. That is one of the purposes of spendthrift trusts and it is a lawful purpose. There was no provision against alienation by the beneficiaries of their interests in the trust property, nor did the will specifically declare that the trust was made for their support, maintenance, and welfare, but the purpose of the testator is no less clear because of these omissions. It was disclosed by the use of the term "spendthrift trust," which has a well understood legal meaning. Such a trust has been frequently defined as "one created for the purpose of providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity." See cases listed in 65 C.J. p. 230, note 50; 39 Words and Phrases, Perm.Ed., p. 797. The testator no doubt used the words advisedly, since the will otherwise made it plain that it was his desire that the trust estate be preserved for the benefit of his daughters to the exclusion of their creditors.

[4-6] No set phraseology need be employed to create a spendthrift trust. It is sufficient if the intent is reasonably plain upon a consideration of the will as a whole. Seymour v. McAvoy, 1898, 121 Cal. 438, 442, 53 P. 946, 41 L.R.A. 544; San Diego Trust, etc., Bank v. Heustis, supra, 121 Cal.App. 675, 10 P.2d 158; Jones v. Harrison, 8 Cir., 1925, 7 F.2d 461. It is not necessary that the instrument creating the trust contain all of the restrictions and qualifications incident to spendthrift trusts. 1 Underhill on Wills, p. 695, sec. 529; 3 Page on Wills, p. 829, sec. 1308; Wagner v. Wagner, 1910, 244 Ill. 101, 91 N.E. 66, 70, 18 Ann.Cas. 490; Bennett v. Bennett, 1905, 217 Ill. 434, 75 N.E. 339, 341, 4 L.R.A.,N.S., 470; Wallace v. Foxwell, 1911, 250 Ill. 616, 95 N.E. 985, 50 L.R.A.,N.S., 632; and cases listed in Sherman v. Havens, 94 Kan. 654, 146 P. 1030, Ann.Cas.1917B, page 400. The courts will not inquire whether the restrictions upon the use of the trust property were necessary for the protection of the beneficiary. Wagner v. Wagner, supra.

[7-10] The will contained all of the essentials of a valid spendthrift trust. Appellant's argument that one of the essentials is a specific declaration in the instrument that the trust is created for the maintenance, support, and welfare of the beneficiaries is answered by the rules of inter-

pretation above stated. Appellant does not go so far as to say that a spendthrift trust, to be valid, must be exclusively for the support and maintenance of the beneficiaries, although the argument that is made, if sound, would lead to that conclusion. The court found, as already stated, that the trust was for the maintenance and support of the beneficiaries. Apellant insists that a finding to this effect was necessary to support the judgment and that it was not justified by the evidence. A complete answer to these contentions is that the so-called finding was no more than a statement of the purpose of the testator as the court understood it from a reading of the will. A finding as to such purpose was unnecessary. The will spoke for itself. In re Estate of Blake, 1910, 157 Cal. 448, at page 456, 108 P. 287. It is elementary that the intentions of a testator must be ascertained from a consideration of the will in its entirety unless there is uncertainty or ambiguity therein which necessitates resort to extrinsic evidence. There was no such evidence in this case, nor any need for it. Where a so-called finding of fact consists only of the construction which the court places upon an unambiguous written document, no question can arise as to the sufficiency of the evidence to support the finding.

[11] The trust provisions cannot be construed as an attempt to shield the estate against claims of creditors of the beneficiaries and at the same time to provide for uses to be made of the property other than those which were personal to the beneficiaries; the will contained not the slightest suggestion of such a purpose. Therefore, the question is not presented whether in this state a spendthrift trust would be valid as against claims of creditors of the beneficiaries if it was created for some purpose other than that of providing maintenance and support for the beneficiaries. This was not such a trust. The testator declared that he had advanced to his daughters and their respective husbands various sums of money at different times. The will as a whole evidenced his solicitude for the welfare of his daughters and the trust property was made available for their support and maintenance. In the absence of any other purpose stated in a will or other instrument creating a spendthrift trust, it is to be presumed that it was created for the maintenance and support and, in some cases, the education of the beneficiaries. Such trusts are unique in that they safeguard the beneficiaries against the consequences of extravagance, improvidence, and incapacity. In Nichols v. Eaton, 1875, 91 U.S. 716, at page 727, 28 L.Ed. 254, at page 257, it was said: "Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived. These views are well supported by adjudged cases in the State courts of the highest character." In Canfield v. Security-First National Bank, 1939, 13 Cal.2d 1, at page 13, 87 P.2d 830, it was stated that recognized public policy requires that impecunious beneficiaries should be protected from their creditors so as to prevent their becoming public charges. We make reference to these cases only because they point out the distinguishing characteristics which, so far as we have been able to discover, are universally and invariably associated with spendthrift trusts and which are so commonly understood as to have earned for such trusts the descriptive name which they bear. That name alone is sufficient to suggest the purpose to provide security and protection—a purpose which brought such trusts into being and which has been a prime factor in sustaining their validity.

[12-14] Contrary to the contentions of appellant, the trustor's purpose to make the beneficiaries secure in their use of the property, to the extent allowed by law, cannot be defeated by the fact that they may not be in actual need or because the trust property may provide funds in excess of their needs, nor by the fact that the trust fund is not so restricted as to make it impossible for the beneficiaries to use it for purposes other than their support. Whatever the rights of creditors may be under the provisions and the circumstances of specific spendthrift trusts, the probate court is concerned only with questions as to the validity of the trusts, and that depends upon the sufficiency and legality of the expressed purposes of the trustor and not upon the necessities of the beneficiaries or the sufficiency of the testator's reasons for creating the trusts. The argument that it was unnecessary for the testator to provide for the support of his daughters because they were married, aside from involving

an obvious nonsequitur, is not pertinent to the matter of the construction of the will. The testator had that fact distinctly in mind; and there is no reason why a spendthrift trust cannot be created for the benefit of a married woman.

[15] Appellant also objected to the executor's request for compensation for extraordinary services, which was allowed in the sum of $425, but this objection must fall because of appellant's failure to successfully attack the trust. The court found that the debts and expenses of administration exceeded the appraised value of all property of the estate that was not included in the trust, and that all money available for distribution had come from collections from the principal and income of the trust estate. It was also found that there was no property distributable to the daughters in excess of that distributed in trust for their benefit. From an inspection of the accounts of the executor it is seen that the trust estate was resorted to for the payment not only of the extraordinary compensation of the executor and other expenses of administration, but also for the payment of a substantial portion of the debts of decedent. Appellant could have no valid objection to payments made from the principal or income of the trust estate.

[16] The court did not err in holding that the beneficiaries were entitled under the trust to receive the income from the trust property from the date of death, where the will was silent on the subject. In re Estate of Platt, 1942, 21 Cal.2d 343, 131 P.2d 825.

It is unnecessary to consider respondent's contention that the probate court does not possess the power in any event to distribute any part of the estate to or for the benefit of a creditor of a devisee or legatee.

The order and decree are affirmed.

DESMOND, P. J., concurs.

BISHOP, Justice pro tem.

I concur in the judgment and in much of the opinion. The question before the trial court was whether or not the trust was a valid one. If it was, the property set aside in trust, and its increase, were properly distributed to the trustee. If it was not a valid trust, then the property intended for the trustee remained a part of the residue of the estate, and the one half of it which belonged to appellant's debtor should have been made subject to appellant's claim.

Appellant cites no authority and makes no argument which causes me to doubt that the trust was a valid one. Its argument in part seems to be based on the proposition that for one reason and another the interest of its debtor, one of the beneficiaries, in the benefits from the trust, is not exempt from her creditors. If this be so, and it may prove to be true by virtue of section 859, Civil Code, the fact does not affect the validity of the trust but only the extent of its success in endeavoring to thwart the beneficiaries' creditors. The question of the validity of the trust is not to be confused with that of the exemption of the proceeds of the trust. See Canfield v. Security-First Nat. Bank, 1939, 13 Cal.2d 1, 19, 87 P.2d 830. The finding which, as appellant rightly claims, lacks evidentiary support, that the trust was "for the maintenance and support of the beneficiaries thereunder", appears as an immaterial one, in the present proceeding.

Hearing denied; TRAYNOR, J., dissenting.



62 Cal.App.2d 862

PEOPLE v. DUTTON.

Cr. 3761.

District Court of Appeal, Second District, Division 3, California.

Feb. 10, 1944.

1. Witnesses ⇐208(2), 209

Permitting a physician, who was not defendant's physician but a psychiatrist connected with city police department, to testify as to an interview with defendant following his arrest, which interview was had in presence of police officer, was not a violation of a "privileged communication". Code Civ. Proc. § 1881, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged Communication".

2. Witnesses ⇐208(2)

The claim of privilege as between physician and patient is limited to civil cases and is not cognizable in a crimina

proceeding. Code Civ.Proc. § 1881, subd. 4.

3. Infants ⇐20

Evidence sustained conviction under statute relative to sex offenses involving a minor. Pen.Code, § 288a.

4. Infants ⇐20

In prosecution for a sex offense involving a minor, that no complaint was made by minor for some time after the alleged acts took place did not lend support to the assumption that the acts did not occur. Pen.Code, § 288a.

5. Infants ⇐20

In prosecution for a sex offense involving a minor, trial court sufficiently instructed jury to examine testimony of prosecuting witness with caution because of the difficulty in disproving the charge. Pen. Code, § 288a.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

John Dutton was convicted of violating Penal Code, § 288a, and he appeals.

Affirmed.

John Dutton, in pro. per., for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, of San Francisco, for respondent.

DESMOND, Presiding Justice.

Appellant was found guilty by a jury of violating section 288a of the Penal Code on three separate occasions, all counts involving the same individual, an eleven year old boy. The court refused to grant appellant probation and sentenced him to the penitentiary.

[1, 2] Although the record indicates that no motion for a new trial was made in defendant's behalf, he appeals, according to the notice in the clerk's transcript, "from the order denying his motion for a new trial and from the judgment," claiming that the jury's verdict is contrary to law and the evidence and that the court erred in permitting a physician attached to the Los Angeles city police force to testify as to an interview had with him after his arrest. This interview, he claims, was a privileged communication as between physician and patient. The claim is not well grounded for various reasons, among them the following: The physician was not his physician but a psychiatrist employed as a member of the police force to "interview all the cases arrested on sex charges"; a third person, a police officer, was present at the interview, and therefore any communications then made could not be considered confidential (27 Cal.Jur. 53.); further, the claim of privilege as between physician and patient is limited to civil cases and is not cognizable in a criminal proceeding. See Code Civ.Proc. § 1881, subd. 4, and People v. West, 106 Cal. 89, 39 P. 207.

[3] Appellant's contention that the verdict is contrary to the evidence, and particularly that "the People's evidence is so incredible as to be unworthy of belief and therefore amounts to no evidence at all," falls of its own weight when one reads the record. In our opinion the evidence in this case is not incredible, and appellant has not called our attention to a single item or circumstance to support his claim that it is. The boy, who had been on friendly terms with the appellant for a considerable period of time, described in detail the events complained of; and although cross-examined at length by experienced counsel he never wavered in his story or contradicted himself. In addition, a police officer testified that after arresting appellant he informed him of the charge against him, quoting the language of the statute, and asked him if he had anything to say about the boy's story and the complaint which had been issued. "My exact words were, 'Are these statements true?' And he said, 'Yes, they are true'; that he might as well tell the truth about it." Another officer corroborated this testimony, and the appellant, while denying the charges as made and the admissions of his guilt as detailed by the arresting officer, still upon cross-examination testified as follows:

"Q. Did he ask you whether you had done this with Lloyd or not? A. I don't recall whether he did or not.

"Q. You wouldn't say he did and you wouldn't say he did not? A. No, sir.

"Q. Then it is possible you might have told him that you did have this act with Lloyd? A. I think if I had said it in any way I would remember it. I don't remember saying anything like that."

This last answer, while not an admission that appellant had confessed his guilt to the officer, was certainly not the direct and positive denial which one would expect

from a man entirely innocent, and it is quite probable, we think, that the jury appraised it at its true value. The psychiatrist of the police department also testified that appellant admitted his guilt to him.

The boy testified that on one of the occasions mentioned in the complaint, when he was visiting at a ranch in Los Angeles county, appellant and he went into a wooded section and that there appellant took pictures of him in the nude; that he undressed at appellant's request. Upon being confronted, in cross-examination, with a letter which he had written the boy, appellant's attention was called to the incident of taking pictures at the ranch and the district attorney inquired concerning a passage in the letter as follows:

"Q. Another place in the letter you say, 'Please don't say any more about those pictures and tear this up when you finish reading it'. You have it underlined. Twice you have that in there. A. Yes, I see it.

"Q. Was there any reason why you put that in there? A. No."

Under the circumstances it is not surprising that the jury rejected the denials of the defendant.

[4, 5] In his brief appellant argues as follows: "As has been stated many times by our courts, a charge of this kind can easily be made but very difficult to disprove. We must look with caution upon the testimony of the complaining witnesses, since by the very nature of the charge there is usually no corroboration of the acts complained of. The fact that no complaint was made by the boy Lloyd for quite some period of time after the alleged acts took place, without some logical reason for his failure to do so, would lend support to the assumption that these acts did not occur." As to the latter part of the argument it may be said that it has no convincing force; as to the first part the answer is that the court in charging the jury gave the following instruction: "Cautionary Instruction (Sex Offenses Involving Minors). By reason of the fact that charges of the nature involved in this case can easily be made and are often difficult to disprove, I instruct you that it is your duty to examine with caution the testimony of the prosecuting witness. The fact that the charge here made, however, is one difficult to disprove should not deter you from rendering a verdict of guilty in the event that you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty as charged."

All three judgments are affirmed. The appeal from the asserted order of the court denying a motion for a new trial is dismissed.

SHINN and PARKER WOOD, JJ., concur.



GARDNER v. MARSHALL et al.*

Civ. 14208.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1944.

Hearing Granted March 30, 1944.

1. New trial ⇐159

Where trial court failed to rule upon motion for new trial, motion was denied by operation of law. Code Civ.Proc. § 660.

2. New trial ⇐163(2)

The granting of a new trial as to one of several independent tort-feasors found jointly liable for negligence does not vacate the judgment against the remainder, but, if the rights and liabilities of the co-defendants are interdependent or those of one are entirely dependent on the other, the judgment should be treated as an entirety, and, if vacated as to the one upon whom the other's rights depend, should also be vacated as to the latter.

3. Appeal and error ⇐842(4)

In action against alleged employer of driver of automobile striking plaintiff's motor scooter where driver owned automobile, record disclosed a question of fact upon issue of relationship of master and servant between employer and driver and consequent liability imposed upon employer based upon respondeat superior principle.

4. Indemnity ⇐13(1)

Where the master's liability is solely on the ground of respondeat superior, the servant is the actual wrongdoer, his liability is primary, and the master is entitled to indemnity from the servant if a judgment be rendered against the master.

* Subsequent opinion 151 P.2d 122.

5. Master and servant ⇐333

Where master's liability is solely on ground of respondeat superior and master and servant are parties defendant, and jury finds against master and in favor of servant, judgment must be reversed because it otherwise would cause the master to lose his right of indemnity from the servant.

6. Dismissal and nonsuit ⇐7(1)

A litigant may dismiss his action against any defendant at any time before submission thereof.

7. Dismissal and nonsuit ⇐29
Judgment ⇐570(16)

At common law, when plaintiff renounced his cause of action and judgment was entered for defendant, a retraxit occurred and the cause of action was forever barred.

8. Appeal and error ⇐1173(1)

Where judgment notwithstanding verdict for alleged employer of driver of automobile striking plaintiff's motor scooter was reversed, order granting new trial to driver was affirmed, judgment was entered against alleged employer, plaintiff dismissed the action as to the driver, and alleged employer's liability was based solely upon respondeat superior doctrine, alleged employer was entitled to new trial to protect his substantial rights to indemnity from driver.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Floyd B. Gardner, Jr., against William H. Marshall and another for injuries sustained in an automobile collision. From an adverse judgment, defendant the American Brake Shoe & Foundry Company appeals.

Judgment reversed and cause remanded for new trial.

Betts & Garrison, of Los Angeles, for appellant.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

This is the second appeal in this case. The first was decided December 11, 1942. 56 Cal.App.2d 62, 132 P.2d 833. In that decision a judgment notwithstanding the verdict as to one defendant was reversed, and an order granting a new trial as to the other defendant was affirmed.

Such facts as are necessary to an understanding of this appeal follow: After a trial by jury a verdict of $15,000 was awarded plaintiff against both defendants. One of the defendants drove his automobile out of his right-hand lane of traffic into the left-hand lane and ran over the plaintiff, who was at the time riding a scooter where he had a right to be. The trial court granted a motion for judgment notwithstanding the verdict as to the other defendant upon the ground that there was no evidence by which that defendant could be held liable as the employer of the defendant who actually caused the accident. A motion for a new trial was granted as to the defendant driver and owner of the automobile.

[1] Upon coming down of the remittitur, the trial court entered judgment in the amount of the jury's verdict in favor of the plaintiff and against the defendant employer. This defendant then moved for a new trial. The trial court failed to rule upon this motion, which was denied by operation of law. Sec. 660, Code of Civil Proc. The action as to the defendant driver was dismissed by the plaintiff on the same day that the motion for a new trial by the employer defendant was filed.

In support of the appeal from the judgment against defendant employer two propositions are urged:

First, the judgment against the employer defendant was solely and entirely because of negligence of the driver defendant. The defendants were not joint tortfeasors; if the employer defendant was liable at all, that liability was based upon the legal rule of respondeat superior. Therefore, a new trial having been granted as to the employee, no judgment may be enforced against the employer defendant.

Secondly, there was an abuse of discretion on the part of the trial court in failing to act favorably upon appellant's motion for a new trial.

In Bishop v. Superior Court, 59 Cal.App. 46, 209 P. 1012, it was held that an order granting a new trial as to an agent vacated a judgment as to his principal. The cause of action in that case alleged fraud, based on false representations of the agent and not his principal. And in that case the comment is made that the reason for the

rule is that the liability of the principal is dependent upon that of the agent.

[2] In Hoffmann v. Lane, 11 Cal.App. 2d 655, 661, 54 P.2d 477, 479, the rule involved is stated: "The granting of a new trial as to one of several independent tort-feasors, found jointly liable for negligence, does not vacate the judgment against the remainder. Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 86 P. 178. But if the rights and liabilities of the codefendants are interdependent or those of one are entirely dependent on the other, the judgment should be treated as an entirety, and, if vacated as to the one upon whom the other's rights depend, also as to the latter. Bishop v. Superior Court, 59 Cal.App. 46, 209 P. 1012; Hamilton v. Prescott, 73 Tex. 565, 11 S.W. 548; Stotler v. Chicago & A. Ry. Co., 200 Mo. 107, 98 S.W. 509. The defendant Lane could not be held liable as owner of the auto truck upon either of the three theories advanced by the plaintiff until the negligence of the defendant Brasesco as the proximate cause of plaintiff's injuries had been established. The order granting a new trial as to defendant Brasesco did not limit the issues to be retried, and therefore the question of his negligence was left undetermined. Hence the defendant Lane was entitled to participate in the redetermination of that issue."

[3] In this case the liability of the defendant employer depends upon the relationship of master and servant and the consequent liability imposes upon the master based upon the legal principle of respondeat superior. Upon this issue the trial record discloses a question of fact the determination of which might go either way, depending upon the admissibility, and the weight, value and effect given to the testimony relevant to the issue by the trier of fact.

Cases in which both employer and employee are joint tort-feasors are not here applicable. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948.

[4, 5] Where the master's liability is solely on the ground of respondeat superior, the servant is the actual wrongdoer, his liability is primary, and the master is entitled to indemnity from the servant in case a judgment be rendered against the master. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. When both master and servant are parties defendant, and a jury finds a verdict against the master and in favor of the servant the judgment must be reversed, because it otherwise would cause the master to lose his right of indemnity. Thompson v. Southern Pacific Company, 31 Cal.App. 567, 161 P. 21; Fimple v. Southern Pacific Co., 38 Cal.App. 727, 177 P. 871; Zulim v. Van Ness, 3 Cal. App.2d 82, 38 P.2d 820.

[6, 7] After the motion for new trial of the defendant driver was granted (and affirmed on appeal), the plaintiff dismissed his action as against that defendant. In Jalof v. Robbins, 19 Cal.2d 233, 120 P.2d 19, our Supreme Court refers to and approves the long-established California rule that a litigant may dismiss his action against any defendant at any time before submission thereof. Sec. 581(1) of the Code of Civ.Proc. At common law when a plaintiff renounced his cause of action and a judgment was entered in favor of the defendant, a retraxit occurred and the plaintiff's cause of action was forever barred. Westbay v. Gray, 116 Cal. 660, 48 P. 800. But under modern practice, it would seem more reasonable to assume that the plaintiff having the right to proceed either against the defendant driver or the defendant employer may dismiss as to one without suffering the penalty of losing his entire cause of action.

[8] Interesting as the latter question may be, it is not necessary to rule upon it because a new trial is required to protect a substantial right of appellant. Bishop v. Superior Court, supra; Hoffmann v. Lane, supra. Moreover, when the trial court granted a motion notwithstanding the verdict as to the employer defendant, then granted a motion for a new trial as to the driver defendant, and then denied a motion for a new trial as to the employer defendant, it is obvious that a reviewing court should make some inquiry to determine if there was an abuse of discretion in making any such conflicting orders. From such inquiry we hold that the latter order should be set aside.

The judgment is reversed and the cause remanded for a new trial.

YORK, P. J., concurs.

DORAN, Justice (concurring).

I concur. It is now my conviction that the decision as a result of the former appeal (56 Cal.App.2d 62, 132 P.2d 833, 835) was erroneous. The decisive question on

appeal was whether evidence of the declarations of the employee of defendant, who was involved in the accident which caused plaintiff's injuries, was hearsay. The pertinent part of the opinion reads: "Thus we come to a determination whether the declarations against interest were hearsay and therefore not admissible in evidence. If they were hearsay, then the judgment notwithstanding the verdict was proper; if they were admissible, then there was such a conflict of evidence that the verdict of the jury must stand. Again we come to another well-settled rule of law in California." Then follows a quotation of the rule recited in section 139, at page 865 of 1 California Jurisprudence. In addition to the above cited authority the court declares that: "In Tsirlis v. Standard Oil Co., 32 Cal.App.2d 469, at page 475, 90 P.2d 128, the rule above set forth is quoted with approval, and supporting cases are cited." In the Tsirlis case, supra, appears the following (at page 475 of 32 Cal.App.2d, at page 131 of 90 P.2d): "The rule is stated in 1 California Jurisprudence, 865, section 139, as follows: 'It is a rule of long standing in California that the declarations of an agent are not admissible to prove the fact of his agency, nor the extent of his authority. They are admissible, however, to prove that his acts were done on behalf of his principal and not in his individual capacity * * *.' See also, Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 P. 719; Smith v. Firestone Tire & Rubber Co., 119 Conn. 483, 177 A. 524; 2 Am.Jur. 352, sec. 445; Restatement of the Law of Agency, sec. 289; 2 Mechem on Agency, 2d ed. p. 1367, sec. 1790."

Thus it will be seen that Gardner v. Marshall, supra, relies on California Jurisprudence and the Tsirlis case, supra, and the Tsirlis case relies on California Jurisprudence and the citations noted.

The unqualified statement in California Jurisprudence, viz.: That the declarations of an agent are admissible to prove "that his acts were done on behalf of his principal and not in his individual capacity", is not the law; nor do the cases cited in support thereof sustain the text. The following are the cases cited. Ferris v. Baker, 127 Cal. 520, 59 P. 937; Swinnerton v. Argonaut Land & Dev. Co., 112 Cal. 375, 44 P. 719.

With regard to the authorities cited in the Tsirlis case, supra, that purport to support the same rule quoted from California Jurisprudence, an examination thereof reveals that they not only do not support such a rule but show the rule to be to the contrary. In Restatement of the Law of Agency, section 289, appears the following: "Evidence of statements of agents, whether or not such statements are authorized, is admissible in favor of and against the principal, if admissible under the general rules of evidence as to the admissibility of such statements by persons not agents." "Evidence of statements by an agent introduced in order to show the purpose for which he did an act or to show his knowledge or state of mind is admissible in favor of and against the principal under the rules relating to the introduction of evidence for this purpose. Statements by an agent are not excluded because made by an agent. If his knowledge or condition of mind or purpose if *relevant* to the cause of action which is being brought, either party may introduce evidence relevant to show this." (Italics added.)

In Mechem on Agency may be found the following.

"Wherever the agent's state of mind at a particular time is material—where the question of his good faith, his alertness, his sense of duty or responsibility, his attention to duty, his motive, his appreciation of danger, and the like, is involved—his statements, admissions or declarations made at the time and indicating what his state of mind then was in reference to such matters, would be admissible in evidence either for or against his principal wherever the principal would be affected by the agent's state of mind, and it would be a proper subject of inquiry. This is not upon any ground of agency, of course, but upon the ordinary rules of evidence.

"Thus if the issue were an agent's negligence, evidence of his declarations at the time tending to show that his thoughts and attention were upon something else than his duty would be admissible; if the charge were his recklessness, declarations showing his indifference to consequences would be admissible; * * *" Section 1790, p. 1367.

But Mr. Mechem further points out (pp. 1368, 1369) that.

"The admissions of an agent, except in the cases already referred to, in which it can be said that he has been expressly or impliedly authorized to make them, are generally not competent to charge his principal. The agent may make admissions

which will charge himself, and the principal may make admissions to bind himself, but usually one man can not admit things to charge another. An agent may confess his own negligence or default so far as his own liability is concerned, but he can not ordinarily be deemed authorized to confess his principal's negligence or defaults. * * * 'If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion.'

"The fact that it is the negligence of the agent which is sought to be proved against the principal does not make the agent's admission of his own negligence competent against his principal. It is bad enough, in many cases, for the principal to be liable for the negligence of his agent, without also fastening his liability by the agent's admission."

The distinction between evidence of the declarations of an agent and the testimony of an agent as a witness referred to by Mr. Mechem is a noteworthy reminder in connection with the subject here considered.

In American Jurisprudence, Vol. 2, p. 352 et seq., appears the following: "It frequently happens in cases where there is an issue of the fact of agency that it is necessary to determine whether the third party to the transaction in question dealt with the alleged agent as an agent or an individual principal. Generally such necessity arises on issues of agency by estoppel or ratification, or questions as to the rights and liabilities of undisclosed principals. On such issues the declarations of the alleged agent, asserting the fact that he is acting in the capacity of an agent, lose their character as hearsay, since the truth of the assertions is immaterial, the evidence being offered only to prove that the alleged agent purported to act in that capacity, or to show that the third party undertook to contract with a principal through the alleged agent." "Although an alleged agent's extrajudicial statements are not admissible to prove the fact of his agency, that fact may, when it rests in parol, be established on the trial by the testimony of the agent himself; * * *"

The Tsirlis case, supra, was an action for personal injuries arising out of an automobile accident which occurred about five o'clock Sunday morning. It was sought to prove that the agent, Mr. Mahoney, who was killed in the accident, was acting in the course of his employment and agency. For that purpose evidence of Mr. Mahoney's declarations to others upon his departure, and two hours before the accident occurred, were received in evidence. The court held that: "The foregoing declarations of Mr. Mahoney were not admitted for the purpose of proving the status of Mr. Mahoney as an employee of the defendant company or of proving Mr. Mahoney's authority to drive the automobile *but said declarations were admitted to show that the trip in question was taken by Mr. Mahoney in pursuance of his employer's business rather than for purposes of his own.*" (Italics added) And the court cited California Jurisprudence, together with the other authorities hereinabove referred to in support thereof.

It is at once evident from an examination thereof, as above noted, that the authorities, with the exception of the quotation from California Jurisprudence, do not sustain the rule laid down in the Tsirlis case. Nor will such a rule stand the test of reason. Obviously, if evidence of the extrajudicial declarations of Mahoney are admissible to prove the trip in question was taken by Mahoney in pursuance of his employer's business, then evidence of the extrajudicial statements of Mahoney's employer to the contrary would be admissible. It is idle to argue that such evidence is not hearsay.

Finally, it should be emphasized that in practically all of the decisions above referred to, the disputes litigated resulted from some transaction of a contractual character, express or implied. In such cases the third party usually is the victim of a misunderstanding or misrepresentation through no fault of his own. In a tort action, however, the third party or plaintiff is a total stranger to both the agent and the principal. As between the plaintiff on the one hand and the agent and principal on the other, there are no equities. There is a fundamental distinction between the admission of extrajudicial declarations of an agent in cases of agency by estoppel and the admission of declarations of an agent in a tort case. The truth of the declaration of an agent made to a third party, inducing the third party to deal with the agent as such, is immaterial. The declaration is admitted only to prove the fact that such a statement was made. See quotation from American Jurisprudence, above noted. On

the other hand, in the Tsirlis case, and in the present case, on the former appeal, supra, the truth or falsity of the declarations made is a material factor. Moreover, in the Tsirlis case and on the former appeal in the present case, the declarations involved were made at times and under circumstances so remote from the occurrence of the accidents in question as to preclude any possibility that such statements constituted a part of the res gestae.

Hearsay always has been a menace to the administration of justice. It is especially menacing when in disguise. To admit evidence of the extrajudicial declarations of an alleged agent to prove "that his acts were done on behalf of his principal" is to prove the ultimate fact of agency and that such acts were in the due course thereof, by hearsay evidence.

In my judgment the evidence of such declarations in the case of Gardner v. Marshall, supra, and Tsirlis v. Standard Oil Co., supra, was hearsay and its admission in evidence was error.



62 Cal.App.2d 776

MADURO v. MADURO.

Civ. 12532.

District Court of Appeal, First District, Division 1, California.

Feb. 7, 1944.

Hearing Denied April 7, 1944.

1. Marriage ⇐65

The word "divorce" in statute precluding grant of divorce upon default of defendant does not include annulments. Civ. Code, § 130.

See Words and Phrases, Permanent Edition, for all other definitions of "Divorce".

2. Trial ⇐20

The statute implying that court must "hear" certain uncontested actions in open court implies that evidence must be taken in open court and precludes court from hearing an uncontested annulment action in chambers. Code Civ.Proc. § 166, subd. 3; § 585.

See Words and Phrases, Permanent Edition, for all other definitions of "Hear".

3. Marriage ⇐60(7), 65

Irrespective of any statutory provision and as a matter of public policy and to protect the state's interest in the marriage relationship, trial court not only has discretion to require production of evidence in a default annulment action, but is without power to enter a judgment without the production of evidence to support the complaint which must be clear, satisfactory, and convincing.

4. Marriage ⇐60(7)

In default annulment proceedings, hearsay declarations of defendant wife that she had another and prior husband living, and that the only divorce she had obtained from him was a Mexican correspondence divorce, were not entitled to much more weight than admission involved in failing to answer the complaint.

5. Appeal and error ⇐994(3), 1012(1)

In annulment proceedings it was for trial court to pass upon credibility of the witnesses and the weight to be given their testimony.

6. Marriage ⇐60(7), 65

In a default annulment proceedings, hearsay declarations by defendant wife that she had another and prior husband living, and that the only divorce she had obtained from him was a Mexican correspondence divorce, was not evidence so clear, satisfactory, and convincing that the trial court abused its powers in refusing to grant an annulment.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by John A. Maduro against Maria Maduro for annulment of marriage. From a decree denying annulment, plaintiff appeals.

Affirmed.

W. L. A. Calder, of San Francisco, for appellant.

No appearance for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action for the annulment of his marriage on the ground that at the time he married the defendant she had another husband living from whom she had not been legally divorced. The defendant wife's default was duly and properly entered. A hearing was then had. The trial court denied the annulment on the ground that plaintiff had not introduced sufficient evidence at the hearing to prove the allegations of his complaint. Plaintiff appeals, the main point urged being that upon default of his wife, the allegations of the complaint being sufficient, he was, as a matter of law, entitled to a decree that the marriage was null and void from the beginning without the production of any evidence at all.

[1, 2] Strangely enough, there appears to be no California case discussing the question as to whether, when a defendant defaults in an annulment proceeding (using the term "annulment" in its broadest sense), such party is entitled to a judgment without the production of evidence. So far as divorces are concerned, the matter is expressly covered by statute. Section 130 of the Civil Code provides that: "No divorce can be granted upon the default of the defendant or upon the uncorroborated statement, admission, or testimony of the parties * * *." There is no comparable statute in reference to annulment. Plaintiff correctly contends that the word "divorce" in § 130, supra, does not include annulments. In Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A. 1918B, 415, Ann.Cas.1918E, 184, it was held that the word "divorce" appearing in § 128 of the Civil Code relating to the requisite residence of a plaintiff in a divorce proceeding, and the same term appearing in § 131 of the Civil Code requiring a decision to be filed in a divorce case, and the same term appearing in § 132 of that code providing for the entry of the final judgment in a divorce action after one year, has no application to annulment proceedings. For the reasons set forth in that opinion (see particularly 175 Cal. at pages 806 to 809, 167 P. at pages 397 to 399, L.R.A.1918B, 415, Ann.Cas. 1918E, 184), we agree that § 130 has no application to annulment proceedings.

There appears to be no direct statutory provision on the subject. Section 585 of the Code of Civil Procedure, upon which plaintiff relies, provides for the entry of defaults in certain cases without the taking of evidence, and requires or permits the taking of evidence in certain other cases, but there is no direct reference to annulment proceedings in that section. Subdivision 3 of § 166 of the Code of Civil Procedure provides that a judge may hear and determine in chambers "all uncontested actions, * * * and other matters pending before the court other than actions for divorce, maintenance or annulment of marriage * * *." Thus, under this section, a judge is without power to hear an uncontested annulment action in chambers. The implication is that the judge must "hear" such uncontested action in open court, which necessarily implies that evidence shall be taken.

[3] However, without regard to any statutory provision, we are convinced that, as a matter of public policy, and in order to protect the interests of the state in the marriage relationship, a trial court not only has the discretion to require the production of evidence in a default annulment, but that, in such a case, such court is without power to enter judgment without the production of evidence. Cases dealing with the dissolution or annulment of the marriage relationship are sui generis. The state is a silent but by no means inactive third party to every action to dissolve a marriage. The institution of marriage is of so much importance to society that the public is interested in the outcome of every action for an annulment. Wadsworth v. Wadsworth, 81 Cal. 182, 22 P. 648, 15 Am.St.Rep. 38; 16 Cal.Jur. p. 943, § 36. It is well settled that: "In view of the peculiar nature of marriage and the grave consequences attendant upon its subversion, the courts will not grant a decree of nullity except upon the production of clear, satisfactory and convincing evidence." 38 Corpus Jur. p. 1354, § 131; see footnote 29 where many cases are cited.

While the state has no interest in preventing an annulment where the grounds necessary therefor exist, it is interested in seeing to it that no marriage is declared void as a result of fraud or collusion, and that the statutory grounds upon which the annulment is sought actually do exist. If annulments could be granted without production of evidence it would rest entirely within the power of the two parties to the marriage contract to secure an annulment upon the filing of a verified complaint and upon default of the defendant. The in-

terests of the state in maintaining the marriage contract would in no way be protected.

We are not without persuasive authority from other jurisdictions on this subject. It is well settled that even though there is no statute requiring the production of evidence in default divorce cases, the interest of the state requires that no judgment be entered without the production of such evidence. Bishop in his book on "Marriage, Divorce and Separation" at p. 284, § 692, states the rule as follows: "A default in a divorce suit, or taking the bill pro confesso when the proceeding is in equity, does not, as in other causes, authorize a judgment without proofs, or in any degree supersede the necessity of proofs, or lighten the burden of the plaintiff in establishing his allegations." As Bishop points out, this doctrine is in accord with the ancient common law (Ibid., p. 290, § 708) and with the canon law (Ibid., p. 290, § 709). He also points out that any admission by the defendant in an annulment proceeding should be received with "particular caution" in order to be sure that parties, by collusion, are not thus seeking to annul a marriage in fact valid. Ibid., p. 293, § 717.

There are several cases from other states holding that, in divorce cases, as a matter of public policy, and in the absence of statute, the trial court is without power to enter a decree without the production of evidence. Robinson v. Robinson, 1 Barb., N.Y., 27; Scott v. Scott, 17 Ind. 309; Palmer v. Palmer, 1 Paige, N.Y., 276; Welch v. Welch, 16 Ark. 527; Fogel v. McDonald, 159 S.C. 506, 157 S.E. 830; Hawes v. Hawes, 33 Ill. 286.

From what has been said, it is clear that in order to preserve the interests of the state in the marriage relationship, and in order that no marriage shall be dissolved, either by divorce or annulment, unless the grounds therefor exist, a trial court is without power to grant an annulment without the production of evidence to support the allegations of the complaint. The trial court did not err, therefore, in requiring the production of evidence in the present case.

[4-6] Plaintiff also urges that the evidence produced by him, as a matter of law, was legally sufficient to require the trial court to enter the decree. The plaintiff testified that his wife had told him in his attorney's presence that she had another and prior husband living, and that the only divorce she had obtained from him was a Mexican correspondence divorce. The trial court termed this testimony the "clearest sort of hearsay," and when plaintiff failed to produce any other evidence, denied the annulment. While such declarations were admissible as admissions against interest, the trial court was entitled to look upon such admissions with suspicion. Such out of court admissions are not entitled to much more weight than the admission involved in failing to answer the complaint. It was for the trial court to pass upon the credibility of the witnesses and the weight to be given their testimony. Certainly such evidence was not so "clear, satisfactory and convincing," that the trial court abused its powers in refusing to base a decree thereon.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.



62 Cal.App.2d 803

PEOPLE v. BEACH.

Cr. No. 3754.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1944.

Hearing Denied March 8, 1944.

1. Larceny ⇨23

"Grand theft" includes larceny. Pen. Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

2. Finding lost goods ⇨10

Finder was entitled to possession of lost money as against all the world except true owner, subject to compliance with statute concerning finding of lost property. Civ.Code, § 1864 et seq.

3. Larceny ⇨7

Any legally recognizable interest is sufficient to sustain averment of ownership in charge of grand theft. Pen.Code, § 484.

4. Larceny ⇐23

Obtaining property with owner's apparent consent but with intent to steal and carry out unlawful intent constitutes "grand theft". Pen.Code, § 484.

5. Larceny ⇐65

Evidence that accused falsely posing as detective representing owner of lost money obtained it from finder and used part of it for his own benefit without attempting to find true owner sustained conviction of grand theft. Pen.Code, § 484.

6. Criminal law ⇐1202(7)

Accused was not prejudiced by action of court in proceeding with trial after amendment of information so as to charge third prior conviction without arraigning accused thereon, where court found charge contained in amendment untrue.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Paul Leslie Beach was convicted of grand theft, and he appeals.

Judgment and order affirmed.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

William G. Kenney, of Los Angeles, for appellant.

W. J. WOOD, Justice.

Defendant was charged with grand theft in each of two counts of the information. In the first count he was charged with the theft of $5,000 and in the second count he was charged with the theft of $980. He was also charged with three prior convictions. At a trial by the court without a jury he was found guilty on both counts of the information and the court also found that the charge of the first prior conviction was true. Defendant has appealed from the judgment and from the order denying his motion for a new trial.

The complaining witness, H. A. McDonald, while walking on Figueroa Street in Los Angeles at about 4:30 o'clock in the afternoon of February 28, 1943, with Margaret Ivers, found $7,000 in United States currency, consisting of seven bills each of the denomination of $1,000. He took the bills to a drug store and asked the clerk whether they were counterfeit. Upon being assured that the bills were good McDonald went to his hotel, where Miss Ivers remained. He later went to a drinking establishment known as the Turf Club, and was there joined by Miss Ivers. At the Turf Club he exhibited the various bills and tendered one of them to Mr. Lane, one of the proprietors, telling Mr. Lane that he had sold a car. Lane was unable to make change for the $1,000 bill but he gave McDonald $20 and a "note" for the $980. The bill was left with Lane. Among those at the Turf Club who saw the bills was one Gil Martin who then met McDonald for the first time. Two hours later the two men left the club together at which time McDonald informed his new acquaintance of his find. Miss Ivers returned to the hotel. Having left Martin at the corner of Eighteenth and Figueroa Streets McDonald went to another bar and finally arrived at his room in the Kerby Hotel, sometime after midnight.

A few moments had elapsed when McDonald heard a knock at his door. He opened the door and defendant entered the room, exhibited a badge and told McDonald that he was a detective. Defendant also stated that he knew the owner of the money which McDonald had found and that he had come to get the money. He also demanded the note for $980. McDonald asked defendant to whom the money belonged but defendant said that there was $3,000 more and when the rest of the money was found he would tell who the owner was. He also said that there would be a reward and that McDonald would get his share. McDonald handed the bills to defendant.

Defendant knocked on McDonald's door at the hotel the following morning at about 10 o'clock. At that time he was accompanied by his wife whom he introduced to McDonald as the daughter of the man who had lost the $7,000. She stated that her father had been held up and when defendant asked her if McDonald was the man who held up her father she stated that he was not the bandit. Defendant then said to McDonald: "McDonald, you get your clothes on. You are going to the Turf Club with me to get the rest of this money." They went together to the Turf Club, where defendant stated to the proprietor that he was an officer. The proprietor of the Turf Club asked McDonald if it was all right to deliver the $1,000 bill to defendant, and upon an assurance from McDonald that it was all right, the $1,000

bill was given to defendant, who in turn repaid the $20 which had been advanced on the bill.

From the testimony of the hotel clerk it appears that defendant and Gil Martin inquired at the Kerby Hotel for McDonald late in the evening of February 28 and upon being told that McDonald had not returned defendant gave the clerk his name and telephone number and asked to be informed when McDonald arrived. After receiving a telephone message from the clerk defendant went to McDonald's room.

A number of American Express money orders in the total sum of $1,000 were purchased by defendant on March 3, from the Security First National Bank. On the same day defendant bought a Packard automobile for the sum of $1,250 and gave as part of the purchase price a $1000 bill.

When he was arrested defendant had five $1,000 bills in his possession. He also had a large number of gasoline coupons and told the arresting officer that he was going to Cleveland to testify in a narcotic case and that he had purchased the automobile to drive to Ohio. It was shown in evidence that defendant did not have a license to operate as a detective. At one time he had applied to the police commission for a license but the commission had denied the application.

Gil Martin testified that he had met McDonald at the Turf Club and had there seen the various bills in McDonald's possession. Later in the same evening he informed defendant of the occurrence and told him that he did not know how much McDonald had but that it "looked like ten or fifteen $1000 bills". Defendant then said "a man with that much money his life is in danger * * * something ought to be done about it". On Monday March 1, Martin asked defendant if he had seen McDonald and if he knew anything about the money and defendant replied, "Oh, just skip it". Defendant also told Martin that he had "dropped the whole matter." At that time Martin did not know that defendant already had the money.

[1-4] Defendant now contends that the evidence is insufficient to support a conviction of the crime of grand theft. The crime of grand theft includes the crime commonly known as larceny. Penal Code, sec. 484. As the finder of the lost money McDonald had the right of possession, and was entitled to retain it as against all the world except the true owner, subject to the obligation to comply with section 1864 et seq. of the Civil Code. Any legally recognizable interest is sufficient to sustain an averment of ownership in a charge of grand theft. People v. Torp, 40 Cal.App. 2d 187, 191, 104 P.2d 542. One is guilty of grand theft who with the apparent consent of the owner obtains property with the intention of stealing it and carries out his unlawful intent. People v. Knox, 32 Cal. App. 158, 163, 162 P. 407.

[5] The evidence is clearly sufficient to support the conviction. The court could reasonably conclude that defendant, without any justification whatever, determined to steal the money which McDonald had found. He went to McDonald's room after midnight and after McDonald had been drinking heavily and by falsely making it appear that he was a detective induced him to release the money. He then used part of the money for his own benefit and made no effort to find the true owner. He avoided the witness Martin, who expected to receive some benefit from the transaction. It is difficult to see any evidence of good faith on the part of defendant. In releasing the money to defendant McDonald thought that it would be returned to the true owner and that he would receive an appropriate reward. It is argued that "the evidence supports the theory that the defendant took the property to find the lawful owner." If indeed such a view could reasonably be taken, it is sufficient answer to the contention to state that the trial court in weighing the evidence did not accept such a theory but determined the facts adversely thereto.

[6] Defendant complains of the action of the trial court in proceeding with the trial after the prosecution was permitted to file an amendment to the information charging a third prior conviction without arraigning defendant thereon. The court found that the charge contained in the amendment was not true. It is apparent that defendant was not prejudiced by the action of the court.

The judgment and the order denying the motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

62 Cal.App.2d 840

NEIGHBOURS v. NEIGHBOURS.

Civ. 14362.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1944.

1. Courts ⇐190(2)

Order of superior court directing marshal of municipal court to apply any moneys in his possession in satisfaction of a judgment upon which a writ of execution had theretofore been issued was appealable. Code Civ.Proc. § 963.

2. Appeal and error ⇐113(2)

Generally, an order refusing to vacate an appealable order is nonappealable if grounds upon which motion to vacate was made existed before entry of original order and were available on appeal from such order.

3. Appeal and error ⇐113(2)

An appeal lies from an order refusing to set aside a final judgment if appellant has no other method of presenting case to appellate court, or from an order setting aside a judgment and rendering a substituted judgment when statute authorizes such an order, or from an order refusing to set aside a previous order when appellant was not a party to original proceeding and could not appeal therefrom.

4. Courts ⇐190(2)

Order of superior court refusing to set aside prior appealable order directing marshal of municipal court to apply moneys in his possession in satisfaction of a judgment upon which writ of execution had theretofore been issued was nonappealable. Code Civ.Proc. § 963.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by J. W. Neighbours against Lillian M. Neighbours. From an order denying plaintiff's motion to set aside a previous appealable order, plaintiff appeals. On defendant's motion to dismiss appeal.

Appeal dismissed.

Buel R. Wood, of Los Angeles, for appellant.

William Ellis Lady, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the appeal from an order of the trial court denying appellant's motion to set aside a previous appealable order of the court.

These are the undisputed facts:

[1] On July 23, 1943, the superior court made an order directing the Marshal of the Municipal Court of the City of Los Angeles to apply any moneys in his possession in satisfaction of a judgment upon which a writ of execution had theretofore been issued. This was an appealable order. (Sec. 963, Code of Civ. Proc.) On August 12, 1943, the trial court denied appellant's motion to set aside its order of July 23, 1943.

Respondent relies upon this proposition:

That since the order of July 23, 1943, was an appealable order, the order of August 12, 1943, denying appellant's motion to set aside the previous order was nonappealable.

[2, 3] This proposition is tenable. It is the general rule* that an order refusing to vacate an appealable order is nonappealable if the grounds upon which the party sought to have the order vacated existed before the entry of the original order and were available on an appeal from such order. (Home Owners', etc., Corp. v. Engelbertson, 54 Cal.App.2d 46, 48, 128 P.2d 424; Meis v. Collins, 1 Cal.App.2d 433, 435, 36 P.2d 662; Taft v. Security-First Nat. Bank, 139 Cal.App. 228, 232, 33 P.2d 683. See also De la Montanya v. De la Montanya, 112 Cal. 101, 118, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep., 165.)

[4] Applying the foregoing rule to the facts of the instant case, since the alleged

* There are certain recognized exceptions to the general rule, to wit, an appeal lies from an order:

(1) Refusing to set aside a final judgment if appellant has no other method of presenting the case to the appellate court. Helbush v. Superior Court, 99 Cal.App. 501, 505, 278 P. 1062.

(2) Setting aside a judgment and rendering a substituted judgment when the statute authorizes such an order. California Delta Farms v. Chinese American Farms, 201 Cal. 201, 202, 255 P. 1097.

(3) Refusing to set aside a previous order when the appellant was not a party to the original proceeding and could not appeal therefrom. Title Insurance & Trust Company v. California, etc., Co., 159 Cal. 484, 488, 114 P. 838.

errors were available upon an appeal from the appealable order of July 23, 1943, the order of August 12, 1943, denying appellant's motion to set aside the previous order was nonappealable, as none of the exceptions to the general rule are applicable, and the purported appeal therefrom must be dismissed.

It is so ordered.

MOORE, P. J., and W. J. WOOD, J., concur.



62 Cal.App.2d 859

PEOPLE v. HICKS.

Cr. 3760.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1944.

Hearing Denied March 8, 1944.

1. Criminal law ⇐1144(13)

On appeal from conviction, evidence will be reviewed in light most favorable to the people.

2. Criminal law ⇐507(4)

A person who feigns complicity in commission of a crime to detect and prosecute perpetrator thereof is not an "accomplice" and his testimony need not be corroborated. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

3. Criminal law ⇐507½

In prosecution against police officer for accepting bribe, evidence warranted finding that state's witness, who paid money to officer when officer charged witness with "booking" feigned complicity in offense to detect perpetrator of crime so as to require no corroboration for his testimony. Pen.Code, § 1111.

4. Bribery ⇐11

In prosecution against police officer for accepting bribe to permit "booking," testimony of state's witness that he paid the money received from accused's superiors to accused to detect perpetrator of crime, and merely feigned complicity therein, was not inherently improbable and was sufficient to sustain conviction.

5. Bribery ⇐11

It being unnecessary that testimony of state's witness, in prosecution against police officer for accepting bribe and who feigned complicity in offense to detect offender, be corroborated, testimony of such witness, believed by trial judge, constituted substantial proof of corpus delicti. Pen.Code, § 1111.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Noel H. Hicks was convicted of receiving a bribe, and he appeals.

Affirmed.

Joseph L. Fainer and Russell E. Parsons, both of Los Angeles, for appellant.

Robert W. Kenny and David K. Lener, both of San Francisco, for respondent.

McCOMB, Justice.

From a judgment of guilty of asking and receiving a bribe after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying the motion for a new trial.

[1] The evidence being viewed in the light most favorable to the People (respondent) and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App. 2d 265, 269, 108 P.2d 732, the essential facts are:

Mr. J. A. McDonald testified that on January 14, 1943, defendant, a police officer, and Officer Antunez went to a service station operated by J. A. McDonald at 3709 Whittier Boulevard, County of Los Angeles. Defendant told Mr. McDonald they had a report he was "booking" at the station. This Mr. McDonald denied. Whereupon defendant said, "We have a report that you are booking here and I am warning you." The officers then left the service station. The following day about 3 p. m., defendant again entered the service station and told Mr. McDonald, "Well, still got a report on this place." Mr. McDonald replied, "Well, you evidently have the wrong place."

Sometime after this second meeting, defendant called Mr. McDonald on the telephone and said, "Watch your step, Central Vice will be out to pay you a visit."

About the 28th of January, 1943, Mr. McDonald was arrested by Officers Ginder

and Tripp and was charged with bookmaking. His arraignment was set for February 17, 1943. Before noon on February 3, 1943, defendant again went to Mr. McDonald's service station and said to him, "Well, I warned you." Defendant then said, "I have been detailed for the last two weeks at San Pedro. I am back in this territory, in this division, permanently now and things will be different. My skipper wants to know who your boss is. We want to line this place up. We want to know who you are working for; I'd like to contact your boss." Defendant then told Mr. McDonald he wanted to be taken care of and that fifty dollars would be just about right. Mr. McDonald told him to return at "high noon" and he would put him in touch with the boss. Defendant returned at the time indicated and Mr. McDonald told him he was unable to contact the boss, but would make a definite appointment for 12 o'clock the next day. Mr. McDonald then contacted Lieutenant Johnston (defendant's superior officer) and Officer Ginder and received from them five $5 bills. The officers retained a written notation of the serial number of each of the bills.

At noon on February 4, 1943, defendant returned to the service station and Mr. McDonald handed to defendant the currency he had received from Officers Johnston and Ginder, saying to defendant, "The boss was in a hurry and couldn't wait, and asked me to give you this money and asked for your card so he could contact you later."

Other witnesses testified that after receiving the twenty-five dollars defendant returned to the police car which he had left parked in a near-by alley. He entered the car and drove twenty or thirty feet when he was stopped by Officers Johnston, Murdock and Ginder. Officer Faxon, who was also present, asked defendant if he had received anything from the service station at 3709 Whittier Boulevard. Defendant replied that he had received twenty-five dollars and handed the bills to Officer Faxon. The bills were the same ones the police officers had previously delivered to Mr. McDonald. Defendant stated to the officers that he had won the money on a horse-racing wager which he had placed through Mr. McDonald.

Defendant relies for reversal of the judgment on the proposition *that the evidence is insufficient to support the judgment in that (a) witness McDonald was an accomplice of defendant and his testimony was not corroborated pursuant to the provisions of Section 1111 of the Penal Code, (b) the testimony of witness McDonald was inherently improbable, and (c) the corpus delicti was not proven.*

This proposition is untenable.

[2, 3] (a) From the evidence, the trial court was justified in impliedly finding that Mr. McDonald was not an accomplice of defendant, but merely feigned complicity in the commission of the crime for the purpose of detecting the perpetrator of a crime. The law is established that one who feigns complicity in the commission of a crime for the purpose of detecting and prosecuting the perpetrator thereof is not an accomplice and his testimony need not be corroborated pursuant to the provisions of section 1111 of the Penal Code. (People v. Buyle, 20 Cal.App.2d 650, 652, 68 P.2d 268; People v. Fitzgerald, 14 Cal.App.2d 180, 199, 58 P.2d 718.) Because Mr. McDonald was not an accomplice of defendant it was unnecessary that his testimony be corroborated in accordance with the requirements of Section 1111 of the Penal Code.

[4] (b) It is obvious that the testimony of witness McDonald as set forth above was not inherently improbable and therefore it was sufficient to sustain the findings of the trial court that defendant was guilty of asking for, and receiving a bribe.

[5] (c) Since it was unnecessary that witness McDonald's testimony be corroborated such testimony, which was believed by the trial judge, constituted substantial proof of the corpus delicti.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

62 Cal.App.2d 938

ISENBERG et al. v. SALYER.

Civ. No. 3101.

District Court of Appeal, Fourth District, California.

Feb. 16, 1944.

1. Evidence ⇐452

Generally, although a lease is written, if there is a latent ambiguity therein or if writing will admit of more than one interpretation, or if parties' intention is left in doubt, parol evidence of parties' circumstances may be considered to ascertain their true intention.

2. Evidence ⇐461(1)

To ascertain parties' intent in entering into a lease, where that intent upon the face of the instrument is doubtful or language used will admit of more than one interpretation, court will look at situation and motives of parties, subject matter of lease, and object to be attained.

3. Evidence ⇐461(1)

A written lease failing to provide a definite term and requiring lessee to pay specified advance rental for year succeeding date of execution of lease to be refunded from first crop produced on leased realty, and fixing no year when such crop must be produced, and specifying advance rental for second and third years to be refunded respectively at harvest time of second and third crops, and fixing no particular term within which such crops must be produced or harvested, left parties' intention doubtful rendering admissible parol evidence as to term of lease. Code Civ.Proc. §§ 1856, 1860.

4. Appeal and error ⇐1008(3)

When construction given an instrument by trial court appears to be reasonable and consistent with parties' intent, reviewing court will not substitute another interpretation, even though equally tenable.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by J. W. Isenberg and another, as administrators of the estate of W. D. Isenberg, deceased, also known as Warren D. Isenberg, and another, against E. C. Salyer for unlawful detainer. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Leland S. Bower, of Los Angeles, for appellants.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, for respondent.

GRIFFIN, Justice.

This is an action for unlawful detainer based upon a written lease between W. D. Isenberg, now deceased, and Land Mortgage Corporation (W. D. Isenberg, president), as lessors, and defendant E. C. Salyer, as lessee. The lease covered 380 acres of farm land in the Tulare Lake basin. Defendant, in his answer, admitted the making of the lease but denied it was for a term of three years commencing on October 1, 1937, and alleged that on the contrary, the lease was for a term which would permit him to produce and harvest on the leased premises three annual crops of wheat or barley. He admitted his possession of the premises and that he refused to surrender possession thereof to plaintiffs. He further alleged, as a separate answer and affirmative defense, that the leased premises were entirely flooded by waters of the lake in the spring of 1937, and were still partially flooded at the time the lease was made and entered into; that it was understood between the parties, and that the lease provided that the term of the lease would be such period as would permit respondent to grow and produce on and harvest from the premises three annual grain crops. A copy of the lease was attached to and made a part of the answer. It was further alleged therein that the leased premises, during practically the entire time since the lease was made, have been and still are flooded by the waters of the lake; that although he planted a portion of the premises to crops in the fall of 1937, and planted all of the premises to crops in the fall of 1940, both of said crops were subsequently flooded and destroyed and were wholly lost to him and that he was never able to grow or harvest any crops from the leased premises; that he fully performed and complied with the lease and that it was still in force and effect and would be until such time as he can grow and produce annual grain crops.

The trial court, in construing the lease, admitted the evidence showing the facts and circumstances surrounding the making of it and the negotiations of the parties in connection therewith for the purpose of explaining the language used in the lease and interpreting what the parties intended

thereby. It then found in favor of defendant on the issues presented and denied plaintiffs' prayer for relief.

The material portions of the lease may be thus summarized: October 1, 1937, lessors leased jointly to lessee the land described. By its terms lessee agrees to pay to lessors "by way of advance rental for the year beginning on Oct. first, 1937, and ending on October 1st, 1938, the sum of $760, receipt of which is hereby acknowledged, which is to be refunded by the lessors to the lessee, out of the first crops produced upon the same being harvested and sold. And the sum of $380 cash advance rental for the second year, and the sum of $380 cash advance rental for the third year, which is refunded respectively at harvest time of the second and third crops produced thereon, upon same being harvested and sold * * *. The annual rental shall be one-third of all crops produced thereon, if the crop is produced without the necessity of irrigation, and during those seasons that irrigation of the land is necessary to produce a crop thereon, the annual rental shall be one-fourth of all crops produced * * * and delivered to the lessors * * * that lessee shall use his best efforts to protect the land herein leased against further inundation by the construction of such levees as are feasible and practicable * * * Lessee promises * * * to enter on said premises, take possession thereof, and at the proper season and in a good and farmer-like manner properly prepare said premises for planting, and to plant all of said premises to crops of wheat or barley; * * * Lessee promises * * * that he will at the proper season, cause to be harvested * * * all crops of wheat or barley and will deliver to lessors" their share; "that if, during the term of this lease herein provided, lessors effect a bona fide sale of said premises and such sale shall be made during the first year of this lease, that is between date hereof and October 1, 1938, then lessee will, upon written notice, surrender possession of said premises * * * on the first day of October, 1938 * * * provided * * * that lessors reimburse lessee for the reasonable cost and expense of * * * work he has done in preparing said premises for planting during the second year of this lease, and for any advance rents which lessee has not had an opportunity to recover; * * * that if said premises should be sold during any year of this lease lessee will * * * surrender possession * * * on October 1st following such notice, and this lease shall end" subject to surrender conditions not here material. "Time is the essence of this lease and of each and every covenant and condition thereof."

[1, 2] In construing an agreement it is the general rule that although the agreement of the parties be reduced to writing, if there be a latent ambiguity therein or if the language of the writing will admit of more than one interpretation, or if the intention of the parties is left in doubt from a reading of the document, parole evidence of the circumstances and of the situation of the parties may be considered in order to ascertain their true intention; and in this manner an issue of fact may be presented to the trial court for its determination. To ascertain the intent of the paries in entering into a contract or agreement, in a case where that intent upon the face of the instrument is doubtful, or the language used by them will admit of more than one interpretation, the court will look at the situation and motives of the parties making the contract or agreement, its subject matter, and the object to be attained by it, and will allow these circumstances to be shown by parole evidence notwithstanding the contract itself is in writing. Shelley v. Byers, 73 Cal.App. 44, 238 P. 177; Weaver v. Grunbaum, 31 Cal.App.2d 42, 87 P.2d 406; Eastman v. Piper, 68 Cal.App. 554, 229 P. 1002; Henika v. Lange, 55 Cal.App. 336, 203 P. 798; Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 41 P. 876.

Plaintiffs do not dispute this rule but contend that the lease is not susceptible of more than one interpretation, and that as signed and executed the term of the lease was for a fixed period of three years and no more, and that their objection to the admissibility of parole evidence bearing on the surrounding circumstances and intent of the parties should have been sustained. This is the main question here involved.

The evidence surrounding the execution of the lease, if admissible, fully supports the court's conclusion that the lease was not intended as a lease for a definite term of three years. Defendant Salyer testified that he and a former partner had leased Isenberg's land in 1933 and 1934; that during those seasons they farmed the land and paid a cash rental of $1 per acre; that the partnership dissolved and his partner leased the same land in 1936 at the same rental; that in August, 1937, Salyer went to Los Angeles to see the owner, W. D.

Isenberg, who was a retired attorney at law and lived in that city, and informed him that he was interested in leasing the lands and that they discussed both a cash rental and a crop rental with cash advance payments; that they discussed the possibility of the lake flooding the lands and that they both knew the lands were under water from 1915 to 1919; that although crops had been planted, none had been harvested during that period; that the land was flooded again in 1922 and 1923; that some years the land was too dry to farm without irrigation; and that at the time of their meeting in August, 1937, the land was under water. He testified that Isenberg stated that he thought defendant would be able to get a crop in three or four years. He then testified that at a later meeting they "discussed the lease and different phases of consummating a lease and we arrived at this idea of paying him $2 an acre the first year and a dollar an acre the second year, and a dollar the third year, and in return for that we was to get a lease that would give us the opportunity to harvest three crops"; that as to the rent payments, instead of running over a period of more than three years, the lease would be drawn so "we could stop it when we made three payments". Defendant then left a deposit of $380 with Isenberg who refused to sign a lease that had been prepared by Salyer's secretary. Isenberg insisted on drawing his own lease and then agreed to go and look at the property. At a later date he visited the property, endeavored to contact Salyer who was away at the time, but discussed with his secretary the terms of the lease. He then dictated the lease as prepared. The secretary testified, over objections, that Isenberg was dictating the lease to her and at the time each was endeavoring to so word the lease that its term would "cover three crops and not three years"; that the written lease which he then signed, after considerable discussion of the intentions of the parties, was the one offered in evidence and was the one which was left with her for Salyer's signature; that she related the above conversation had with Isenberg to Salyer when he returned home; that he subsequently took the lease to Los Angeles and signed it; that Isenberg and he agreed "that we was to make it $2 the first year, $1 an acre for two more payments, and we was to have three, we was to be able to harvest three crops, harvest and sell, from that land, to get our money, advance rent and the crops off of them".

Salyer then testified that in October, 1937, he entered into possession of the premises, expended $6,646, which included cost of building levees, seeding, plowing and rental for three years, and that his only return therefrom was a check for $646.45, which was two years' parity payments from the government.

As W. D. Isenberg died shortly after the execution of the lease, no evidence was available to rebut the above-mentioned conversation admitted over objections. Plaintiffs rested and relied upon the strict interpretation of the lease.

[3, 4] We will therefore consider the terms of the lease to determine whether they come within the exception to the rule that where a contract is reduced to writing there can be, as between the parties, no evidence of the terms of the agreement other than the contents of the writing. Secs. 1856 and 1860, Code Civ.Proc. In the first place, the lease fails to provide any definite term for which it should run. It is dated as of October 1, 1937, and provides that lessors hereby lease to lessees the property described; that the lessee agrees to and did pay $760 advance rental for the year beginning October 1, 1938, which amount "is to be refunded * * * out of the first crops *produced* upon the same being harvested and sold". (Italics ours.) It fixes no year when that first crop must be produced. There appears to be no limitation on that subject. If a first crop were not, therefore, produced until the third or fourth year, lessee, under the terms of the written lease as set forth, might be entitled to remain in possession of the property until such first crop was *produced.* The same argument and interpretation would apply as to the cash advance rental for the second and third year, which rental was to be refunded "respectively at *harvest time* of the second and third *crops produced* thereon". (Italics ours.) Again, there is no particular year specified or term fixed within which such second or third crop must be produced or harvested. It therefore clearly appears that the intention of the parties as to the term of the lease is left in doubt from a mere reading of the lease itself. Parol evidence was therefore admissible to ascertain the true intention of the parties and an issue of fact was therefore presented to the trial court for its determination. It cannot be said that the lease, considered in the light of the evidence, is not susceptible of the interpretation placed upon it

by the court. Hence, we cannot disturb the decision. It was the province of the trial court to resolve doubtful language in the lease and to determine the meaning and effect of it. When the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Scoville v. De Bretteville, 50 Cal.App.2d 622, 123 P.2d 616; Tide Water Associated Oil Co. v. Curtin, 41 Cal. App.2d 884, 895, 107 P.2d 945; Asamen v. Thompson, 55 Cal.App.2d 661, 670, 131 P.2d 841; Tillis v. Western Fruit Growers, Inc., 44 Cal.App.2d 826, 831, 113 P.2d 267; Hayward Lumber, etc., Co. v. American National Bank, 50 Cal.App.2d 247, 254, 123 P.2d 56. The evidence supports the court's findings.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



62 Cal.App.2d 842

HOWARD v. SOCIETA DI UNIONE E BENEFICENZA ITALIANA et al.

Civ. 6919.

Sac. 5574.

District Court of Appeal, Third District, California.

Feb. 8, 1944.

Rehearing Denied March 6, 1944.

Hearing Denied April 7, 1944.

1. Joint adventures ⇐1

The essential features of a "joint enterprise" are a community of interests in the object of the undertaking, an equal right to direct and govern the conduct of each other with respect thereto, a share in the losses and profits and close relationship between the parties.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Enterprise".

2. Joint adventures ⇐1

Usual test of a "partnership" between parties to a joint adventure is their intent to become partners and even when there is a sharing of profits it does not follow that there is a joint adventure relationship where there is no joint participation in management and control.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

3. Joint adventures ⇐1

An agreement by which a society leased an athletic field to an association for a fixed term at a fixed rental, the association being permitted to erect improvements and obligated to hold society harmless from liability because of association's activities, and containing no provision for sharing of losses and profits or of management, did not create a "joint adventure" so as to make society liable for materials and money furnished to association for construction of improvements.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

4. Joint adventures ⇐1

Where money and material furnished to lessee for construction of improvements on leased premises were not furnished in reliance upon ownership of the property or lease agreement between owner and lessee, owner was not estopped to deny liability for money and materials on theory of a joint adventure.

5. Mechanics' liens ⇐260(6)

The right to a mechanics' lien depends upon a compliance with statute, and the right to such lien is lost by failure to commence an action within the time provided. Code Civ.Proc. § 1190.

6. Work and labor ⇐3

Where material furnished to lessee for construction of improvements on leased premises was not furnished in reliance upon ownership of property or lease agreement between owner and lessee, or because of any representations of owner, no mechanics' lien was filed and there was no evidence as to value of improvements, owner could not be held liable merely because improvements were erected upon its land with its consent. Code Civ.Proc. § 1190.

7. Mechanics' liens ⇐8

No right to mechanics' lien arose in favor of a bank which lent money to les-

see for construction of improvements on leased premises. Code Civ.Proc. § 1190.

8. Mechanics' liens ⇐202

The statutory right to a mechanics' lien is not assignable. Code Civ.Proc. § 1190.

9. Equity ⇐87(3)

Equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law has provided. Civ.Code, § 3527.

Appeal from Superior Court, Amador County; J. A. Smith, Judge.

Action by Nelson Howard against Societa Di Unione E Beneficenza Italiana and Amador County Rodeo Association, a corporation, to recover for material and money furnished for the erection of improvements and to establish a lien therefor. Judgment for plaintiff as against both defendants and defendant first named appeals.

Reversed.

C. W. Pearson, of Placerville, for appellant.

Snyder & Snyder, of Jackson, for respondent.

ADAMS, Presiding Justice.

On December 10, 1937, Societa Di Unione E Beneficenza Italiana, a corporation, hereinafter referred to as the Society, entered into a written agreement with the Amador County Rodeo Association, a corporation, hereinafter called the Association, under the terms of which the Society purported to "demise and lease" to the Association the baseball field of certain premises owned by said Society, for a term of five years, with an option for an extension of five years. The rental agreed to be paid by the Association was $200 per year. There was a further option for a renewal for two five year periods after the expiration of the first ten years, at a like rental of $200 per year, plus 50% of the net gate receipts of the lessee.

The recited purpose for the letting aforesaid was to enable the Association to conduct livestock races and shows, and like exhibitions, on the leased premises, and particularly one rodeo each year on the day on which the Society held its annual picnic in June, other exhibitions to be held on not to exceed three additional days in each year when the Society was not using the baseball field. Except for the dates upon which the Association was entitled to use of the premises the unrestricted use thereof was reserved to the Society, it being provided, however, that should said Society make use of any improvements installed by the Association, a reasonable rental of not to exceed $25 per day should be paid to the Association for such use. The Society reserved to itself the right to all concessions on its property except that the Association was assured the exclusive right to print and sell programs of its exhibitions. Use of grandstands already on the premises was permitted to the Association during its exhibitions, and the latter agreed to construct at its own cost such additional grandstands, fences, corrals, chutes and other appurtenances as might be necessary for its exhibitions.

It was mutually agreed that for the annual picnic day of the Society and the rodeo of the Association a campaign of publicity was desirable, the cost of which was not to exceed $500, one-half to be paid by each of the parties. Lessee was required to provide indemnity insurance to take care of damages that might become due because of accidents upon the leased premises, and to safeguard the parties against detriment from any liability that might be imposed by reason of activities resulting from the lease. The Association also agreed to maintain the Society and the leased premises free from claims or liens for labor or material or otherwise, the Society reserving the right to post and record notices of nonliability pursuant to section 1192 of the Code of Civil Procedure. All improvements and structures placed upon the premises by the Association were to belong to the Society; but until the lessee's rights under the agreement were terminated the latter was to be responsible for the maintenance and repair of such improvements. It was agreed that all structural work done by the Association under the lease was to be under the control of the Association, and that the Society should not be deemed the lessee's principal or employer, nor be deemed connected with such construction.

This instrument was not recorded, and while the Society posted a notice of nonresponsibility it is apparently conceded

that same was for some reason insufficient.

The Association erected improvements, and became indebted to Jackson Lumber Yard in the sum of $2,731.92 for lumber and materials used in the construction of same; to the Bank of Amador County for $1,500 advanced to it on its note dated May 31, 1938; to C. Soracco Company in the sum of $435 for various goods, wares and merchandise; to J. A. Chichizola in the sum of $182.39, also for goods, wares and merchandise; to W. S. Hartwick in the sum of $53 for services; to Piccardo Bros. in the sum of $169.03 for hauling and services, and to Spinetti Bros. in the sum of $185.60 for goods, wares and merchandise. It thereafter became insolvent. Its creditors above named, in March and April, 1941, assigned their claims to plaintiff Howard, who brought this action against the Society and the Association on September 5, 1941, alleging that defendants had entered into a mutual joint adventure agreement by and through which the Society became enriched by virtue of the improvements which the Association had placed upon the premises of the Society; that the lumber and materials, and the goods, wares and merchandise furnished by plaintiff's assignors, were used in the construction of the improvements made on the premises of the Society, that the money lent by the Bank of Amador County was used in the said construction; and that the services of Hartwick and the "services and hauling" of Piccardo Bros. were "rendered in connection with and as part of" said construction. Plaintiff prayed for judgment against both defendants for the amounts of the various claims, with interest and attorney's fees on account of the note, and for interest on the various accounts, and that the judgment be declared a lien upon the premises described in the written agreement.

The Association defendant defaulted in the action. The Society filed its answer to which it attached the lease agreement as an exhibit. It denied that it had entered into any joint adventure with the Association, and denied that it ever became indebted to the various creditors named in the complaint. The action was tried by the court sitting without a jury, and resulted in a judgment for plaintiff in the sum of $6,339.50. Said sum was declared an equitable lien upon the real property of the Society (including a tract other than that included in the lease agreement, being one leased by the Association from Allen Estate Company) and further provided that unless said judgment was paid within sixty days, the property might be sold to satisfy said judgment.

In its findings the court found that plaintiff's assignors had furnished the Association with the materials, supplies and money for the purpose of constructing the improvements, and that same were actually used in the construction thereof; that the Society had been enriched by virtue of the improvements which the Association had placed upon the premises, in an amount of approximately $12,000, all without cost to it.

There is no finding that the various creditors of the Association, at the time the Association became indebted to them, had any knowledge of the agreement between the Society and the Association, or that in extending credit to the Association they relied upon any such agreement, or upon the Society, or upon its ownership of any of the land.

No mechanics' liens were filed by plaintiff or his assignors. The theory upon which plaintiff premised the liability of the Society was that the agreement between it and the Association created a special partnership or joint adventure, and that by virtue of said relationship the Society became liable for the debts of the Association; and that the Society received the benefit of the improvements placed upon the property and should therefore be held liable for the debts of the Association. There is, however, no finding that the Society and the Association became joint adventurers.

The judgment appears to rest solely upon the proposition that the Society has been benefited by the improvements and that therefore it should pay for them. While it is entitled "Judgment and Decree of Foreclosure of Equitable Lien," it declares that there is due to plaintiff from defendants the sum of $6,339.50, with costs and interest. Both defendants are therefore held personally liable for the debt.

Appellant here contends that the agreement between the Association and the Society did not have the effect of making them joint adventurers; that the creditors of the Association, by failing to perfect liens under the mechanics' lien law, lost

any right they may have had to any lien upon the property of the Society; that no privity of contract between the creditors and the Society has been found or shown by the evidence; that the creditor bank which lent money to the lessee would in no event be entitled to a lien; and that the most that said creditors or any of them had was a right to a lien, which right was not assignable.

Respondent, in this court, rests his case upon the proposition that the Association and the Society became joint adventurers, stating in his brief that "this is not a case where a lessee has made improvements upon lessor's property, but that the improvements were made for the mutual benefit of the parties pursuant to a joint adventure between them." He does assert that "where the relationship between the parties is a lease and the owner does not give notice of his non-responsibility, he may be estopped to deny his responsibility for the debt"; but he recites no evidence upon which an estoppel can be premised in this case.

The first question for determination is whether the agreement between the parties constituted them joint adventurers.

[1] In Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 89, 84 P.2d 296, some of the features of a joint enterprise are said to be: (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) a share in the losses if any; (d) close and even fiduciary relationship between the parties. Citing State v. Superior Court, 108 Wash. 443, 184 P. 348. In the cited case the court said that the instrument there in question created only the relation of landlord and tenant; that it lacked many of the essentials of a joint adventure or copartnership; that by the instrument two farms were leased, for the use of which the lessor was to receive one-third of the crops; that the tenants were to do all the work and bear the expense; that they had no authority to charge any of such expense to the lessor; the tenants were forbidden to permit any liens for work or otherwise; there was no provision for sharing losses, if any; and that an agreement to share losses is the ordinary test of a partnership.

In Beck v. Cagle, 46 Cal.App.2d 152, 161, 115 P.2d 613, the court held that to constitute a joint enterprise the parties must have a community of interest in the purposes of the undertaking and equal authority or right to direct the movements and conduct of each other in connection therewith. In Stoddard v. Goldenberg, 48 Cal.App.2d 319, 119 P.2d 800, it was said that an indispensable feature of a joint venture is an agreement by the parties to it to share jointly in the profits and losses. Also see Enos v. Picacho Gold Min. Co., 56 Cal.App.2d 765, 771, 133 P.2d 663. In Quinn v. Recreation Park Ass'n, 3 Cal. 2d 725, 728, 46 P.2d 144, the court said that in order to establish the existence of a joint adventure there must be proof of a community interest, and a sharing of profits. Citing 14 Cal.Jur. 761; Dempsey-Kearns Theatrical, etc., Enterprises v. Pantages, 91 Cal.App. 677, 267 P. 550. In United Farmers Ass'n v. Sakiota, 7 Cal. App.2d 559, 560, 46 P.2d 770, it is stated that an essential element of a joint adventure is that the parties share in the profits and losses.

In 30 Am.Jur. 681, sec. 7, the relation of joint adventurers is said to be created where two or more persons combine their money, property, or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly, or in proportion to the capital contributed, in the profits and losses, assuming that the circumstances do not establish a technical partnership. Also see page 682, sec. 11, where it is stated that a joint proprietary interest and a right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure.

[2] The usual test of a partnership between the parties to a joint adventure is their intent to become partners. Even where there is a sharing of profits the conclusion does not follow that there is a joint adventure relationship where there is no joint participation in the management and control of the business, which is an essential element of a partnership. Spier v. Lang, 4 Cal.2d 711, 715, 53 P. 2d 138.

[3] Viewed in the light of the foregoing authorities the agreement between the Association and the Society is entirely lacking in the essential elements of a joint undertaking of the enterprise of the Association. There was no agreement to share gains and losses, but on the contrary

the Association agreed to hold the Society free from claims or liens and to provide its own insurance; there was reserved to the Society no right to direct or govern the conduct of the Association, and no such right was ever asserted or exercised; the Association was to pay a stipulated rental for the use of the field, regardless of its profits or losses, and whenever the Society used the facilities which were to be constructed by the Association it was required to pay to the Association a rental therefor. While the cost of joint publicity for the annual picnic and rodeo was to be shared, the cost thereof was limited by the agreement, and the fact that this provision was inserted in the agreement raises an inference that other expenses were not to be shared jointly. There is neither expression nor intimation that the two organizations contemplated other than completely independent operations, or that they intended to become partners.

There is in fact no claim on the part of the Association that it was engaged in a joint adventure with the Society. Plaintiff produced as a witness the president of the Association who testified that the relationship of the Association and the Society was embraced in the agreement, and that there was no other agreement between the parties; and there was testimony that no one connected with the Society had anything to do with directing the building of the improvements made by the Association.

The next question for consideration is whether, though the agreement between the parties did not contemplate nor constitute a joint adventure, anything was established by the evidence in the case that can be said to have estopped the Society from denying liability for the debts of the Association.

[4] It is not alleged, nor is it found by the trial court, that in furnishing the Association with the goods sold and money lent, any reliance was had by the creditors upon any partnership or joint adventure arrangements between the Society and the Association. The finding is that advances were made to the Association; and the evidence establishes that the agreement between the Society and the Association was not in fact relied upon by any of the creditors. Several of them were called as witnesses and testified that the credit was extended to the Association. No one of them testified that in extending such credit he was influenced by or relied upon the agreement between the Association and the Society, or upon any act or representation by the Society, or upon the fact that the Society owned the land upon which the improvements were constructed by the Association. Mr. Steele, head of the Jackson Lumber Yard, stated that when the material furnished by his firm was put on the ground he did not know who owned the ground but thought the Allen Estate Company owned some of it; that he did not know what the relationship was between the Association and the Society. Other creditors were called, most of whom were members of the Association, and no one testified as to any reliance upon the Society for payment or any liability on its part, or reliance upon the lease agreement or the ownership of the property by the Society. There is not an iota of testimony which can be relied upon as creating an estoppel against the Society in favor of any of the creditors. An opinion filed by the trial court indicates that the liability of appellant is premised solely upon the fact that it became the owner of the improvements and the assumption that it was thereby enriched—and enriched not to the extent of any value which said improvements may have added to its premises, as no evidence of any such value was tendered—but enriched to the full extent of the indebtedness incurred by the Association. Plaintiff merely introduced a financial statement of the Association as of January 1, 1941, which set forth its total investment as $12,377.99 and an unpaid indebtedness of $5,906.39; and for this balance the Society was held jointly liable with the Association.

[5] No mechanics' or other liens were filed by anyone; and if, in the absence of such filing, it can be said that where credit is extended to A, who uses moneys lent and goods sold to him by B to make improvements upon C's lands, B, without further showing, may recover from C and acquire a lien upon C's land without complying with the statutes providing for the filing of mechanics' liens, such statutes would be useless. See Houston Lumber Co. v. Hunt, 96 Kan. 778, 153 P. 554. It is well established that the right to a mechanics' lien depends upon a compliance with the requirements of the statutes (Stanislaus Lumber Co. v. Pike, 51 Cal. App.2d 54, 59, 124 P.2d 190; Holm v.

Bramwell, 20 Cal.App.2d 332, 334, 67 P.2d 114; Weaver v. Atlantian Const. Co., 84 Cal.App. 161, 164, 258 P. 114; Wilson v. Nugent, 125 Cal. 280, 284, 57 P. 1008; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 379, 51 P. 555); and the right to such a lien is lost by failure to commence an action within the time provided by statute. Code Civ.Proc. sec. 1190; Hickman v. Freiermuth, 21 Cal.App. 629, 132 P. 772.

In Burr v. Peppers Cotton Lumber Co., 91 Cal.App. 268, 273, 266 P. 1025, it is said, quoting from 40 C.J. 53, sec. 14, that provisions relating to the creation, existence or right to mechanics' liens, being in derogation of the common law, should be strictly construed. And where parties have failed to comply therewith relief has been denied in numerous cases. See Walker v. Hauss-Hijo, 1 Cal. 183, 186; Goss v. Strelitz, 54 Cal. 640, 644; Johnson v. La Grave, 102 Cal. 324, 36 P. 651; Pacific Mfg. Co. v. Rasmussen, 42 Cal.App. 742, 744, 746, 184 P. 54; Norton v. Bedell Engineering Co., 88 Cal. App. 777, 264 P. 311; Pacific Mut. L. I. Co. v. Fisher, 106 Cal. 224, 234, 39 P. 758.

[6] We are cited to no authorities which justify a conclusion that under evidence such as was adduced in this case appellant is liable for the debts of the Association merely because the structures were erected upon its land with its consent. There is no evidence that plaintiff's assignors relied upon the agreement between the Society and the Association, or upon any conduct or representation or inducement on the part of the Society (Crescent Lumber Co., Inc., v. Borchers, 59 Cal.App.2d 318, 138 P.2d 779), or upon the fact that the land upon which the structures were erected belonged to the Society; and, as a matter of fact, a portion of the land upon which same were erected belonged at that time to the Allen Estate Company from whom the Association had a lease entered into in January, 1938, which provided that the Association might erect improvements upon the demised premises (which adjoined those included in the lease with the Society), with the privilege of removing them at any time prior to the termination of the lease. The land covered by this lease was subsequently purchased by the Society, but did not belong to it when the improvements thereon were erected. And yet by the judgment in this action the Society is held liable for the cost of the improvements placed thereon, and both tracts are held subject to lien.

There is no evidence that the Society ever assumed or agreed to pay any of the debts of the Association. The testimony is to the contrary. And there is no evidence from which any contract between the Society and the creditors can be implied, or upon which an equitable lien can be premised.

[7] That no right to a lien arose in favor of the bank which lent money to the Association is particularly to be noted. Burr v. Peppers Cotton Lumber Co., 91 Cal.App. 268, 274, 266 P. 1025, and authorities there cited, especially Godeffroy v. Caldwell, 2 Cal. 489, 56 Am.Dec. 360.

[8] Also, in this case, plaintiff is the assignee of the claims of the various creditors of the Association, and it is urged by appellant that the most that such creditors could have had was a right to a lien, and that such right was not assignable. This contention appears to be supported by Mills v. La Verne Land Co., 97 Cal. 254, 32 P. 169, 33 Am.St.Rep. 168; McCrea v. Johnson, 104 Cal. 224, 37 P. 902; California P. C. Co. v. Wentworth Hotel Co., 16 Cal.App. 692, 711, 118 P. 103, 113; Burr v. Peppers Cotton Lumber Co., supra. Also see note in 83 A.L.R. 11.

[9] It is a maxim of jurisprudence that the law helps the vigilant before those who sleep on their rights Civ.Code, § 3527; and it is well said in De Mattos v. McGovern, 25 Cal.App.2d 429, 433, 77 P.2d 522, 524, that "Equity will not come to the aid of one who, through his own delay and [own] fault, has lost the remedy which the law has provided."

We are unable to find any theory either of law or equity upon which to sustain the judgment of the trial court, and it is therefore reversed.

PEEK and THOMPSON, JJ., concur.

62 Cal.App.2d 880

In re OTTOVEGGIO'S ESTATE.

SCELSO v. OTTOVEGGIO et al.

Civ. No. 12507.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1944.

1. Wills ⇐573(2)

An unqualified testamentary gift of the rents, issues, and profits of a fund or property constitutes a gift of the fund or property.

2. Wills ⇐470

All parts of a will must be construed together. Probate Code, § 103.

3. Wills ⇐560(1)

In absence of anything in a will showing a contrary intention, a devise of a designated house, place, or tract does not include personalty in the house or elsewhere on the land.

4. Wills ⇐478

A devise may arise by implication, but to warrant the court in so declaring there must be something more than conjecture, and the probability of an intention to make the gift implied must be so strong that an intention contrary to that imputed to testator cannot be supposed to have existed in his mind.

5. Wills ⇐449

A will should be construed if reasonably possible to avoid partial intestacy.

6. Wills ⇐572

A bequest of "twelve acres of ranch including the houses and all the furniture, linen and gold, and all silverware including all my clothes" did not limit bequeathed personalty to that contained in devised houses, but was of all such personalty wherever situated, including that contained in house devised to another in a succeeding paragraph.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Proceeding in the matter of the estate of Vincenza Ottoveggio, also known as Vincenza Sciascia, Fincinza Ancona, and Vincenza Filomo, deceased, by Dr. Pasquale Scelso, opposed by Mary Ottoveggio and others. From an adverse order, Dr. Pasquale Scelso appeals.

Affirmed.

J. M. Atkinson, of Mountain View, for appellant.

W. E. Foley, of San Jose, for respondents.

DOOLING, Justice pro tem.

This is an appeal by Pasquale Scelso, one of the beneficiaries of the holographic will of Vincenza Ottoveggio, deceased, from an order of the probate court construing certain provisions of the will. The will was written entirely in Italian. As translated the provisions construed in the order attacked on appeal read as follows:

"Ninth I give and leave to Mary Ottoveggio daughter of Paul Ottoveggio Five Thousand Dollars besides there is to be paid One Thousand Dollars of Insurance Twelve acres of ranch including the houses and all the furniture linen and gold and all silverware including all my clothes that is Mary Ottoveggio daughter of Paul the remainder of the ranch of twenty-two acres to be divided between Frank Ottoveggio and Michael Ottoveggio sons of Paul Ottoveggio

"Tenth I give and leave my house of Santa Clara ten four seven together with the house of Santa Cruz one two seven Buena Vista

"All shares of Transamerica as well as Bank of America as well as shares of Blair Corporation as well as all the money is to be paid to Doctor Pasquale Scelso but with the duty of giving me honorable burial that is Doctor Pasquale Scelso"

The house in Santa Cruz which was devised to appellant by the tenth paragraph above quoted was furnished and a dispute arose between appellant and respondent Mary Ottoveggio as to which of them was entitled to the household furniture and furnishings in the Santa Cruz house. The executor petitioned the court for instructions on this subject and the court by its order determined that the devise to appellant of the house in Santa Cruz "did not include any personal property located therein or thereon" and that the phrase "all the furniture, linen and gold and all silverware including all my clothes" in the ninth paragraph "included and embraced all furniture, linen, gold and silverware contained in the house or on the premises known as

No. 127 Buena Vista Avenue, Santa Cruz" (the house devised to appellant).

Oral testimony was introduced that the Santa Cruz house was furnished for occupancy, that house and furniture were used by the testatrix as a unit, and that none of the furniture or furnishings thereof was ever transferred between the testatrix' home in Santa Clara and the Santa Cruz house which she used for vacation purposes.

[1] Appellant claims that this testimony, which was uncontradicted, brings the case within the rule announced in Re Estate of Franck, 190 Cal. 28, 210 P. 417. In that case the testatrix bequeathed "all the net profits or net income that may be derived from those premises" situated in the City of Richmond and particularly described to Mary Ray Spencer to be used for her care and education until she shall have reached the age of twenty years, the accumulation unexpended to be paid to her at that time and with the further direction that when "Mary Ray Spencer shall have reached the age of thirty-five years the said above described real property is hereby bequeathed to her as her property." The evidence in the Franck case showed that the real property referred to was improved with an apartment house, that this apartment house was furnished, that the apartments therein were rented furnished and that the furniture, fixtures and other personal property therein had at all times been used as a part of the apartments. The Supreme Court held (190 Cal. at page 32, 210 P. at page 418) that "the unqualified gift of the rents, issues, and profits of a fund or property, real or personal, amounts to a gift of the fund or property itself", and that the bequest of the income of the "premises" to Mary Ray Spencer carried with it the title to the furniture, fixtures and other personal property since they had constituted an integral part of the "premises" as customarily operated and rented by the testatrix. The court said in this connection (190 Cal. at pages 32 and 33, 210 P. at page 418): "If it be claimed that the word 'premises' should be held to only apply to the real property devised, it sufficiently appears from the will, the circumstances under which it was made, the persons named as devisees and legatees, and the property itself, that Mrs. Franck intended to make no subtle distinction between the realty and the personalty, which, by unity of use, comprised the apartment house premises. * * * It is hardly to be thought that she intended to segregate realty from personalty in making the gift. She made no specific disposition of the personal property, comprising the furniture and equipment of the Raymond Apartment House, nor bequest over in the event of Mary Ray Spencer's death. Hers was an absolute gift of the income arising in part from personal property, and insofar as the personalty was concerned, making no direct mention of the principal, it amounted to a general gift of the personalty itself."

[2] The Franck case is not controlling in the construction of the will before us. All parts of a will must be construed together in arriving at the intent of the testator. 26 Cal.Jur. 886; In re Estate of Northcutt, 16 Cal.2d 683, 689, 107 P.2d 607; Probate Code sec. 103. The probate court was entitled to consider the ninth and tenth paragraphs together in order to determine the testatrix' intent. It is to be observed that in the ninth paragraph the testatrix clearly and specifically described "all the furniture, linen and gold and all silverware including all my clothes." By contrast in the tenth paragraph no mention is made of any personal property of this character. It is a reasonable assumption that, if the testatrix had intended by the tenth paragraph to bequeath any personal property of the kind so carefully described in the ninth paragraph, she would have said so expressly; or conversely that if she had intended only the furniture and furnishings of each house to go with that house and had believed that the devise of each house would carry with it its own furniture and furnishings, she would have omitted the specific enumeration of those articles in paragraph nine.

[3] The trial court's construction is further fortified, if need be, by the generally accepted rule of law recently quoted from Thompson on Wills (2d Ed.) sec. 252, p. 327, by the Supreme Court of Kansas in Mann v. Haines, 146 Kan. 988, 73 P.2d 1066, 1072: "'In the absence of anything in the will showing a contrary intention, a devise of a designated house, place, or tract, does not include personal property in the house or elsewhere on the land.'" Cf. 69 C.J. p. 404, sec. 1456; Holohan v. McCarthy, 130 Or. 577, 281 P. 178; Smith v. Heyward, 115 S.C. 145, 105 S.E. 275.

[4] It is said in the very case most strongly relied upon by appellant, In re Estate of Franck, supra, 190 Cal. 28, at pages 31 and 32, 210 P. 417, at page 418: "It is equally well settled that a devise or bequest may arise by implication. To warrant the court in so declaring there must be something more than conjecture. The probability of an intention to make the gift implied must appear to be so strong that an intention contrary to that imputed to the testator cannot be supposed to have existed in his mind."

This is a rule frequently since reiterated and applied. In re Estate of Swan, 5 Cal.2d 635, 639, 55 P.2d 1171; In re Estate of Vizelich, 129 Cal.App. 347, 353, 354, 18 P.2d 773; In re Estate of Kruce, 10 Cal.App.2d 426, 429, 51 P.2d 1174.

The language of the will before us so far from showing an intention to make a gift of the furniture and furnishings of the Santa Cruz house to appellant "so strong that an intention contrary * * * cannot be supposed to have existed" in the testatrix' mind, rather shows the contrary. As already noted when she intended to make a gift of such articles in the ninth paragraph she was careful to say so. The omission of their mention in the tenth paragraph could not be made the basis of a finding based on anything stronger than conjecture, opposed to the internal evidence of the will itself, that she intended the furniture and furnishings to go with the Santa Cruz house.

[5, 6] Appellant argues that the use of the words "including" and "the" in the ninth paragraph evidence an intention to limit the articles of personal property bequeathed thereby to those contained in the houses devised therein. It is to be noted, however, that "including" modifies "houses" and "all my clothes" only and not "furniture", "linen", "gold" or "silverware". The use of the definite article before the word "furniture" cannot be given particular weight, since it is omitted entirely from the entire clause "linen gold and all silverware." A will should be construed if reasonably possible to avoid partial intestacy. 26 Cal.Jur. pages 899–900, sec. 215. The testatrix only mentioned furniture, linen, gold and silverware and clothes once in her will, in paragraph nine. It is conceded by appellant that the words "including all my clothes" refer to clothes of the testatrix wherever located. The probate court properly construed the bequest in paragraph nine as one to Mary Ottoveggio of all such articles wherever situated.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.



62 Cal.App.2d 672

GERARD v. GERARD et al.

SEGUIN v. SAME.

Civ. 14079.

District Court of Appeal, Second District, Division 3, California.

Jan. 31, 1943.

1. Deeds ⇐207

Proof that grantor signed and acknowledged a deed and handed it to a grantee established a prima facie case of complete execution.

2. Deeds ⇐194(2)

The presumption of delivery with intent to make a grant operative immediately, from proof that grantor signed and acknowledged deed and handed it to a grantee, is not conclusive.

3. Deeds ⇐56(1)

"Delivery" involves more than merely physically handing possession of deed to grantee or some one in his behalf.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

4. Deeds ⇐56(2)

Act of delivery must be accompanied with intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time, whether possession of the deed is given to a third person, or to grantee directly.

5. Deeds ⇐56(2)

Intention to part with title is the factor that gives vitality to the delivery.

6. Appeal and error ⇐1010(1)

Trial court's finding that there was no effective delivery of a deed, when supported by sufficient evidence, is conclusive on appeal.

7. Wills ⇐93

Where grantor executed deeds on day she went to hospital, evidence sustained finding that grantor's intent in delivering the deeds was not to make them presently operative as conveyances, but to make something in the nature of a testamentary disposition of her property.

8. Wills ⇐88(2)

Where intent of grantor was that deeds were to be effective only if grantor did not recover from illness and an operation, deeds would not pass title, notwithstanding the deeds were subsequently delivered to a grantee.

9. Evidence ⇐222(3)

In action by one grantee to quiet title under deed of deceased grantor, where other grantee had quitclaimed his interest to plaintiff merely to enable plaintiff to bring her action against him as grantor's administrator, declarations by administrator showing intention of grantor at time deeds were executed and delivered were admissible as admissions against interest.

10. Deeds ⇐200
Evidence ⇐269(3)

Where question is whether grantor intended to make legal delivery, the subsequent acts and declarations of the parties are admissible.

11. Evidence ⇐269(3)

Where grantor executed and handed to a grantee deeds on day grantor was taken to hospital, delivery was equivocal, and subsequent declarations of one of the grantees were admissible to show the intention of the grantor at the time the deeds were executed.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by Mary Gerard against Charles A. Gerard, administrator, and Jeanne Seguin, to quiet title to realty, wherein second-named defendant filed a cross-complaint making plaintiff and first-named defendant cross-defendants. From a judgment for cross-complainant, cross-defendants appeal.

Judgment affirmed.

Kenneth A. Davis and Henry D. Lawrence, both of Long Beach, for appellants.

Denio, Hart, Taubman & Simpson and John E. Munholland, all of Long Beach, for respondents.

SHAW, Justice pro tem.

The main question to be determined on this appeal is whether a deed signed by Emelie Cederholm as grantor and running to Chas. Gerard and Mary Gerard as grantees, under date of August 6, 1940, was delivered by the grantor with intent to make it presently operative as a deed passing title to the land described in it. Mrs. Emelie Cederholm was the sister, and Mary Gerard was the wife, of Chas. Gerard, who is the defendant Charles A. Gerard. Mrs. Cederholm died August 10, 1940, and Charles A. Gerard was appointed administrator of her estate on September 3, 1940. On January 8, 1941, Chas. Gerard quitclaimed to Mary Gerard all his interest in the property described in the deed of Mrs. Cederholm, so far as it is involved in this appeal, merely to enable her to bring this action. On August 29, 1941, Mary Gerard began this action against Charles A. Gerard as administrator of the estate of Emelie Cederholm, making Jeanne Seguin also a defendant, to quiet plaintiff's title to a part of the property described in the deed of Mrs. Cederholm above mentioned. Defendant Jeanne Seguin filed an answer and cross-complaint to which both Mary Gerard and Charles A. Gerard as an individual were made defendants, in which she alleged that Emelie Cederholm at the time of her death was the owner of all the property described in the deed first above mentioned, that said deed had never been delivered as an effective conveyance, and that the cross-complainant was a sister and heir at law of Emelie Cederholm, and sought to have the deed declared void. The cross-complaint contained other matters, but they are immaterial to the present appeal. The trial court made findings in favor of the defendant and cross-complainant, stating that the deed in question was signed by Emelie Cederholm and handed to Charles A. Gerard in her presence, but that she "did not at any time intend to make delivery of said deed to any person or persons" and "did not make a delivery of said deed or

deliver said deed with the intention of conveying any interest to the property therein described unto the cross-defendants herein or either of them, or as to any part of said property" and gave judgment that the deed was void, that the property was a part of the estate of Emelie Cederholm, and that the cross-defendants had no interest therein, except the interest of Charles A. Gerard as an heir. From this judgment both of the cross-defendants appeal.

[1-5] The law affecting this case was so recently and so well stated, with ample citation of authority, in Dinneen v. Younger (1943) 57 Cal.App.2d 200, 134 P.2d 323, in which the Supreme Court denied a hearing, that we need do no more as regards the law than refer to and quote briefly from that case. As there stated, at pages 204 and 205, proof that the grantor "signed and acknowledged the deed and handed the same to the grantee * * * established a prima facie case of complete execution—that is, of delivery with intent to make the grant operative immediately as a transfer of title. [Citing cases.] The presumption of legal delivery, thus created, is not conclusive. The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. [Citing cases.] The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. (See cases collected 9 Cal.Jur., p. 153, sec. 52.) The rule applies not only where possession of the deed is given to a third person, but also where such possession is given to the grantee directly. [Citing cases.] Intention to part with title is indispensable—that is the factor that gives vitality to the delivery. [Citing cases.]"

[6] Applying the rules there stated to the present case, we must hold that the trial court's finding that there was no effective delivery of the deed is supported by sufficient evidence and is hence conclusive here. Mrs. Cederholm was a resident of Long Beach, California, and so were Mr. and Mrs. Gerard, and her sister, Mrs. Seguin. She also had a brother and a sister in France, whose fate was apparently unknown at the time her deed was signed. Mrs. Cederholm had been on an extended tour, and arrived at Beaverton, Oregon, on June 30, 1940, to visit an old friend, Mrs. Berney, who was the mother of the witness, Mrs. Grace Thompson, and has since died. While at Beaverton, Mrs. Cederholm stayed at the home of Mrs. Thompson. Soon after her arrival there, Mrs. Cederholm became ill and was examined by a physician, who found that she had angina pectoris and arteriosclerosis and was overweight. About three weeks after she came to Mrs. Thompson's house, Mrs. Cederholm had an embolism in her leg. This caused much pain and she was given morphine for a time. This was discontinued on July 31 and she had no opiate thereafter until after the deed was signed on August 6. Her leg got worse, the embolism stopping circulation in it, and Mrs. Cederholm was told by the Doctor on July 31 that it would have to be amputated, but he did not tell her what were her prospects of recovery from the operation. The next day she asked Mrs. Thompson "do you think this might kill me?" Mrs. Thompson replied, "I don't think so." At that time her leg was black and the skin was falling off and she could see this. About the 29th or 30th of July, Mrs. Cederholm asked Mrs. Thompson to write, and the latter did write, on July 30, a letter to Mr. and Mrs. Gerard in Long Beach, asking them to come up and bring with them tax bills containing the descriptions of her real estate. The Gerards came as requested, bringing the tax bills, and arriving in Beaverton on August 4.

On the morning of August 6 Mrs. Cederholm asked Mr. Gerard to get someone to fix up some papers for her, and also asked Mrs. Thompson whom to get. Thereupon Mr. Gerard went away and presently returned with Mr. Gibson, who was a notary public and employed in a bank at Beaverton. There was no lawyer available. Mr. Gibson and Mr. Gerard had some discussion with Mrs. Cederholm. Mr. Gibson then went back to his office, and about noon returned with two deeds which he had prepared, and showed Mrs. Cederholm. One of these was the deed here in question from Mrs. Cederholm to the Gerards and the other purported to convey other property to them. Mrs. Cederholm was in bed, and Mr. Gibson and Mr. and Mrs. Gerard were in the same room with her. Either in the room or standing in and around the doorway of an adjoining room were Mr. and Mrs. Thompson, and Mrs. Thompson's mother,

Mrs. Berney. Mrs. Cederholm signed the deeds and they were then signed by Mrs. Berney and Mr. Thompson as witnesses, and handed to Mr. Gerard. On the afternoon of the same day, August 6, Mrs. Cederholm was taken to the hospital, as had been arranged before the deed was signed. On August 8 the operation was performed upon her, and on August 10 she died.

On the foregoing matters there is no doubt or dispute in the evidence. As to the manual handing over of the deeds to Mr. Gerard there is some uncertainty. That he received the deed in question is certain; all the witnesses so testified, and he had it and produced it at the trial. But there is much confusion as to the person who handed it to him. Of the six persons present besides Mrs. Cederholm, one, Mrs. Berney, died before the trial and Mrs. Gerard did not testify at the trial. The other four were witnesses. Mr. Gerard testified that after the deeds were signed by Mrs. Cederholm, the notary, and the witnesses, they were handed to him by either his sister or the notary, he wasn't sure which, but thought it was his sister, and if the notary did this, it was done in front of his sister's bed. Mr. Gibson, the notary, had little recollection of the transaction and was unable to say what became of the deed in question after Mrs. Cederholm signed it. Mr. Thompson, who signed the deed as a witness, testified that it was then handed to Mr. Gerard, in whose possession he saw it, but did not know who handed it to him. Mrs. Thompson testified that after all the signatures were on the deed she saw it in Mr. Gerard's hands, that one of the witnesses, she did not say which one, handed it to him and that Mrs. Cederhold observed the procedure.

There was very little testimony of any expression by Mrs. Cederholm of her purpose or intent regarding the deed. Mr. Gerard testified that she did not discuss the matter with him, that at Beaverton he did not discuss any business with her at all except that on the morning of August 6 she said she wanted to make out some papers to him, not saying what they were and asked him to get someone to attend to it. He testified further that when he brought Mr. Gibson back Mrs. Cederholm said to Mr. Gibson that "she wanted to make out some deed to me." Although asked about conversation after Mr. Gibson came back with the deeds, Mr. Gerard testified to nothing of substance, and stated that nothing was said by her about the deeds when they were handed to him, and that she never mentioned the deeds to him thereafter. He testified that about a year before she died, when she was apparently in good health, she told him she intended to leave everything to him; that the two deeds which she signed included all the real property which she owned, and that an hour or so after the deeds were signed she also signed checks in blank on the banks in which she had accounts and handed them to him, saying, "you get that money out before them people in Long Beach get it. * * * I want you to have it." These checks could not be cashed after her death, and this was the reason for Gerard's application to be appointed as administrator of her estate. Mr. Gerard further testified that at the time she handed him the checks, she also said: "I want you to give that 16th Street house to Jeanne. I want her to have the home." Jeanne was Mrs. Seguin, and the 16th Street house was a part of the property described in the deed here in question. At some time unspecified she asked Gerard to help out the people in France.

The notary, Mr. Gibson, testified that he had some conversation with Mrs. Cederholm both before and after he drew the deed, but had very little recollection of it. However, he did testify, in response to a question whether Mrs. Cederholm said anything in his presence about why she executed the deed, that she said, "That she was going to the hospital; she deeded this to Mr. Gerard and he would know what to do with the property if anything happened to her," and he answered "Yes" to a question, "But you do definitely recall her telling you that she was executing this deed because she thought that Mr. Gerard—because Mr. Gerard knew what she wanted him to do?" Mrs. Thompson overheard the conversation in which Mrs. Cederholm asked Mr. Gerard to give the 16th Street house to Jeanne, and testified to it in substantially the same words used by Mr. Gerard. Although she observed other conversations between Mrs. Cederholm and Mr. Gerard and Mr. Gibson, she either did not hear or could not remember further parts of them. This

witness also testified that at some unstated time, apparently before the deeds were signed. Mrs. Cederholm "told me her husband died two years before, she told me just through some small slip-up it had been, she said, an awful mess, and she said she did not ever want that to happen to her property." Mr. Thompson, who was present when the deed was signed and handed to Mr. Gerard, did not hear Mrs. Cederholm say anything about it.

Mrs. Seguin testified that when Mr. Gerard returned to Long Beach after Mrs. Cederholm's death, he told Mrs. Seguin that Mrs. Cederholm had made "some sort of a will," and in this she was corroborated by her daughter, Lily Seguin. Mrs. Seguin also testified that several weeks later Mr. Gerard told her:

"Mrs. Cederholm had signed some papers. * * * He said it was in case she should die. Then if she lived any, just file papers.

"Q. He said these papers were signed in case she should die? A. To save some steps.

"Q. But if she lived we were to tear the papers up? A. Yes, they were."

"He said it was to save expenses that she had made these papers in case she dies. He said the sort of will she made was to save expenses in case she died."

[7, 8] From the evidence above summarized the trial court might reasonably conclude that Mrs. Cederholm's intent, when the deeds were signed and delivered to Mr. Gerard, was not to make them presently operative as conveyances of title, but to make something in the nature of a testamentary disposition of her property, to be effective only if she did not recover from her then present illness and the impending operation. If such was her intent the deeds were not completely executed and did not pass title, under the rules above stated. It is true, there is some evidence to support a contrary conclusion, and perhaps some of that above stated may admit of conflicting inferences; but in such a case the trial court's resolution of the conflict is conclusive on appeal.

[9-11] Appellants further contend that the evidence of statements made by Mr. Gerard after the death of Mrs. Cederholm was erroneously admitted and the judgment should be reversed for that reason. It does not appear that any objection was made to the testimony of Mrs. Seguin on this subject. But assuming that later objections to other testimony on the same subject place appellant in a position to raise the point, it is not well taken. In addition to that already stated, the testimony admitted over objection shows statements by Mr. Gerard to Mrs. Seguin and others of her family, after Mrs. Cederholm's death, that the latter's property was in court and would be divided as the judge decided. The point is argued by appellant as if the testimony related to declarations made by Mrs. Cederholm, but such is not the case. It is undisputed that the deed of Mr. Gerard to Mrs. Gerard, already mentioned, was made merely to enable her to bring this suit against him as administrator, and that he remains one of the parties in interest under the deed of Mrs. Cederholm. Any admissions he may have made against his interest in that respect, are therefore the proper subject of proof here, and for that reason the various declarations were properly admitted, insofar as they tend to show what was the intention of Mrs. Cederholm at the time the deeds were signed and handed to Mr. Gerard. The case is in this respect, also, very much like Dinneen v. Younger, supra (1943) 57 Cal.App. 2d 200, 207, 134 P.2d 323, 327, where the court said, after citing cases: "These cases establish beyond a doubt that where the very question at issue is whether the grantor intended a legal delivery, the subsequent acts and declarations of the parties are admissible. When a grantor or grantee subsequently deals with the property in a manner inconsistent with the theory of an effective delivery, such fact is of considerable importance in determining their probable intent. * * * All we know is, that the parties executed the deeds and handed them to each other. Such 'delivery' is equivocal. It could mean that the parties intended to part with title. It could also mean that in view of the dangers of the contemplated trip the parties intended the deeds to operate as wills and did not intend a present passage of title. Under such circumstances, evidence of their subsequent acts was clearly admissible on the issue of intent." So here we have no evidence of any declaration by Mrs. Cederholm at the time the deeds were handed to Mr. Gerard. In the light of all the circumstances such delivery was "equivocal," as the court said in Dinneen

v. Younger, supra, and the evidence was admissible.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



62 Cal.App.2d 830

MORRISON v. WILLHOIT et al.

Civ. 14247.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1944.

Rehearing Denied March 2, 1944.

Hearing Denied April 7, 1944.

1. Appeal and error ⇐931(1), 1012(1)

On appeal, the evidence is not weighed, but the reviewing court views the proof most favorable to respondent.

2. Appeal and error ⇐931(1)

Where findings were supported by substantial evidence, they were construed so as to uphold the judgment, rather than defeat it.

3. Building and loan associations ⇐23(8)

That receiver took possession of building and loan association's assets, including plaintiff's money on deposit in names of association officers as plaintiff's unpaid agents, did not render the officers personally responsible for plaintiffs' ensuing loss.

4. Appeal and error ⇐1008(1)

In action on notes, meaning of plaintiff's testimony and contentions, if ambiguous, was to be determined by the trial judge upon the evidence.

5. Appeal and error ⇐1008(3)

Where the meaning of an ambiguous contract is determined by extrinsic evidence, a question of fact is presented and the finding thereon if not unreasonable will be upheld on appeal.

6. Bills and notes ⇐527(1)

Evidence authorized denial of recovery on notes on ground that notes had been discharged.

7. Equity ⇐65(1)

Burden is upon a complainant in equity to prove that, so far as transaction involved in his demands is concerned, he is free from vice, and equity interposes a barrier against such a litigant making an inequitable demand for the sake of the law itself, and upon ascertaining the fraudulent nature of the original transaction will deny relief to a demand stemming from the original, tainted arrangement.

8. Equity ⇐65(2)

Where notes had their genesis in the transfer of plaintiff's properties for the purpose of defrauding plaintiff's creditors, plaintiff was not entitled under equitable principles to recover on notes, notwithstanding that complaint presented only a legal demand.

9. Judgment ⇐701

Judgment dismissing complaint to cancel notes and trust deeds executed to building and loan association to extent of money not used or paid to plaintiff by association's officers was res judicata of officers' liability on their notes executed plaintiff for money loaned to plaintiff by the association and turned over to the officers as her agents.

10. Judgment ⇐570(11)

An adjudication of the insufficiency of a complete statement of facts relied upon is res judicata, and a subsequent suit based upon the same transaction will be barred.

11. Judgment ⇐585(2)

Where the evidence used to establish a demand or a defense is identical with that used in a former action by the same parties, the res judicata doctrine applies.

12. Judgment ⇐572(1)

A judgment upon facts pleaded and confessed by demurrer is no less effectual as a bar to a subsequent action than a judgment based upon a verdict.

13. Judgment ⇐693

Where signature of agent's wife was added to agent's notes to plaintiff only to evidence good faith of agent's promise to restore to plaintiff the residue of her money at the conclusion of the agency, and the wife received no consideration other than that received by the agent, judgment of agent's nonliability to plaintiff was res judicata as to the wife's liability, notwithstand-

ing she was not a party to the former action.

Appeal from Superior Court, Los Angeles County; Albert F. Ross, Judge.

Action by Amber Morrison against J. D. Willhoit and others on two notes. From a judgment denying relief, plaintiff appeals.

Affirmed.

William Ellis Lady, of Los Angeles, for plaintiff and appellant.

Bauder, Veatch & W. I. Gilbert and W. I. Gilbert, Jr., all of Los Angeles, for defendants and respondents.

MOORE, Presiding Justice.

From a judgment denying relief to plaintiff in her action on two promissory notes, plaintiff appeals.* The execution of the notes was admitted, but after denying all other material allegations of the complaint, defendants pleaded affirmatively: (1) The notes were given in connection with a transaction whereby plaintiff on September 10, 1929, transferred certain properties for the benefit of the Marine Building and Loan Association of San Pedro, hereafter referred to as Marine, for the purpose of delaying and defrauding her creditors; (2) on September 15, 1933, plaintiff instituted an action in the Superior Court at Long Beach to cancel the notes and trust deeds given to Marine in the original transaction on the ground of fraud, which action was decided adversely to her; and (3) the institution of the action in Long Beach demanding the cancellation of the transfers of September, 1929, and the payment of the moneys she had placed with the defendants herein constituted an election of recission as her remedy as well as a declaration that the notes here in suit were due and owing and therefore the present action is estopped by such election as well as barred by the statute of limitations.

In September, 1929, plaintiff owned a number of valuable properties in Los Angeles County. Prior to that time and for more than two years, plaintiff had transacted business with Marine, and at that time maintained on deposit with that company in excess of $5,000. During the period prior to September 1929, plaintiff sought the advice of Willhoit and Gibson, President and Secretary respectively of Marine, with reference to her business transactions, and the management of her properties. Such advice was given by defendants in the discharge of their duties as officers of Marine. In September 1929, plaintiff was about to be made defendant in certain litigation in which she feared an adverse judgment. She sought the advice of defendants for the purpose of determining upon a method of protecting her property against sale under execution in the event that her adversary should prevail. An arrangement was agreed upon whereby plaintiff executed and delivered to Marine nine certain promissory notes aggregating $40,000, and to secure same she executed and delivered her several deeds of trust in favor of Marine as beneficiary. On the same day, defendants, as officers of Marine, issued checks in the sum of $39,-168.50, the difference evidently being the compensation of Marine for the services of Willhoit and Gibson. Those gentlemen caused plaintiff to indorse the checks which defendants promptly cashed. On the same day defendants executed their notes to plaintiff in the aggregate sum of $40,000 but gave no security. These notes were evidently given as contemporaneous proof of the possession of plaintiff's money by defendants, but no change in their relation of principal and agents was intended. Under the arrangement, defendants deposited plaintiff's money with Marine in account No. 2300 under "Willhoit and Gibson" and used it to pay taxes and expenses of plaintiff. All sums withdrawn from this account were paid solely for the use and benefit of plaintiff.

About the 10th of March, 1931, defendants and their wives executed to plaintiff the two notes here in suit aggregating $31,625.59 as evidence of the balance of her money in the treasury of Marine. Aside from the execution of the notes, nothing in the findings or in the evidence indicates that the parties intended thereby to evidence the personal debt of Willhoit and Gibson so long as they acted in good faith as plaintiff's agents in handling her money.

* The word plaintiff as used throughout this discussion will refer to Mrs. Weltha Reynolds, owner of the notes in suit, and not to the nominal plaintiff who is assignee solely for convenience. Although the defendants Gibson were not before the court, the references made to "defendants" throughout refer to Willhoit and Gibson as to all acts occurring prior to the filing of this action.

On the 6th of June 1933, the Building and Loan Commissioner of California, as receiver, took charge of Marine and thereafter administered its affairs. In her action filed in the Superior Court of Long Beach on September 15, 1933, plaintiff sought the cancellation of her nine notes to Marine of September 10, 1929, to the extent that the moneys evidenced thereby had not been expended for her account and for the cancellation of the deeds of trust given at the same time to secure such notes. The bases of her Long Beach action were: (1) That the litigation with which she had been threatened had been terminated and she was therefore entitled to have the balance of her money returned to her and the deeds of trust cancelled; and (2) that she had been unduly persuaded by Willhoit and Gibson to execute such instruments.

In the Long Beach action, plaintiff sued Marine, the receiver of Marine, and Willhoit and Gibson. Judgment of dismissal was rendered after the court had sustained a demurrer that the complaint failed to state a cause of action. The judgment was entered on March 27, 1934. Thereafter the receiver of Marine in the execution of his official duties foreclosed the trust deeds of September 1929, and applied all the moneys in its treasury to the uses of Marine.

The present action was filed on July 19, 1941. The court found against plaintiff on all of her allegations, namely: Defendants induced plaintiff to transfer her property to defendants; her property had been disposed of by defendants for their own use; defendants have neglected to pay any part of the notes; defendants had no intention of ever paying the notes but intended to dispose of the property for their own uses; the making of the original notes was a scheme to obtain the property of plaintiff fraudulently or otherwise without intending to pay the value or the amount evidenced by the promissory notes; the notes in suit had been completely discharged; the properties were conveyed to defendants at the instance and request of plaintiff; defendants had dealt with the properties in the manner directed by plaintiff. It was also determined that it was not true that defendants failed to pay plaintiff the moneys evidenced by the original promissory note, or that they had no intention of paying the same but because of the facts found, the notes in suit have been completely paid and discharged.

On the affirmative defenses it was found: (1) That the Long Beach action had resulted adversely to plaintiff in favor of defendant Willhoit and that such judgment constitutes res judicata of the present action; (2) that the Long Beach judgment disposed of all rights of plaintiff, including her right to declare the notes to be in default and the whole thereof to be due plaintiff, and that by reason whereof her action on the two notes is barred by subdivision 1 of section 337, Code of Civil Procedure; and (3) that, by virtue of filing the Long Beach action, plaintiff elected to pursue her remedy for cancellation of the notes and therefore she is now estopped, precluded and barred from recovering on them.

(1) The finding that the notes in suit have been discharged spell finality for the action. The sufficiency of the evidence to support that finding is open to view. Plaintiff's declaration in her Long Beach action shows that she sought an arrangement with defendants whereby she might conceal her property from her anticipated creditor. Her first effort was to encumber her titles. To do this effectually she must obtain a consideration for such encumbrances. This she obtained from Marine, a loan of $40,000. She turned over the proceeds of that loan to Willhoit and Gibson, not for the purpose of lending them individually the money, but that they might conceal it from her creditors and carry it on Marine's books in their own names and disburse it for her uses as occasion might necessitate. They became her agents. She required of them no security; she collected from them no interest. After three and a half years had elapsed, on March 10, 1933, she agreed that they had properly expended all but $31,377.51 of the original fund. She then took from them the notes in this suit as evidence of the amount they still held for her. After the new notes were taken according to the witness Willhoit they paid out $9,770.69 for her taxes and $12,991.69 for her personal use, leaving $8,615.13 in Marine's treasury. This much was clear and positive proof. Other testimony and documentary proof indicate a total of $38,000 had been paid out for plaintiff prior to the receivership of Marine. This would have left defendants in possession of only $1,168.50. Whether defendants had paid out for her use all of plaintiff's money but $8,615.13 or all but $1,168.50 the fact remains that any balance of her money was in the keeping of Marine as her debtor by her choice at the time when that corporation was taken over by the receiver. Such

event gained for her no superior rights; no advantage over other creditors or depositors. Whatever money she had caused to be deposited in the treasury of Marine to be concealed from her creditors awaited the same fate as that of all other deposits of that company.

[1-3] On appeal the evidence is not weighed but the court views the proof most favorable to respondent. California Employment Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 351, 128 P.2d 874. Since the findings are supported by substantial evidence, they must be so construed as to uphold the judgment rather than defeat it. 24 Cal.Jur. 1009. The fact that the receiver in the exercise of his duty took possession of all the assets of marine, including securities and moneys on deposit, did not convert the gratuitous arrangement of its officers to do a service without pay into one whereby they should be personally responsible for all losses of their principal in the event of Marine's failure.

[4-6] If plaintiff's appeal is based upon the theory that the agreement of September 1929 is ambiguous, still the findings are sufficient. The only noticeable ambiguity is that arising from the testimony and contentions of plaintiff and from the execution of the notes in suit. If it be conceded to be ambiguous its meaning was to be determined by the trial judge upon the evidence. Where the meaning of an ambiguous contract is determined by extrinsic evidence a question of fact is presented (17 C.J.S., Contracts, § 617, p. 1284) and the finding thereon if not unreasonable will be upheld on appeal. See California Well Drilling Co. v. California Midway Oil Co., 178 Cal. 337, 343, 177 P. 849. The agreement of defendants to protect against plaintiff's creditors the money received from her contemporaneously with her loan from Marine, as testified by Willhoit, was sufficient if believed to warrant a finding that the agreement was made to defraud plaintiff's anticipated creditor. And if there were no other evidence we could not say that the finding that the notes were discharged is without support.

[7, 8] (2) The record contains no substantial dispute of the contention that plaintiff's transfers of her properties on September 10, 1929, were executed to defraud a contingent creditor. She alleged that fact in her Long Beach complaint and Willhoit testified to the same at the trial below. Plaintiff argues in her brief that the question of transfer is not involved; that she loaned the $40,000 to defendants and took their notes for the amount they received from her. Such is a specious argument. It was only after she had encumbered her lands by trust deeds to Marine for a loan that she entrusted the proceeds of that loan to defendants as officials of Marine to secrete it from the world and to pay it out for her account. She was not only in pari delicto; she herself conceived the purpose of moral obliquity and invited Willhoit and Gibson to her home where she confided her fraudulent design to them and prevailed upon them to enter into a contract violative of good morals. The authorities cited by defendants (Saint v. Saint, 120 Cal.App. 15, 7 P.2d 374; Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296; Withrow v. National Surety Co., 122 Cal.App. 242, 10 P.2d 83; Richman v. Bank of Perris, 102 Cal.App. 71, 86, 282 P. 801) are in point. One who transfers his property for the purpose of cheating his creditors will plead in vain for relief from his own chosen distress. Saint v. Saint, supra, 120 Cal.App. 22, 7 P.2d 374. Even though it were unfair for a transferee under a fraudulent conveyance to keep the property as against the fraudulent grantor, still equity is so jealous of its principles that it turns away at its very threshold those who have been a party to the wrong. Withrow v. National Surety Co., supra, 122 Cal.App. 242, 10 P.2d 83. The burden is upon the complainant in equity to prove that, so far as the transaction involved in his demands is concerned, he is free from vice. Equity interposes a barrier against such a litigant making an inequitable demand for the sake of the law itself and upon ascertaining the fraudulent nature of the original transaction, it will deny relief to a demand stemming from the original, tainted arrangement. Richman v. Bank of Perris, supra, 102 Cal.App. 86, 282 P. 801. By virtue of these principles the defendants invoked the equity side of the court for relief and it was properly granted. The notes in suit had their genesis in no place and arose out of no event other than the transfer of plaintiff's properties in 1929 for the purpose of defrauding a creditor. The fact that the complaint presents only a legal demand does not prevent the application of equitable principles. They were appropriately invoked by respondents.

[9, 10] (3) The Long Beach action was a final adjudication of all the rights of plaintiff as against Mr. Willhoit. The inadequacy of her complaint then was apparent on its face. She sued to cancel all the notes and trust deeds she had executed to Marine in 1929 "to the extent of any money not used or paid to and for the use and benefit of plaintiff." She had no dealings with Willhoit and Gibson other than those arising from the transfers to Marine. Consequently, when the Long Beach court adjudged that the action filed there did not state a cause of action and entered a judgment of dismissal, that was res judicata of all transactions necessarily arising out of such fraudulent transaction. In contending that the earlier lawsuit was not an adjudication on the merits, plaintiff relies upon Goddard v. Security Title Insurance & Guarantee Company, 14 Cal.2d 47, 92 P.2d 804; and Campanella v. Campanella, 204 Cal. 515, 269 P. 433. These authorities do not support her contention. While the Goddard decision is readily distinguished on its facts, at the same time also it contains the fundamental pronouncement (page 52 of 14 Cal.2d, 92 P.2d 804) that a judgment based upon an order sustaining a demurrer on *the ground* that an absolute defense is disclosed by the complaint may be deemed a judgment on the merits. In the Campanella case there were no findings in the first action whose judgment roll did not disclose upon what grounds that action had been dismissed. In the course of its discussion the court declares that if a judgment of dismissal fails to show that the judgment was based upon a consideration of the merits of the controversy it is not res judicata; that a judgment of dismissal because of plaintiff's choice of the wrong forum or form of proceeding or defects of pleading is likewise unavailable as a bar to a subsequent suit. But those principles do not impair the vitality and force of the doctrine that an adjudication of the insufficiency of a complete statement of facts relied upon is res judicata and a subsequent suit based upon the same transaction will be barred.

[11, 12] Where the evidence used to establish a demand or a defense is identical with that used in a former action between the same parties, the doctrine of res judicata is clearly applicable. Hardy v. Hardy, 97 Cal. 125, 31 P. 906. A judgment upon the facts pleaded and confessed by demurrer is no less effectual as a bar to the subsequent action than a judgment based upon a verdict. See v. Joughin, 18 Cal.2d 603, 606, 116 P.2d 777. In presenting their defense to the action at bar respondents found it necessary to prove the identical fraudulent transaction which plaintiff had alleged in her Long Beach complaint. In the Long Beach action plaintiff sued Willhoit and Gibson as well as Marine. While that action against Marine alone might have resulted in a final judgment as to plaintiff's rights against Willhoit and Gibson, she left no doubt upon the subject by including those men as parties there.

[13] The fact that Mrs. Willhoit was not a party to the former action is not sufficient to defeat the plea of res judicata. She received no consideration other than that received by her husband. Her signature was added to the note for no reason other than to evidence the good faith of Mr. Willhoit's promise to restore to plaintiff the residue of her money at the conclusion of his agency. The judgment of his non-liability under the allegations of the Long Beach complaint is likewise res judicata as to his co-promisor or guarantor of the repayment of moneys claimed by virtue of the immoral transaction.

In view of the foregoing a discussion of the other defenses would be excessive.

The judgment is affirmed.

McCOMB, J., concurs.

W. J. WOOD, J., took no part in the decision.

62 Cal.App.2d 792

CARNEY v. HAYTER et al.

Civ. No. 14322.

District Court of Appeal, Second District, Division 1, California.

Feb. 7, 1944.

1. Evidence ⇐264

Employee's admission that rate of compensation was to be fixed at some future time was not necessarily an admission that money already received was full compensation until conditions for fixing rate of compensation had been met so as to preclude recovery for value of services, where employee terminated employment before such conditions were met.

2. Master and servant ⇐80(10)

Conflicting evidence sustained trial court's finding that though bowling establishment manager had monthly drawing account, rate of compensation for his services had not been agreed upon so that he was entitled to reasonable value thereof. Civ.Code, § 1611.

3. Appeal and error ⇐931(1)

On appeal evidence must be viewed in light most favorable to successful party in lower court.

4. Work and labor ⇐11

Where work is done under express contract that does not specify the compensation to be paid, the law implies a promise to pay what the service is reasonably worth. Civ.Code, § 1611.

5. Master and servant ⇐70(1)

That determination of rate of compensation was postponed to future time and that employee terminated employment before such time arrived did not affect implied promise to pay what employee's services were reasonably worth. Civ.Code, § 1611.

6. Appeal and error ⇐994(3)

In trial by the court without a jury, the credibility of witnesses was for trial court.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action in quantum meruit by Theodore R. Carney against Russell B. Hayter and another for the reasonable value of services performed by plaintiff as manager of a bowling establishment owned by named defendant. Trial by the court without a jury resulted in a judgment for plaintiff, and defendants appeal.

Judgment affirmed.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for appellant.

Pierson & Block, of Compton, for respondent.

DORAN, Justice.

The defendant, in an action in quantum meruit for the reasonable value of work, labor and services performed, appeals from a judgment in favor of plaintiff. The trial court denied defendant's motion for a new trial, but modified its findings of fact and amended the judgment accordingly. The appeal is taken from the amended judgment. The action was brought by respondent plaintiff to recover the balance of the amount alleged to be the reasonable value of respondent's services as manager of a bowling establishment owned by appellant. Respondent alleged in his complaint that the reasonable value of the services was $6,375, that only the sum of $2,743 had been paid respondent, and that appellant had failed and refused to pay the balance of $3,632. Trial was by the court, a jury having been waived, and respondent was awarded a judgment of $3,132 with interest and costs.

Evidence as to the agreement under which respondent was employed by appellant is conflicting. According to respondent's testimony, the amount actually received by respondent during his term of employment was received as a drawing account and not as salary. According to appellant's testimony, there was a definite agreement that respondent was to work for appellant as manager of the bowling establishment at a salary of $200 per month. The checks by which respondent was paid were signed in blank by appellant and completed by respondent. With the exception of the first three, these checks bore the notation "Drawing". Respondent testified that this notation was made at the direction of appellant, who told respondent to make such notation on the checks that were drawn to respondent and to appellant. In some instances the notation of "Drawing" on the stubs of checks made to respondent had been crossed out and the word "salary" written above it. These changes had been made by appellant, apparently toward the

end of respondent's period of employment. There is a discrepancy between the testimony of respondent and that of appellant as to the time when respondent actually started to work for appellant. Respondent testified that compensation was first discussed between appellant and respondent in August of 1940, and that respondent did work preliminary to the opening of the bowling establishment from that time on until the business opened up on October 23rd, for which work he received no pay.

Respondent and appellant first met in the summer of 1939 when appellant sold respondent a home in the city of Compton, in appellant's subdivision. The home sold to respondent was on the lot adjoining appellant's real estate office and respondent frequently visited with appellant at this office. According to respondent, the subject of possible business dealings between appellant and respondent was first broached about the spring of 1940. Respondent at that time was employed as a field man for a brewing company. Following is respondent's account of the conversation.

"During the course of the conversation, Mr. Hayter said to me, 'Ted, let's you and I get into something together.' I said to him, 'What do you mean, Speck?' He said, 'Well, my tract is—I am going to close my tract out.' He said, 'I have got six or seven houses yet to sell. I want to get in something else.' 'I would like to get into something with you,' I said. 'How about your acreage on Chester Street?' He said he has got a man to buy that and subdivide it himself. I said, 'Have you anything in mind, Speck?' He said, 'No.' We had both been ex-druggists. Neither one was licensed. We had a lot in common. Talked about those things. I said, 'I haven't any money to put in a business.' He said, 'That won't be necessary; I can get it.' I said, 'I don't know, Speck.' He said, 'Think it over.' I said I had nothing in mind at that time. Neither did he. The conversation went into other channels. Nothing more said about it that day." Later, according to respondent's testimony, respondent suggested the proposition of a bowling alley; and after investigating the matter, appellant decided upon such a venture, and eventually a location was selected and the establishment in question constructed. Appellant financed the venture. Around the first part of August 1940, respondent testified that the following conversation took place, as revealed by the following excerpt from the record.

"I said to Mr. Hayter, 'I would like to have an understanding as to our arrangement at the bowling alley.' He was very congenial, Mr. Hayter; very good sport. He said, 'You bet, my boy. What do you want to know?' I said, 'I want to know where I stand.' He took out a sheet that Brunswick sends out as to the recommendations for the personnel of bowling alleys they made. He said, 'I have been thinking about that myself. What will it take you to get by on to start with?' I said, I don't know. He said, 'Could you get by on $200?' I said, 'I presume I could on $200 a month.' He said, 'Yes.' He said, 'You understand that is just a drawing account.' He said, 'That is just to get started. Business may be good or bad. We don't know what to look for in the future. But I can tell you this: You stick with me. That is your drawing account, and that is all it is. When there is more money there, it is yours.' He said, 'Don't consider it a salary in any sense of the word.' He said, 'I will go further than that.' He said, 'We are going to incorporate this business and you will receive stock in it. Holly will get stock, and I will.'" Holly is appellant's brother The following was developed upon cross examination of respondent.

"Q. Did he ever tell you when you were to receive anything in addition to $200 a month? A. The nearest date I can give you is when he said the heavy payments to Brunswick would be over in one year. Then we would have something to ourselves.

"Q. When did he tell you that? A. When we first opened up. Prior to the time we actually opened up.

"Q. Would you say that was around the first part of August, 1940? A. It was after I had my first conversation with him, but in the first part—it was before Christmas, 1941. When you are talking to a man every day, you cannot place a conversation every day in the week. I cannot.

"Q. Then you understood the Brunswick obligation had to be paid off before you would receive anything in addition to $200 a month? A. That and the heavy contracts."

Respondent left his position as manager of the bowling establishment early in

January 1942, after a dispute with appellant. The termination of the relationship between respondent and appellant apparently was the result of two incidents, first, a dispute over the working hours of an employee, and second, a heated argument over appellant's purported intoxication and behavior one evening on the premises. According to respondent, "From then on, it was very miserable." Respondent introduced expert testimony as to the reasonable value of his services as general manager of a bowling establishment of the type in question. Testimony to this effect was that the services would be worth at least $325 to $350 a month, as a conservative estimate, if the work were performed as it was supposed to be performed.

The trial court found that "between the 1st day of August, 1940, and the 5th day of January, 1942, plaintiff, at the request of defendant, did do and perform work, labor and services for the defendant, in consideration of the promise of defendant to pay the plaintiff, on request, so much money as the plaintiff therefor reasonably deserved to have." In other words, the court found that respondent was entitled to be paid what his services were reasonably worth.

[1-3] Appellant contends that the evidence conclusively shows that there was an express agreement between appellant and respondent as to respondent's services; that this agreement provided that the payment to respondent of any amount in addition to $200 per month was conditioned upon the payment of the heavy obligations of the business; and that since respondent voluntarily left the employ of appellant prior to the time when the heavy obligations had been paid off, respondent was not entitled to anything more than the sum of $200 per month for the services he performed. As to the discharge of the heavy obligations of the business, respondent argues that it may be inferred from the evidence that these obligations had been paid off prior to the time respondent's services terminated. However, it will not be necessary to consider that question here. Appellant contends that respondent admitted by his own testimony upon cross-examination that it was understood that no additional salary would be paid until the heavy obligations had been discharged. The testimony in this respect is quoted above. It does not unequivocally appear that respondent admitted that $200 per month was to be the full rate of compensation for the services he had already performed. It may reasonably be inferred from such testimony that the fixing of the rate of compensation was to be postponed until such time as the obligations in question were paid off; but an admission that the rate of compensation was to be fixed at some future time is not necessarily an admission that the amount of money already paid was to constitute full and complete compensation until the conditions for fixing the rate of compensation had been met. The findings of the trial court necessarily imply that no rate of compensation for respondent's services had been agreed upon. These findings are supported by the evidence, when that evidence is viewed in the light most favorable to respondent, as must be the case upon this appeal from the judgment in respondent's favor. It should also be pointed out that respondent's testimony indicated that respondent was under the impression he was to have an interest in the business; that he was a partner of appellant. Under these circumstances the trial court might well find that the parties had never arrived at a definite understanding as to respondent's compensation.

[4, 5] "Where work is done under an express contract which does not specify the compensation to be paid, the law implies a promise to pay what the service is reasonably worth." 27 Cal.Jur. 207; Bee v. San Francisco & H. B. R. Co., 46 Cal. 248; Elconin v. Yalen, 208 Cal. 546, 282 P. 791; Laven v. Cowan, 108 Cal.App. 628, 291 P. 877. The fact that determination of the rate of respondent's compensation may have been postponed to some future time, and that respondent may have left appellant's employ before that time arrived, has no effect upon the implied promise to pay respondent what his services were reasonably worth. The findings of the trial court, upon sufficient evidence, preclude an inference that respondent must have remained in appellant's employ until discharge of the obligations of the business, in order to receive any additional compensation for his services.

In Hunter v. Ryan, 109 Cal.App. 736, 293 P. 825, the plaintiff's assignor was hired by the defendant by a letter which stated, "'I have a job for you. I will give you $50 a week and a bonus to try it out.'" The offer was accepted and the employment continued for approximately one

year when a dispute arose and the employee terminated the employment. The bonus had never been paid. Plaintiff sued for the reasonable value of the "bonus" and recovered judgment. Upon appeal the judgment was affirmed, the court holding that respondent was entitled to recover the reasonable value of the services if the jury found such value to be in excess of the weekly sum paid. The court in its opinion declares the principle involved to be recognized in the provisions of section 1611 of the Civil Code, which declares that when the amount of the consideration is not fixed in the contract it is to be determined on the basis of quantum meruit.

[6] In the present case the trial court was confronted with two conflicting versions of the transaction involved, and it was incumbent upon the court to decide which of the two versions was correct. The credibility of the witnesses was for the trial court to determine; and it cannot be said that the judgment lacks support in the evidence presented. The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.



PEOPLE v. SCOTT.*
Cr. 3763.

District Court of Appeal, Second District, Division 1, California.

Feb. 9, 1944.

Hearing Granted March 6, 1944.

1. Rape ⇐51(1)

Evidence sustained conviction for rape. Pen.Code, § 261, subds. 1, 3, 4.

2. Infants ⇐20

Evidence sustained conviction for contributing to delinquency of a minor. St. 1937, p. 1033, § 702.

3. Criminal law ⇐1115(1)

Appellate court could not interfere with trial court's ruling denying motion to set aside charge contained in a count of information on ground that defendant had not been legally committed by a magistrate where transcript of preliminary examination was not before appellate court. Pen. Code, § 995, subd. 1.

4. Infants ⇐18

The juvenile court has original jurisdiction over all misdemeanors defined by statute regarding the contributing to delinquency of minors. St.1937, p. 1033, § 702.

5. Infants ⇐18

In prosecution for contributing to delinquency of minor, juvenile court has jurisdiction to impose penalty where defendant enters a guilty plea, but, when defendant enters a plea of not guilty, jurisdiction is in superior court. St.1937, p. 1033, § 702.

6. Criminal law ⇐1144(1, 5)

Where defendant intends to rely upon error because complaint was not filed in proper court, or because he was not properly held to answer for offense charged, he should make the proceedings on which he bases such claim a part of the record on appeal and regularity of such proceedings as were had will be presumed in absence of showing to contrary.

7. Criminal law ⇐1144(1)

Where record did not show where proceedings as to count charging defendant with contributing to delinquency of minor were initiated, before what court original complaint, if any, was filed, preliminary examination held, whether district attorney initiated prosecution, or whether any proceedings were had prior to filing of information, appellate court assumed that procedure was regular up to time defendant entered his plea of not guilty. St.1937, p. 1033, § 702; Pen.Code, § 809.

8. Rape ⇐1

Under statute regarding rape, but one punishable offense of rape results from a single act of intercourse, notwithstanding the single act may be accomplished under more than one of the conditions enumerated in the various subdivisions of the statute. Pen.Code, § 261.

9. Rape ⇐63

Where separate judgments convicting defendant of statutory rape, of rape accomplished by force and violence, and of rape accomplished by threats of great bodily and immediate harm to prosecutrix were predicated on single act of intercourse, modification by consolidating the

* Subsequent opinion 151 P.2d 517.

separate judgments into a single judgment was authorized. Pen.Code, § 261.

10. Weapons ⇐17(2)

In prosecution for obliterating marks of identification on an automatic pistol, corpus delicti cannot be established with aid of presumption of defendant's guilt because of his possession of firearm on which marks of identification had been obliterated, and the rule of comparative convenience of producing evidence of ultimate facts is inapplicable. Gen.Law 1937, Act 1970, § 13.

11. Criminal law ⇐307

The controlling test of validity of a presumption created by statute is whether there is some rational connection between facts proved and ultimate facts presumed, and the inference of one fact from proof of another must not be so unreasonable as to be a pure arbitrary mandate.

12. Criminal law ⇐1172(2)
Weapons ⇐3

The portion of the statute making possession of firearm, on which marks of identification have been tampered with, presumptive evidence that such possessor so changed or altered the identification marks, is unconstitutional, and, in prosecution for obliterating identification marks on firearm, giving of instruction embodying such presumption constituted prejudicial error. Gen.Laws 1937, Act 1970, § 13; Code Civ.Proc. § 1963, subd. 1; Const. art. 1, § 13.

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Aaron Scott was convicted of statutory rape, of rape accomplished by force and violence, and of rape accomplished by threats of great bodily and immediate harm to prosecutrix, of contributing to delinquency of a minor, and of willfully and unlawfully altering, removing, and obliterating certain marks of identification upon an automatic pistol in his possession, and he appeals.

Judgment as to counts charging rape modified and as modified affirmed, judgment as to count charging defendant with contributing to delinquency of minor affirmed, and judgment as to count charging that defendant willfully and unlawfully altered, removed, and obliterated certain marks of identification on an automatic pistol, reversed and remanded for a new trial.

Fred A. Shaeffer, of Santa Maria, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lever, Deputy Atty. Gen., Lawrence M. Parma, Dist. Atty., of Santa Barbara, and Thomas P. Weldon, Deputy Dist. Atty., of Santa Maria, for respondent.

WHITE, Justice.

In an information filed by the district attorney of the County of Santa Barbara defendant was accused in Counts I, II and III of the crime of rape based on a single act of intercourse committed without the consent and against the will of a sixteen-year old girl. Count I charged statutory rape upon a female under the age of consent, contrary to the provisions of subdivision 1 of section 261 of the Penal Code. Count II, after alleging that it was "for a further and separate cause of action", but which in reality and for all intents and purposes was but a separate statement of the same offense, alleged that the crime of rape was accomplished by force and violence, in violation of the provisions of subdivision 3 of the section. Count III, which was also in reality a separate statement of the same offense though it was pleaded as "a further and separate cause of action", charged that the rape was accomplished by threats of great bodily and immediate harm to the prosecutrix, by reason of which she was prevented from resisting, and which offense was in violation of subdivision 4 of the section.

In Count IV of the information the defendant was charged with a violation of section 702 of the Welfare and Institutions Code of California and which charge was pleaded as "connected together in the commission of the crimes set forth in Counts I, II and III".

By Count V the defendant was charged with a violation of section 13 of the Dangerous Weapons' Control Law of 1923, as amended (Stats.1923, ch. 339, p. 702, Deering's General Laws 1937, Act 1970, p. 999), in that he did wilfully and unlawfully alter, remove and obliterate certain marks of identification upon an automatic pistol in his possession.

Following the entry of not guilty pleas to all counts of the information, the cause proceeded to trial before a jury resulting in the conviction of defendant on all five

counts. As to the charges of rape contained in Counts I, II and III, a separate judgment was pronounced and entered on each count, sentencing the defendant thereon to the state prison at San Quentin "for the term prescribed by law", the sentences to run concurrently. As to Count I, wherein the punishment prescribed by section 264 of the Penal Code is either by imprisonment in the state prison or county jail as the jury may determine and recommend, it is to be noted that pursuant to the provisions of said section the jury in the instant case, in the exercise of the discretion reposed in them, fixed the punishment as imprisonment in the state prison. From the judgments of conviction on all five counts and from the order denying his motion for a new trial, defendant prosecutes this appeal.

[1, 2] In summarizing the evidence we deem it unnecessary to here set forth in detail the testimony in regard to the charges of rape embodied in Counts I, II and III. This for the reason that on both the direct and cross-examination of the defendant he admitted having the act of sexual intercourse with the prosecutrix as charged against him; that she was not his wife, and there was abundant proof that the complainant was of the age of sixteen years; all of which practically demonstrated defendant's guilt as to Count I. Concerning Counts II and III, suffice it to say that an examination of the record reveals sufficient evidence to support defendant's conviction thereon, consisting as it does of ample testimony that the assault was accomplished by force and threats of great and immediate bodily harm to the victim thereof. By the same character of evidence defendant's guilt was legally established upon the charge of violating section 702 of the Welfare and Institutions Code, St.1937, p. 1033, as charged in Count IV. As to Count V the evidence establishes the fact that defendant had in his possession and exhibited to the complainant the gun which formed the basis of the charge therein contained. That the identification marks upon the weapon were altered or changed by someone, in violation of the statute, was also established by competent evidence.

After a jury was empaneled, but before they were sworn to try the cause, defendant asked permission to withdraw his pleas of not guilty as to Counts II, IV and V for the purpose of making certain motions. The record is not altogether clear as to whether the court granted the motion to withdraw the not guilty pleas but it does appear that certain motions were made and considered by the court, to which we will now give consideration in view of appellant's contention that the court's adverse rulings thereon require a reversal.

[3] As to Count II the defendant moved to set aside the charge therein contained on the ground that the defendant had not been legally committed by a magistrate. Subdivision 1, section 995, Penal Code. In support of this motion defendant offered the transcript of the testimony taken at the preliminary examination. After reading the same the court denied the motion. With this ruling we cannot interfere as the transcript of the preliminary examination is not before us, not having been brought up on appeal. Without the aid of such transcript we cannot assume error in the ruling of the court based upon a reading thereof.

[4-7] The motion to dismiss Count IV was grounded on the claim that the superior court, when not sitting as a juvenile court, is without jurisdiction to try a defendant accused of violating section 702 of the Welfare and Institutions Code unless such prosecution was initiated in the juvenile court and transferred to the superior court sitting in the exercise of its general jurisdiction. That the juvenile court has original jurisdiction over all misdemeanors defined by section 702 of the Welfare and Institutions Code cannot be denied. The legislature having conferred upon the juvenile court original jurisdiction of all misdemeanors mentioned in the last named code section, that court has exclusive jurisdiction as to such misdemeanors, and as to them the superior court is without jurisdiction. In re Gamo, 122 Cal.App. 725, 726, 10 P.2d 770. However, it is equally well established that while the juvenile court has jurisdiction in such a case to impose a penalty where the defendant enters a guilty plea, yet when a defendant, as was done in the case at bar, enters a plea of not guilty, the jurisdiction is in the superior court. People v. Superior Court of San Bernardino County, 104 Cal.App. 276, 285 P. 871; In re Gamo, supra; Section 702, Welfare and Institutions Code. Therefore, the juvenile court had jurisdiction to conduct the proceedings as to the offense charged in Count IV herein up to the time defendant entered his plea of "not guilty", and thereafter the superior court had jurisdiction to try and sentence the defendant

upon his conviction. There was filed in this case a stipulation entered into by both appellant and respondent wherein it is recited that there are two superior court judges in the County of Santa Barbara; that the departments of said court presided over by both judges have been designated as a juvenile court; and "that all proceedings in said case were heard before either of said two judges; that defendant's plea was entered before Judge Wagner and all other proceedings were before Judge Westwick". The record before us does not show where the proceedings as to Count IV were initiated, before what court the original complaint, if any, was filed, the preliminary examination held; whether the district attorney initiated such prosecution pursuant to the provisions of section 809 of the Penal Code, or whether any proceedings whatsoever were had prior to the filing of the information and the entry of a not guilty plea. If appellant intended to rely upon error, because the complaint was not filed in the proper court or because he was not properly held to answer for the offense charged, he should have made the proceedings upon which he based such claim a part of the record on appeal. The regularity of such proceedings as were had will be presumed, in the absence of a showing to the contrary. People v. Sanchez, 21 Cal.2d 466, 467, 469, 132 P.2d 810. We must, therefore, assume that the procedure was regular up to the time the defendant entered his plea of not guilty, and by reason of what we have heretofore said, it is manifest that the proceedings which attended defendant's trial, conviction and sentence in the superior court were legal and regular. This is at once apparent when, according to the stipulation, the department of the superior court in which the defendant entered his plea, as well as the department in which he was tried, operated under the law, as both a juvenile and superior court.

Error is next asserted because of the denial of defendant's motion to dismiss Count V of the information. In view of the conclusion at which we have arrived and will later discuss, that the conviction under Count V must be reversed, it becomes unnecessary to here give consideration to the claimed erroneous ruling on such motion.

[8, 9] We come now to a consideration of appellant's claim that he cannot be legally convicted on three separate counts of rape when the evidence shows that such counts were predicated upon a single act of intercourse. It is now definitely established as the law in this state that under section 261 of the Penal Code but one punishable offense of rape results from a single act of intercourse, notwithstanding that the single act may be accomplished under more than one of the conditions and circumstances enumerated in the various subdivisions of the code section. People v. Craig, 17 Cal.2d 453, 455, 110 P.2d 403, 404. In the cited case it was held: "These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; they are not to be construed as creating several offenses of rape based upon that single act." The reasons for the rule just announced are presented with exceptional clarity in a well-considered opinion prepared by Mr. Chief Justice Gibson in the case from which we have just quoted. The same case furnishes authority for this court to so modify the separate judgments pronounced in Counts I, II and III herein by consolidating them into a single judgment. By so doing, no possible disadvantage or detriment will ensue to the defendant when the time arrives for the State Board of Prison Terms and Paroles to fix his definite term of imprisonment. This we shall do in remanding the case to the trial court.

Finally, appellant challenges the constitutionality of certain provisions of section 13 of the aforesaid Dangerous Weapons' Control Act of 1923, as amended, which formed the gravamen of Count V.

Section 13 of the act reads as follows: "No person shall change, alter, remove, or obliterate the name of the maker, model, manufacturer's number, or other mark of identification on any pistol or revolver. *Possession of any such firearm upon which the same shall have been changed, altered, removed, or obliterated, shall be presumptive evidence that such possessor has changed, altered, removed, or obliterated the same.*" (Emphasis added)

Pursuant to the aforesaid provisions the court instructed the jury that if they found from the evidence that the defendant was in possession of a firearm upon which the enumerated marks of identification were altered, removed or obliterated, such possession would constitute presumptive evidence that the defendant had so changed, altered, removed or obliterated such identifying marks.

The constitutionality of that portion of the section which makes possession of a firearm upon which marks of identification have been tampered with, presumptive evidence that such possessor so changed or altered the identifying marks, is challenged by appellant upon the ground that being an essential element of the offense charged—a part of the corpus delicti—the fact that the defendant made the changes or alterations on the firearm must be proved by the prosecution, and that the burden of such proof cannot be shifted to the defendant by force of a legislative declaration that because of his possession of the firearm the defendant is presumptively guilty of the crime of making alterations or changes thereon.

The vice of the challenged portion of the statute, as we view it, lies in the fact that it leaves the jury free to act upon the presumption alone, once the specified fact of possession is proved, unless the defendant comes forward with opposing evidence. Under the American philosophy of jurisprudence and constitutional guaranties, is this not enough of itself to vitiate the statutory provision?

It is here sought to sustain the validity of the questioned provisions of the statute upon the rule or principle of "ab inconvenienti". This principle, it is true, has been consistently followed in this state in cases involving prosecutions for practising medicine and other professions without a license; selling intoxicating liquors without being licensed so to do; illegal possession and transportation of intoxicating liquors, and in cases involving the question of citizenship or alienage. But in all these cases it is emphasized that the rule of convenience is applied only where the defendant has more convenient access to the proof, and where requiring him to go forward with such proof will not subject him to unfairness or hardship. In prosecutions for the doing of an act restricted to those who are licensed therefor, the rule of convenience is applicable because the accused, if licensed, can immediately show it without the least inconvenience. People v. Boo Doo Hong, 122 Cal. 606, 607, 55 P. 402. Where a statute made it an offense knowingly to conceal smoking opium illegally imported and threw upon a defendant found in possession of such opium the burden of showing that he had not acquired it through illegal importation, the presumption was sustained on the ground that no lawful purchase of smoking opium could occur in this country, and therefore, the possession alone gave rise to sinister implications. Yee Hem v. United States, 268 U.S. 178, 45 S.Ct. 470, 69 L.Ed. 904. Where an act of Congress placed upon an alien in deportation proceedings the burden of proving his residence and of excusing his failure to procure a certificate of residence from the Collector of Internal Revenue, it was held that in such a situation the shifting to the alien of the burden of explanation imposed no unreasonable hardship upon him. Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905. But, as pointed out in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, the fact that the defendant has the better means of information cannot, standing alone, justify the creation of such a presumption, for the defendant in every criminal case possesses at least an equal familiarity with the true facts, and in most cases, a greater familiarity with them than does the prosecution. Does that fact, however, justify the assertion under our law, that all defendants in criminal cases should assume the burden of going forward with the evidence? If such an argument is sound and be carried to its logical conclusion, then why could not the legislature validly command that the finding of an indictment, the holding of a defendant to answer by a committing magistrate, or even mere proof of the identity of the accused, should be presumptive evidence of the existence of all the facts essential to guilt?

Undoubtedly the defendant in the instant case knew better than anyone else whether he himself altered the identification marks on the firearm in question. True, it would be a convenience for the prosecution to rely upon the presumption and cast upon the defendant the burden of producing evidence to rebut it. But the burden cannot thus be lawfully shifted when the fact of possession is not relevant to guilt of the offense of altering certain identifying marks upon the weapon. If the offense charged was possession of the pistol without a permit, the situation would be quite different and the presumption would be legal because neither inconvenience nor hardship would be worked upon the defendant in requiring him to produce such a permit, while to require the prosecution to negative such possession of a permit would require endless search of records, files and documents.

Many people might acquire a firearm in good faith, and unacquainted with where

marks of identification are placed upon the weapon, not even look for them. Yet such innocent possession, under the wording of section 13 of the act, creates a presumption that such possessor is guilty of a felony and requires him to do what might be well nigh impossible—that is, produce evidence as to who did make the alterations.

[10] Respondent relies upon the case of People v. Osaki, 209 Cal. 169, 286 P. 1025, in which case proof of alienage of the defendants was in issue in connection with the Alien Land Law, forbidding ownership of land by Japanese aliens. In the cited case the court upheld the presumption of alienage under section 1983 of the Code of Civil Procedure. But, as in the medical and other license cases, no hardship was worked upon the defendants in requiring them to produce proof of their citizenship, for such fact was peculiarly within their knowledge, while to require the prosecution to prove alienage would be well nigh impossible. We think it may fairly be stated that the principle of ab inconvenienti", which is an exception to the general rule applicable to criminal prosecutions, has, in this state, been confined to the particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the non-existence of a license required by law or of a certificate of citizenship. In such cases it is easy for the defendant to meet the burden thus placed upon him. However, the rule should not be applied in the enforcement of law so as to relieve the prosecution of the imperative duty to establish the truth of the charge made against the accused. Any relaxation of the general rule in that regard should be strictly confined to the principle of the rule of convenience. In the instant case it is at once apparent to us that the gravamen of the offense denounced by section 13 of the act is not the possession of a firearm, but the alteration, changing, removal or obliteration of certain identification marks thereon. Manifestly, if the proof of the prosecution under section 13 were to stop with a showing that the accused was in possession of the firearm, not even the corpus delicti of the charged offense would be proven. In addition thereto, the prosecution must prove that such possessor altered the identification marks on the weapon. Indeed, such proof is vital to establish the corpus delicti of the offense charged. In our opinion, under such circumstances, the corpus delicti can no more be established with the aid of a presumption of defendant's guilt because of his possession than it could be shown by the extra-judicial statements or admissions of the accused. People v. Quarez, 196 Cal. 404, 238 P. 363. The rule of "ab inconvenienti" is not therefore, applicable herein.

[11] The rule of comparative convenience of producing evidence of the ultimate fact is, in our opinion, but a corollary to the main and controlling test of the validity of a presumption created by statute, viz., the essential requirement that there shall be some rational connection between the fact proved and the ultimate fact presumed (Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519), and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899. The essence of this requirement is tersely illustrated in the language used in Brightman v. United States, 8 Cir., 7 F.2d 532, 534, involving a prosecution under the Harrison Anti-Narcotic Act, 26 U.S.C.A. Int.Rev.Code, §§ 2550 et seq., 3220 et seq., and wherein the court said: "there is in our judgment no such rational connection between the fact of the possession of morphine in the Western district of Oklahoma and the fact of a purchase of it in that same district as to make the former prima facie evidence of the latter. Common experience does not support such a presumption." So in the case with which we are here concerned, we are unable to perceive any reasonable connection or rational relationship between the fact proved, viz., possession of the weapon, and the ultimate fact to be presumed, i.e., alteration of identifying marks thereon. The relationship, if any, is strained, remote and not justified in the light of common experience. Section 13 of the statute herein shifts the burden of proof, and in a criminal case deprives the defendant of the protection of his constitutional guaranties. Running through all of the numerous authorities we have read on the subject, there is to be found a concession that such a statutory rule of evidence is a dangerous one, and should not be applied where it has no intrinsic evidential force, or where its application will impair some positive statutory or constitutional right. In the case of In re Wong Hane,

108 Cal. 680, 682, 41 P. 693, 694, 49 Am.St. Rep. 138, the supreme court had before it an ordinance of the city of Los Angeles, the effect of which was to make proof of the mere possession of a lottery ticket a misdemeanor, and to place upon the defendant the burden of showing that his possession was lawful or innocent. In declaring the ordinance void as unconstitutional the court said: "If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights." In citing with approval the case just mentioned, Mr. Justice Preston, in a well reasoned and carefully considered dissenting opinion in People v. Troche, 206 Cal. 35, 61, 273 P. 767, 778, sets forth the broad and historic background of the doctrine of presumption of innocence in the following language:

"This is no time or place for a lengthy dissertation upon this presumption, but it may be well remembered that its object is to protect the innocent and not to shield the guilty. It is a presumption of both law and fact. It was present in the Roman law and some authorities state that it marks back through Sparta and Athens to the Book of Deuteronomy. It was known to be a part of the common law as early as 1802. In 1817 Lord Gillies, in McKinley's Case (33 St.Tr. 275, 506), in speaking of this presumption said, among other things: 'It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty.'

"Blackstone maintained (1753-1765) that: 'The law holds that it is better that ten guilty persons escape than that one innocent suffer.' 4 Bl.Com., c. 27, margin page 358, ad finem.

"It is the strongest presumption known to the law. It is as much a part of our Constitution, both state and national, as if it were written therein in letters of burnished gold. This fact has been assumed many times in this state and in one case at least expressly stated. In re Wong Hane, 108 Cal. 680, 41 P. 693, 49 Am.St.Rep. 138. We presume that no one would contend that this presumption could be overthrown by any statutory enactment. Prima facie evidence or presumptions may be declared to exist where they flow logically from certain facts, but the presumption of innocence is ever present even in the deliberations of the jury and may alone and of itself sometimes avail to acquit the defendant.

"This court should be quick and decisive in its action to declare anew our Bill of Rights and to preserve the essential attributes of a jury trial as known to the common law and as preserved by our Constitution. Article 1, §§ 7 and 13, Const."

The claim that application of the presumption in the instant case resulted in doing justice to the particular defendant at the bar, does not justify its application, for while a departure from those long established, sound, legal principles and constitutional guaranties may result in justice for a particular defendant, it is dangerous to the community, and in the final analysis, serves only to pave the way for conviction of the innocent.

Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from established legal modes of procedure. In a strong dissenting opinion delivered by Mr. Justice Sutherland of the Supreme Court of the United States in Associated Press v. National Labor Relations Board, 301 U.S. 103, 142, 57 S.Ct. 650, 659, 81 L.Ed. 953, we are counselled to "withstand all beginnings of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time". The acquittal of a guilty person is truly a miscarriage of justice, but the conviction of an innocent person through relaxation of those fundamental legal principles such as the constitutional "due process of law" provision, art. 1, § 13, the presumption "that a person is innocent of crime or wrong", subdivision 1, section 1963, Code of Civil Procedure, would be a tragedy. It is the duty of the courts to be watchful of the constitutional and inalienable individual rights of the citizen and to halt any stealthy encroachments thereon.

We here quote the powerful and significant language of the late Mr. Presiding Justice Houser of this court in the case of People v. Bullock, 123 Cal.App. 299, 305, 11 P.2d 441, 443, wherein he said: "I reluctantly concur in the judgment. My consent to the affirmance of the judgment has resulted solely from the compelling force of the precedents as established by the cases to which, in the opinion of my associate, attention has been directed. It is clear that the constitutional guaranty of 'due process of law' is in great danger of being set at naught. With but slight extension of the rule, either as promulgated by the statute, or as judicially announced preceding its enactment, in any criminal prosecution in which the district attorney may find it difficult to produce evidence of the guilt of the defendant, he may invoke the doctrine of 'ab inconvenienti' and thus shift to the defendant the entire burden of establishing his innocence. The formerly time-honored, but now not greatly respected rule of law which requires the prosecution to prove beyond a reasonable doubt every essential element of the crime of the commission of which the defendant is charged would appear to have been given a construction which would seem to be wholly at variance with the plain language of the ordinary rule and completely out of harmony with ancient judicial precedents. It is but a short step backward to a former procedure which permitted prosecution on mere hearsay information, and on which, in the absence of the most positive affirmative proof of innocence, the accusation itself was sufficient to sustain a judgment of conviction. To my mind, the trend of judicial utterance is too much toward the abrogation of many of those constitutional principles which affect human rights and which were most dearly obtained. With the destruction of the doctrine of 'burden of proof on the prosecution,' no innocent man will be safe; but personal liberty will again become a prized, if not an uncommon, condition or attribute to the citizen of the republic."

[12] We therefore conclude that the portion of section 13 of the aforesaid act which provides that "possession of any such firearm upon which the same shall have been changed, altered, removed, or obliterated, shall be presumptive evidence that such possessor has changed, altered, removed, or obliterated the same" is unconstitutional and void; that therefore the giving to the jury of the instruction embodying such presumption constituted prejudicial error and invaded the substantial rights of the defendant.

For the foregoing reasons the "judgments" as to Counts I, II and III herein are consolidated and modified to read: "Whereas the said Aaron Scott has been found guilty of the crime of rape, a felony, as defined and prescribed in subdivisions 1, 3 and 4 of section 261 of the Penal Code, being separate statements of the same offense, it is therefore ordered, adjudged and decreed that the said Aaron Scott be punished by imprisonment in the state prison of the State of California at San Quentin for the term prescribed by law". As so modified the judgment and the order denying a new trial are and each is affirmed.

The judgment and the order denying a new trial as to Count IV is affirmed.

The judgment and the order denying a new trial as to Count V is reversed and the cause remanded for a new trial upon such count.

DORAN, J., concurs.

YORK, P. J., concurs in the conclusions reached.



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SECURITY-FIRST NAT. BANK OF LOS ANGELES v. COOPER et al.

Civ. No. 14000.

District Court of Appeal, Second District, Division 3, California.

Jan. 31, 1943.

1. Appeal and error ⇐356

An appeal from orders and judgments, dismissing action as to some defendants over 60 days before filing of notice of appeal, is too late and must be dismissed.

2. Appeal and error ⇐125

A judgment dismissing action as to one defendant on plaintiff's own motion was "consent judgment" and hence not "appealable".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Judgment" and "Consent Judgment".

3. Appeal and error ⇐133

An order, entered on court's minutes, that motions for judgments of nonsuit as to certain defendants were granted and "counsel for defendants to prepare order," was not "appealable judgment," but mere memorandum affording data for drafting of proper final judgment.

4. Appeal and error ⇐664(1)

A judgment dismissing action only as to certain named defendants, in conformity to motions for nonsuit on their behalf, must be accepted on appeal as expressing trial court's full intent, despite minute entry of order granting motions as to such defendants and other defendants.

5. Appeal and error ⇐323(1)

A motion for judgments of nonsuit on behalf of three named defendants, separately and individually, cannot be deemed the motion of other defendants, who merely adopted named defendants' answer by stipulation and did not otherwise appear at trial, so that such other defendants are not before District Court of Appeal on appeal from judgment dismissing action as to named defendants, though represented by such defendants' counsel who made the motion.

6. Parties ⇐84(5)

An objection to defect of parties defendant is waived by failure to raise it by demurrer or answer and in such case cannot be made ground of nonsuit. Code Civ. Proc. §§ 430, 433, 434.

7. Mortgages ⇐199(2)

A contract which is simply a mortgage or trust deed, though purporting to include rents, issues and profits of mortgaged realty as security, with right in mortgagee, beneficiary or trustee to take possession thereof on mortgagor's default, confers no right to such rents, issues and profits until possession is taken by mortgagee or receiver appointed for such purpose, but further contract made by parties on subject is valid as between them.

8. Landlord and tenant ⇐24(1)

A lessee's agreement to make payments, not to be deemed rent, to lessor as additional consideration for lease, is valid.

9. Corporations ⇐478
Landlord and tenant ⇐57(1)

The term "rent" in corporation's assignment of all its right, title and interest in and to lease obligating lessee to pay not only rent, but interest on corporation's bonds and amounts payable under trust deed on leased realty into sinking fund for payment of bonds, as additional consideration for lease, included only payments designated as rent in lease, leaving provision therein for other payments unaffected by provision in assignment that assignor might collect all rents until it defaulted in such payments and trustee entered into possession of realty and proceeded to collect rents as provided in trust deed.

10. Corporations ⇐479

The fact that corporate mortgagor's assignment to mortgage trustee of all of mortgagor's interest in lease of mortgaged realty was only as further security for payment of mortgagor's bonds did not prevent trustee from collecting amounts of lessee's bond interest and sinking fund payments under lease after mortgagor's default and trustee's entry into possession of realty under mortgage, since one holding title to demand, though only as security, may sue thereon in his own name.

11. Contracts ⇐187(2)

A provision in lease for lessee's payment of interest on corporate lessor's bonds, secured by mortgage on leased realty, and payments into sinking fund for payment of bonds, directly to mortgage trustee after mortgagor's default and trustee's entry into possession of realty, was within statutory provision that contract made expressly for third person's benefit may be enforced by him at any time before parties rescind it. Civ.Code, § 1559.

12. Guaranty ⇐77(3)
Mortgages ⇐218

An action may be maintained on independent agreement, as by guaranty or endorsement, to pay debt of another than promisor, without foreclosure of mortgage or trust deed securing primary debt.

13. Associations ⇐1, 16

An unincorporated association not organized for profit, is not a "partnership," and its members are not liable as partners on contracts made by association.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

14. Associations ⇐16

Mere membership in unincorporated association, not organized or conducted for

profit, imposes no personal liability on members for association's debts, but to charge member with liability therefor, he must be shown to have actually or constructively assented to or ratified contract on which liability is predicated.

15. Associations ⇐16

Where member of unincorporated association, not organized or conducted for profit, directly incurs debt or expressly or impliedly authorizes or ratifies transaction in which it is incurred by association, he is liable therefor as principal, so that member is liable for any debt necessarily contracted by association to carry out its objects.

16. Beneficial associations ⇐7

Provisions of constitution and statutes of national unincorporated fraternal association for local lodges' establishment and maintenance of homes or clubs for their members' social enjoyment were sufficient to render applicable the rule that association's members, impliedly authorizing or constructively assenting to transaction by which association incurs debt, are liable therefor as principals, so as to render all members of local lodge at time of its officers' execution of lease of club building liable thereon as principals, though they did not expressly authorize it by appearing at lodge meeting and voting for resolution directing its execution.

17. Beneficial associations ⇐14

A provision of unincorporated lodge's by-law that lodge trustees, given control of lodge's funds, investments and property, should execute all leases, contracts or other papers necessary or proper in the premises, referred only to leases of or contracts regarding lodge's property and did not preclude lodge officers from executing lease of other property for use as home or club by lodge, as directed by resolution of lodge members.

18. Associations ⇐24

Where there is statute authorizing organization of voluntary associations into corporations when such an association is formed, such statute must be deemed incorporated into association agreement by necessary implication, and every member of association must be conclusively presumed to have impliedly agreed that association might be converted into corporation in accordance with statute at any future time, so as to render inapplicable the rule requiring unanimous consent of association's members to its incorporation in order to work association's dissolution.

19. Beneficial associations ⇐16

The incorporation of subordinate lodge of voluntary unincorporated fraternal association, as authorized by corporation laws and association's national statutes, ipso facto dissolved association and transferred its property and rights to corporation.

20. Associations ⇐24

When a voluntary association becomes incorporated under special charter or general laws, it is merged in corporation, its members become constituent members of corporation, and its property and debts become those of corporation.

21. Beneficial associations ⇐16

After incorporation of unincorporated local lodge of fraternal association, pursuant to corporation laws and association's national statutes, corporation was bound by lodge's lease of club building as unincorporated lodge previously had been.

22. Beneficial associations ⇐7

While unincorporated fraternal association ceased to exist as such or was dissolved on its incorporation, its members' liability on association's lease of club building was not terminated or altered thereby as to payments, not barred by statute of limitations, under lease.

23. Beneficial associations ⇐7

Persons joining unincorporated lodge after it executed lease of club building did not thereby assume liability on lease.

24. Beneficial associations ⇐7

A lodge member's tenancy of club building, leased by lodge before he became member, ends when he ceases to be a member or lodge ceases to occupy leased property as on lodge's incorporation.

25. Beneficial associations ⇐7
Limitation of actions ⇐172

Persons who became members of lodge before its incorporation, but whose liability, accruing before such event, under lease executed by unincorporated lodge before they joined, was barred by four-year statute of limitations, were not liable after incorporation.

26. Beneficial associations ⇐7

Persons becoming members of lodge after its incorporation were not liable as

tenants for payments due under lease of club building, executed by lodge before its incorporation.

Appeal from Superior Court, Los Angeles County; B. Roy Schauer, Benjamin J. Scheinman, Frank G. Swain, George A. Dockweiler, and Carl A. Stutsman, Judges.

Action by the Security-First National Bank of Los Angeles, as trustee under a trust indenture of the Santa Monica Elks Home, Inc., against Gary Cooper and others for moneys due such corporation from Santa Monica Lodge No. 906, Benevolent and Protective Order of Elks, under a lease made by the corporation to such lodge and assigned to plaintiff. From a judgment of nonsuit as to certain defendants and judgments and orders dismissing the action as to some defendants, plaintiff appeals.

Appeal from judgments and orders of dismissal as to two defendants dismissed, judgment and order of dismissal as to another defendant affirmed, and judgment of nonsuit affirmed as to three defendants and reversed as to four defendants.

Warren E. Libby, of Los Angeles, for appellant.

Dana R. Weller, of Los Angeles, for respondents.

SHAW, Justice pro tem.

The plaintiff brought this action against Santa Monica Lodge No. 906, Benevolent and Protective Order of Elks, an unincorporated association, and 1188 persons alleged to be members of it, of whom 188 were designated by their true names and 1000 by names alleged to be fictitious. Two corporations were also made defendants, one being an incorporation of the lodge, and the other, Santa Monica Elks Home, Inc., being a corporation which owned property formerly occupied by the lodge. Plaintiff sought to recover from both the incorporated and the unincorporated lodges and from the individual members of the latter sums of money due from the unincorporated lodge to the corporation, Santa Monica Elks Home, Inc., under a lease of certain real property made by the corporation to that lodge and alleged to have been assigned to plaintiff. At a trial at which a number of the individual defendants were represented, a nonsuit was granted. Plaintiff appeals.

The array of facts leading up to this litigation begins about July 1, 1926. Just before that date the Santa Monica Lodge of Elks was an unincorporated association of about 2200 members and occupied for lodge purposes a building herein referred to as the "old building." Desiring to have a newer building, this lodge caused to be organized the above-mentioned corporation, Santa Monica Elks Home, Inc., and this corporation, in some manner not appearing in the record, acquired the real property on which the old building stood and another parcel of real property on which the new building was later built. On or about July 1, 1926, this corporation issued bonds in the sum of $400,000, and to secure their payment executed a mortgage with power of sale of both parcels of real property above mentioned to a bank which, by a series of consolidations, has become merged into the plaintiff. This mortgage might well be called a trust deed, for it contains words of conveyance, as well as words of hypothecation, and the parties, in the instruments discussed below, referred to it as a "trust indenture," and to the bank as a "trustee." At the same time the lodge entered into a lease by which it leased all of said real property from the corporation above mentioned for a term of 30 years, agreed to pay as rent an amount equivalent to the operating costs and repairs of the real property and of all buildings upon it and (beginning July 1, 1941) a yearly rental of $40,000 per year in equal monthly installments, agreed to pay taxes and various other charges against the property, and "as further consideration for the leasing of the property aforesaid" the lessee agreed to pay all interest on the bonds above mentioned (referring to the "trust indenture") to the trustee bank "or such other person as is designated by the Lessor." "As additional consideration for the granting of this lease" the lessee further agreed to pay to the bank the amounts required by the trust indenture to be paid into a sinking fund, which payments were to begin January 1, 1930, and continue to July 1, 1940. The mortgage and the lease were both dated July 1, 1926, but the evidence leaves some doubt whether they were delivered, so as to become effective, before July 31, 1926. On the last mentioned date the lessor named in the lease, Santa Monica Elks Home, Inc., executed and delivered to the trustee bank an assignment "as further security" for the bond issue, of "all right,

title and interest in and to" the lease. In this assignment it was agreed that the assignor "may collect all rents unless and until the undersigned [the assignor] has defaulted on any of the terms and conditions of said trust indenture, and the Trustee in its discretion as provided in such trust indenture, proceeds to collect the rents in the manner therein provided." The trust indenture provided that failure to pay the principal of any bond when due, or any interest within 30 days after it is due (as well as other acts or omissions) shall constitute a default, and upon the happening thereof the trustee in its discretion may (and upon conditions not shown to have existed here, shall) "enter into and upon and take possession of the trust estate [defined to mean the property mortgaged] and may exclude the Company [the lessor above named] and its agents and servants and all other persons or corporations, wholly therefrom, and may use, operate, manage and control the trust estate, and conduct the business of the Company to the best advantage of the holders of the bonds secured hereby" and further that "The Trustee in case of such entry * * * shall be entitled to collect, take and receive all tolls, earnings, income, rents, issues and profits of the trust estate." We find no other provision in the trust indenture for the collection of rents by the trustee.

With the proceeds of this bond issue a new building was erected on part of the real property above mentioned. This building was completed and the lodge occupied it in August, 1927. The unincorporated lodge continued to occupy the new building until July 16, 1930. At this date the lodge was incorporated and thereafter the incorporated lodge occupied the new building until August, 1933, and then it moved back into the old building. On receipt of notice of this abandonment of the new building, plaintiff declined to take possession of it or of any part of the leased premises. The first time plaintiff ever took possession of the premises was June 16, 1937, and before that time it collected no rent. In January, 1930, a payment of $2,000 was made under the terms of the lease, but since then none of the payments required by it have been made, and plaintiff sues to recover all that have since accrued. The action was begun on June 30, 1936.

[1, 2] The parties have discussed here only the propriety of the nonsuit granted at the trial. However, plaintiff has given notice of appeal from "those certain orders and judgments made in the above-entitled cause in favor of defendants and against plaintiff in the above entitled cause." The record presents to us a number of judgments and orders dismissing the action as to some individual defendants, made before the trial on the supposed authority of Code sections penalizing failure to prosecute. The notice of appeal is adequate to cover all of these orders and judgments. It was filed September 5, 1941. Some of the orders and judgments just referred to were made more than 60 days before that date, and as to them the appeal is too late and must be dismissed. Another was made on plaintiff's own motion, and being a consent judgment is not appealable. The others were made on what would constitute good grounds for dismissal, and since the parties have not discussed them, these judgments and orders will be affirmed without discussion here.

Before we reach the merits of the appeal it seems necessary to inquire what defendants were parties to the motion for a nonsuit, or, in other words, in whose favor does the judgment of nonsuit that is appealed from run. The record is not entirely clear on this point. It appeared at the trial that the individual defendants could be divided into three classes with reference to the time of their membership in the lodge; first, those who were members of the unincorporated lodge when the lease was executed, July 1 or 31, 1926, this class including defendants Thomas Robinson, L. O. Foreman, Joe Vivalda and R. A. Boswell; second, those who joined after the execution of the lease but before the incorporation of the lodge, on July 16, 1930, this class including defendants, M. F. Nelson and Leon Alexander; and third, those who joined after the incorporation, this class including defendant, Samuel Butler. One of the defendants' counsel, who represented a considerable number of them, apparently believing that there might be some difference in the liability of those three classes, filed three separate answers, one for Thomas Robinson, which admitted, by failure to deny, that he was of the first class, one for M. F. Nelson of the second class, and one for Samuel Butler of the third class. Each of these answers stated that the defendant named in it was answering "for himself alone." Then this same counsel entered into four written stipulations with counsel

for plaintiff, the first declaring that 57 defendants named therein were within the first of the classes above mentioned, and the other three providing, separately, that each of the answers above mentioned should be "considered and treated" as the answer of certain other named defendants, that of Robinson to serve for the 57 other defendants who were in the same class with him, that of Nelson to serve for 77 other defendants and that of Butler to function for 48 other defendants. It was apparently understood at the trial that the members of the last two groups were, respectively, in the same class as the defendant whose answer was thus adopted for them, although we find no stipulation to that effect. The three stipulations last mentioned also provided that each defendant might introduce evidence on his own case, in addition to the general defense, and that if he failed to do so, judgment in his case should be the same as in case of the defendant whose answers he adopted.

None of these stipulations was filed before the trial. Apparently all were delivered to counsel for the plaintiff, for after the trial had begun he produced them all and offered them in evidence as exhibits. They were admitted and filed as exhibits. There seems to be plausible ground for questioning whether the production of these exhibits in this way effectively adopted the answers on file for the defendants named in the stipulations. The stipulations were not filed for that avowed purpose, and if they had been it would have been the duty of the clerk to demand and collect an appearance fee for each defendant named in the stipulations before filing them. Pol.Code, secs. 4295, 4300a. This does not appear to have been done. Some of the defendants named in the stipulations in fact appeared and filed answers by other counsel and one filed an answer in propria persona, and then appeared at the trial by counsel other than the one signing the stipulation. Some of them also were dismissed before the trial on motions made for them by other counsel. In these cases the stipulations manifestly could not serve as answers. This apparent overlapping of counsel, we suppose, is not the fault of counsel, but probably results from a change of mind on the part of some defendants who, after agreeing to a group defense, concluded to have separate counsel but failed to inform either counsel of the facts. By reason of the condition of the record in other respects we need not pass on the effect of these stipulations, but some attention should be given to the subject in any further proceedings that may be had.

[3] At the conclusion of plaintiff's evidence, the counsel who filed the three answers, Judge Weller, made a motion for a nonsuit, which he stated was "on behalf of the defendants Thomas Robinson, M. F. Nelson and Samuel Butler, separately and individually." Counsel who appeared for defendants Vivalda and Alexander at the trial adopted Judge Weller's motion for their clients, with some additions, and by stipulation previously made it was deemed also to be adopted for defendant Boswell. The minute entry of the order made on these motions is: "Motion by Dana R. Weller for a judgment of non-suit as to the defendants he represents and represents by stipulation is granted and motion by Leon Alexander for a judgment of non-suit is granted. The judgments of non-suit as to other defendants represented at this hearing are also granted. Counsel for defendants to prepare order." In view of the final sentence of this order, as well as its other language, it cannot be regarded as the appealable judgment herein but is a mere memorandum "affording data from which a proper final judgment might thereafter be drafted." In re Estate of Yale, 1929, 208 Cal. 102, 104, 280 P. 358, 359; See also Scrimsher v. Reliance Rock Co., 1934, 1 Cal.App.2d 382, 390, 36 P.2d 688; McColgan v. Jones, Hubbard, etc., Inc., 1938, 11 Cal.2d 243, 247, 79 P.2d 1010. Accordingly, the court entered a formal judgment of nonsuit, which is more limited than the minute order. It reads as follows: "This action came on regularly for trial on the 28th day of July, 1941, Messrs. Thomas H. Cannan and Elmer L. Walther, appearing as attorneys for the plaintiff, and James E. Mackel, Esq., for the defendant Joe Vivaldi, William G. Stein, Esq., for the defendant Leon Alexander, Floyd S. Sisk, Esq., for the defendant R. A. Boswell, and Dana R. Weller, Esq., for the defendants Thomas Robinson, M. F. Nelson, Samuel Butler and L. O. Foreman, and plaintiff having introduced evidence and having rested on the 31st day of July, 1941, whereupon the attorneys for the respective defendants above named, separately and individually, having moved the Court for judgment of non-suit on the grounds stated

in the motion, and after argument of counsel and due consideration by the Court, said motion having been granted:

"Now Therefore, It Is Ordered And Adjudged:

"That said action be and the same is hereby dismissed as to said defendants, and that plaintiff take nothing from them or either of them by reason of this action."

[4, 5] Considering that this judgment conforms to the motions in ordering a dismissal only as to named defendants, we must ignore the greater reach of the minute entry and accept the judgment as expressing the full intent of the court. In view of the fact that counsel who made the motion apparently represented many defendants who could raise the same questions as could those he named, we are disposed to give his motion as liberal a construction as it will reasonably bear in order to extend its benefits to all; but we cannot see how a motion which is expressly limited to three named defendants "separately and individually" can be deemed the motion of other defendants who have merely adopted by stipulation the answer of those three defendants as their own, even if the stipulations can be given that effect here. The result is that as far as the record here shows, no disposition at all has been made in the trial court of the case as it affects the defendants named in the stipulation and not otherwise appearing at the trial, and such defendants are not before us on this appeal.

[6] It was shown at the trial that at the time the lease was made the unincorporated lodge had from 2200 to 2500 members. As already stated, only 1188 of them were made defendants in this action. One of the grounds on which the motion for a nonsuit was made and granted was that the liability of the members of the lodge, if they were liable, was joint, only, and that hence the action could not be maintained against a part of them only. The objection thus raised is, in substance, that there is a defect of parties defendant. This is an objection which must be raised by demurrer or by answer, or it is waived. Code Civ.Proc. secs. 430, 433, 434. Here it was not raised in either mode. Consequently, it was waived, and could not be made the ground of a nonsuit. Stackpole v. Pacific Gas & Elec. Co., 1919, 181 Cal. 700, 704, 186 P. 354.

[7] The motion was made, in part, and the order granting the nonsuit is now defended on the ground that plaintiff is seeking to enforce the rights of a mortgagee in possession of the mortgaged property, and that it is not entitled to do so because it was not in possession of that property when this action was begun. It is undisputed that plaintiff first took possession of the property on June 16, 1937, while this action was begun on June 30, 1936. The rights of the parties in this matter arise out of contract. Kinnison v. Guaranty Liquidating Corp., 1941, 18 Cal.2d 256, 262, 115 P.2d 450; Title Guarantee & Trust Co. v. Monson, 1938, 11 Cal.2d 621, 625, 627, 81 P.2d 944. Where the contract is simply a mortgage or trust deed, even though it purports to include the rents, issues and profits as security, with the right in the mortgagee, beneficiary or trustee to take possession upon default, the contract does not confer any right to the rents, issues and profits until possession is so taken by the mortgagee, etc., or by a receiver appointed for that purpose. Childs, etc., Co. v. Shelburne Realty Co., 1943, 23 Cal.2d 263, 143 P.2d 697; Kinnison v. Guaranty Liquidating Corp., supra, 18 Cal.2d at page 261, 115 P.2d 450; Bank of America, etc., v. Bank of Amador County, 1933, 135 Cal.App. 714, 721, 28 P.2d 86; Casey v. Doherty, 1931, 116 Cal.App. 42, 43, 2 P.2d 495. There is nothing in this rule to prevent the parties from making a further contract on the subject, and such a contract is valid as between them (Kinnison v. Guaranty Liquidating Corp., supra, 18 Cal.2d at pages 262, 263, 115 P.2d 450), however it might be as against creditors of the mortgagor or other third parties. In this case the parties did make a further contract by the assignment of lease, from which we have above quoted the principal parts. As far as the "rent" payable under the lease is concerned, the rights granted by this assignment are substantially the same as those provided by the rule above stated. As appears from parts of that assignment above quoted, the original lessor retained therein the right to collect "all rents" until it defaulted and the trustee proceeded, as provided in the trust deed, to collect them. By the provisions of the trust deed, also above quoted, the trustee is entitled to collect the rents only in case it has entered into possession of the property after default. If only "rent" were provided for in the lease, or the assignment carried with it only "rent,"

plaintiff's rights under the assignment would be as claimed by defendants.

[8, 9] But the assignment is of "all right, title, and interest in and to" the lease, and the lease contains two sets of provisions regarding payments to be made by the lessee thereunder. One of these sets provides for payment of what is denominated as "rent," to which the conclusion above stated applies. But the other series of payments—the interest on the bonds and the sinking fund payments—are not designated in the lease as "rent." They are to be made, it declares, "as further consideration for the leasing of the aforesaid premises" or "as additional consideration for the granting of this lease"—phrases which are identical in meaning. The lessee may agree in a lease to make payments to the lessor, as additional consideration for the lease, sometimes called a "bonus," which are not to be deemed "rent," even though made in installments, and such agreements are valid. See Parigian v. Citizens Nat. Tr. & Sav. Bank, (1941) 42 Cal.App.2d 773, 780, 110 P.2d 117; A—1 Garage v. Lange Investment Co., (1935) 6 Cal.App.2d 593, 596, 44 P.2d 681; Wood v. Hipwell, (1930) 107 Cal.App. 680, 683, 290 P. 1040. In view of the careful segregation and different labeling of the two classes of payments in the lease here involved, the term "rent" in the assignment was undoubtedly intended and must be construed to include only those payments which were so designated in the lease. This leaves the provision in the lease for payments by the lessee of bond interest and sinking fund unaffected by the limitation in the assignment on the assignee's rights of collection.

[10] The fact that the assignment was for security only does not prevent the assignee from collecting the payments to be made for these items. One who holds the title to a demand, even though only as security, may sue thereon in his own name. Kinnison v. Guaranty Liquidating Corp., supra, (1941) 18 Cal.2d 256, 262, 115 P.2d 450; Tilden Lumber, etc., Co. v. Bacon Land Co., (1931) 116 Cal.App. 689, 693, 3 P.2d 350.

[11, 12] But, if we disregard the assignment, we see that by the lease itself the lodge agreed with its lessor to make these payments for interest and sinking fund directly to the plaintiff as trustee. This agreement is within the provision of section 1559 of the Civil Code that "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." The only reason advanced by defendants for excluding plaintiff from the operation of this section is that these payments are secured by the trust indenture and hence the plaintiff may not sue for them until it has first exhausted the security. But the trust indenture secured only the agreements of the corporation which was the lessor of the lodge. While that corporation did agree in the trust indenture to make the interest and sinking fund payments to plaintiff, the agreement of the lodge in the lease to make the same payments was its own independent agreement and was not the agreement secured by the trust indenture. An action may be maintained upon any such independent agreement (instances of which are guaranty and endorsement) without foreclosure of a mortgage or trust deed securing the primary debt. 18 Cal.Jur. 242-3; Loeb v. Christie, (1936) 6 Cal.2d 416, 57 P.2d 1303; Nuetzel v. Mackie, (1927) 80 Cal.App. 768, 775, 253 P. 166; Murphy v. Hellman Commercial, etc., Bank, (1919) 43 Cal.App. 579, 586, 185 P. 485.

[13-15] Another ground of the motion was that the individual members of the unincorporated lodge are not bound by the action of its officers in entering into the lease and no liability was cast on them personally thereby. The liability of the members of an unincorporated association on contracts made by it varies according to the answer to the question whether the association is one organized for profit. Here there is no doubt that the association was not organized for profit. (See Herald v. Glendale Lodge No. 1289, (1920) 46 Cal. App. 325, 328, 189 P. 329, where it was so held of another Elk's lodge whose activities were substantially the same as those of the lodge here.) Such an association is not a partnership and its members are not liable as partners. 7 C.J.S., Associations, § 1, p. 22, § 32, p. 77. The rule of liability of members of such an association, not organized or conducted for profit, is stated in 7 C.J.S., Associations, § 32, p. 78, as follows: "Membership, as such, imposes no personal liability for the debts of the association; but to charge a member therewith it must be shown that he has actually or constructively assented to or ratified the

contract on which the liability is predicated. If, however, a member, as such, directly incurs a debt, or expressly or impliedly authorizes or ratifies the transaction in which it is incurred, he is liable as a principal. So a member is liable for any debt that is necessarily contracted to carry out the objects of the association." Similar statements of the rule are made in 4 Am.Jur. 481, 482, and in a note in 7 A.L.R. 22–33, where the matter is discussed at length and many cases are cited in support of the rules stated. A supplemental note on the same point appears in 41 A.L.R. 754. Substantially the same rule was stated in Leake v. City of Venice, (1920) 50 Cal. App. 462, 465, 195 P. 440, by quoting from another case, as follows: "Where the parties unite in a voluntary unincorporated association, and for convenience contract under an associate name, the acts of the association, it not being a legally responsible body, are the acts of its members who instigate and sanction the same." The meaning of the words "constructively assented" in the above quotation from Corpus Juris Secundum is illustrated by the statement of the court in Richmond v. Judy, (1879) 6 Mo.App. 465, that "Persons who organize as a campaign committee on the eve of an election may perhaps be supposed to know that their associates, in the name of the committee, will incur certain obvious expenses in giving notice of political meetings, and to sanction such outlay by the very fact of their organization."

[16] In this case the lease was executed in behalf of the unincorporated lodge by its presiding officer and secretary, after a vote of the lodge at a regular meeting authorizing them to do so. Plaintiff was unable to prove that any of the defendants appearing at the trial was present at that meeting, as far as we can discover by our unaided search of the record. However, 58 of the defendants, including defendants Robinson, Foreman, Vivalda and Boswell, were members of the lodge at the time the lease was executed. All of them had, on joining, signed the by-laws of the lodge. These by-laws contained provision for "The operation, management and control of the Home or Club occupied by this Lodge." The Constitution and Statutes of the National Order of Elks, which appear to be binding on all individual lodges and the members thereof, provided that "A Lodge may establish and maintain a home or club, for the social enjoyment of its members * * *" and set forth in some detail the mode of controlling and managing such a home or club. These provisions of the governing regulations of the order and of the lodge are sufficient to bring the case within the rule above quoted from Corpus Juris Secundum, that members of an association who "impliedly authorize" or "constructively assent to" a transaction by which a debt is incurred are liable as principals. Or, to use the other form of expression appearing in the same quotation, the establishment and maintenance of a "home or club" was one of the objects of the association (lodge). The lease was executed to accomplish this object and was an appropriate means to that end. Consequently, all who were members of the lodge at the time the lease was executed by the lodge were liable thereon as principals, even though they did not expressly authorize it by appearing at the meeting and voting for the resolution directing its execution.

[17] Defendants seek to avoid this conclusion by the contention that the presiding officer and secretary were not the proper officers of the lodge to execute such a contract in its behalf, claiming that this could be done only by the trustees. In support of their claim they point to section 7 of the by-laws, which provides that the trustees "shall have the following powers subject to the control of the lodge: they shall have control of the funds, investments and property of the lodge, whether real or personal, not otherwise provided for by law; they shall receive and collect the income and rents from said property, and pay the same through the Secretary of the Lodge; *shall execute all leases, contracts or other papers* necessary or proper in the premises." (Emphasis that of defendants.) It is obvious from the context quoted that the words relied on by defendants have reference to the funds, investments and property of the lodge, and to leases of or contracts regarding such property; not to property of which the lodge might desire to become a tenant in order to provide itself with a home or club. Moreover, the tenure of the enumerated powers by the trustees is "subject to the control of the Lodge"; hence a resolution directing other officers to execute such a lease as we have here would not infringe upon the by-law.

[18-21] It is contended that when the lodge was incorporated, July 16, 1930, the unincorporated association ceased to exist and the liability of its members upon the lease terminated. That the incorporation of an association works its dissolution is stated in 7 C.J.S., Associations, § 9, p. 29, and 5 C.J. 1338, as the rule where all members agree to incorporation. Examination of the cases cited in support of this statement shows that the qualification requiring unanimous consent to incorporation of an association in order to work the dissolution of the latter is applicable only to cases where there is no provision for incorporation in statute or in the governing regulations of the association. Where there is such statutory provision the rule is that stated in Spiritual & Philosophical Temple v. Vincent, (1906) 127 Wis. 93, 105 N.W. 1026, as follows, quoting the syllabus in 105 N.W.: "Where a law authorizing the organization of voluntary associations into corporations is in existence when a voluntary association is formed, it must be deemed to be incorporated into the association agreement by necessary implication, and every member must be conclusively presumed to have impliedly agreed, in joining the association, that it might at any future time be converted into a corporation in accordance with the statutes regulating the matter." There has been provision in the corporation laws of California for the incorporation of associations ever since the enactment of the Codes in 1872; we have not checked statutes prior to that time. While the date of organization of the unincorporated lodge does not appear in the record, it must have been later than 1872. The national statutes of the Elks provide that any subordinate lodge may incorporate itself, authorize this to be done on a majority vote of the lodge and declare that when any lodge shall incorporate "the voluntary association shall merge in such Corporation." The incorporation in this case having been thus fully sanctioned by both state law and organizational regulations, full effect must be given to it. As stated in Corpus Juris Secundum and Corpus Juris at the places above cited, the effect is that the creation of the corporation "ipso facto dissolves the association and transfers its property and rights to the corporation." As stated in First Russian Nat. Organization v. Zuraw, (1915) 89 Conn. 616, 94 A. 976, 977: "Where a voluntary association becomes incorporated under a special charter or general laws, it becomes merged in the corporation, its members become the constituent members of the corporation, and its property becomes the property of the corporation. Ferris v. Strong, 3 Edw.Ch. (N.Y.) 127, 128." While these authorities were not concerned with the question of debts it must follow from the far reaching character of the merger, as there depicted, that the debts of the association also become the debts of the corporation. The incorporated lodge was bound by the lease after incorporation as previously the unincorporated lodge had been.

[22] While by incorporation the unincorporated association ceased to exist as such, or was dissolved, as Corpus Juris Secundum puts it, yet this was a mere transmigration of souls, so to speak, whereby the real entity which formerly dwelt in the association became reincarnated in the corporation. No reason appears why such a process should terminate or alter the then existing liability of the members who constitute that real entity. Indeed, even the entire disbanding of an association and cessation of its activities would not, for any reason that occurs to us, terminate the liability of its members on contracts already made by it. If such contracts were binding on its members when made, the members would remain bound after its dissolution, or other termination of their membership, as before. Hence the statute of limitations pleaded by defendants does not afford support for the nonsuit as to all of them. While payments due under the lease at the time of incorporation of the lodge, as well as some later ones, appeared to be barred by the statute pleaded, when the action was brought, other later payments which had accrued under it were not so barred, and some of the defendants were liable for them.

[23-25] But the defendants who became members of the unincorporated lodge after the lease was executed on July 1 or 31, 1926, are in a different situation. They were not bound by the lease when it was made, and while they could assume such liability, the mere act of joining the lodge would not constitute such an assumption, and nothing more appears here. In this connection the plaintiff cites De Motte v. Arkell, (1926) 77 Cal.App. 610, 619,

247 P. 254, which holds, and San Juan G. Co. v. San Juan R., etc., Ass'n, (1939) 34 Cal.App.2d 159, 168, 93 P.2d 582, 588, which refers to the holding, that where property is leased to an unincorporated association—there, a lodge—all its members become tenants. But, while in the De Motte case the person whose acts were in question became a member of the tenant lodge after the lease was made, the court there was not concerned with the questions, as to how his tenancy arose, and what would end it. At the time in question he was still a member. The case does not hold that by becoming a member of the lodge the person also became a contracting party to the lease. We are satisfied that the tenancy in such a case would arise, not by contract, but by privity of estate, similar to that existing in case of an assignee of a lease who becomes such without an assumption of the lease. Such a person's privity of estate ceases upon his reassigning the lease or surrendering possession of the property. 15 Cal. Jur. 754, 755. In like manner the tenancy of a lodge member who becomes a member after the lodge has made a lease, must end when he ceases to be a member of the lodge or the lodge ceases to occupy the property. In this case the unincorporated lodge ceased to occupy the property at the date of incorporation, July 16, 1930. Those who became members before this event but after the making of the lease (July 1 or 31, 1926) could have no liability under the lease after the incorporation, for reasons hereinafter stated. Their liability, if any, which accrued prior to that event was barred by the four-year statute of limitations which they pleaded, and as to such defendants a nonsuit was proper, no cause for suspending the operation of the statute appearing. Wrightson v. Dougherty, (1936) 5 Cal.2d 257, 262, 54 P.2d 13.

[26] The same principles would not apply to those who became members of the lodge after its incorporation. While the incorporated lodge might be substituted for the unincorporated lodge and in legal effect become the tenant under the lease, it would be a recognized legal entity, capable of holding property in its own name, and reason would no longer exist for holding that the members were the real tenants or stood in any privity of estate with the landlord. Hence no liability as tenants would rest on the members after incorporation. Such of them as were members between the date of incorporation and the date of repeal, in 1931, of section 322 of the Civil Code, which formerly imposed on the members of a nonstock corporation a proportionate liability for its debts, doubtless incurred such a liability as members, but this action was not brought to enforce that liability, and if it had been it would have been barred by the statute of limitations, having been brought nearly five years after repeal of the liability statute.

The appeal from the judgments or orders of dismissal in favor of defendants Byron C. Hanna and John Conterno is dismissed. The judgment and order of dismissal in favor of defendant Nicholas Pirolli is affirmed. The judgment of nonsuit is affirmed as to the defendants M. F. Nelson, Leon Alexander and Samuel Butler and is reversed as to defendants Thomas Robinson, L. O. Foreman, Joe Vivalda and R. A. Boswell.

DESMOND, P. J., and SHINN, J., concur.

23 Cal.2d 689

BOARD OF DENTAL EXAMINERS OF CALIFORNIA v. JAMESON.

L. A. 18829.

Supreme Court of California.

Feb. 14, 1944.

1. Appeal and error ⇐478

On supersedeas to stay enforcement of judgment enjoining defendant from engaging in certain acts which constituted practice of dentistry, Supreme Court could not decide whether such acts constituted practice of dentistry since such question was to be determined of the merits of appeal. St.1937, p. 1241 et seq., § 1600 et seq.

2. Appeal and error ⇐460(3)

Judgment enjoining defendant, not licensed to practice dentistry, from certain acts which constituted practice of dentistry, was not mandatory and hence was not stayed by appeal. St.1937, p. 1241 et seq., § 1600 et seq.

3. Appeal and error ⇐478

The test whether appellate jurisdiction will be safeguarded by issuance of writ of supersedeas is based upon consideration of respective rights of the litigants, which contemplates possibility of affirmance as well as of reversal.

4. Appeal and error ⇐479(1)

Where defendant, not licensed to practice dentistry who was enjoined from publishing advertisement inviting public to deal directly with him for dental laboratory work, as constituting act in practice of dentistry, brought writ of supersedeas to stay proceeding because he would suffer incalculable loss if judgment would not be stayed, but represented at same time that in no event did he accept orders for dental work except through licensed dentists, writ was denied. St.1937, p. 1241 et seq., § 1600 et seq.

In Bank.

Action by Board of Dental Examiners of the State of California against E. K. Jameson to enjoin defendant from engaging in acts alleged to constitute practice of dentistry. Defendant appealed from judgment ordering injunction. On petition by defendant for writ of supersedeas to stay enforcement of judgment pending appeal.

Petition denied.

Booth B. Goodman, of Oakland, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

SHENK, Justice.

The Board of Dental Examiners brought an action in the Superior Court in and for Los Angeles County to enjoin the defendant from engaging in acts alleged to constitute the practice of dentistry. The trial court issued an injunction, and the defendant is prosecuting an appeal from the judgment ordering the same. By the present proceeding he seeks the writ of supersedeas to stay the enforcement of the judgment pending appeal.

The petition shows the following:

The defendant is not licensed to practice dentistry. He operates the E. K. Jameson Dental Laboratories and is skilled in the manufacture of dental bridges, dentures and plates, a business in which he has been engaged for a long period of time. It was stipulated that he published the following advertisement:

"Perfect
DENTAL PLATES
Are NOT Expensive
If You Arrange to Deal with
Manufacturing Dental Laboratory.
This is not a dental office, but a laboratory. Our entire facilities are devoted to the building of fine plates which you may arrange to purchase at our low laboratory rates.
Plates Repaired and Rebuilt
E. K. JAMESON DENTAL LABORATORIES
4157 W. 5th St., at Western
PHONE EXpstn 1000"

It was also stipulated that in the manufacture of dental bridges, dentures and plates, the defendant accepted work only directly from, or accompanied by written authorization of, a licensed dentist.

The trial court granted the injunction apparently on the theory that the alleged act of advertising was an act in the practice of dentistry, and enjoined the defendant from "carrying on or conducting in the State of California the practice of dentistry, as defined in the Dental Practice Act." Business & Professions Code, § 1600 et seq., St.1937, p. 1241 et seq. The defendant's application to that court for a stay of execution pending appeal was denied.

[1] The question whether the publication of the advertisement constituted an act in the practice of dentistry is not involved in this proceeding. That is a question to be determined on the consideration of the merits of the appeal.

[2] It is obvious that the injunction is not mandatory and therefore is not stayed by the appeal. Compliance with the injunction will not require the defendant to do anything. He is merely required to refrain from doing anything that might be deemed the practice of dentistry. Under the stipulated facts the only act directly affected by the restraint is the act of publishing the quoted advertisement. Therefore the only question here is whether the defendant's continuation of the publication of the quoted advertisement pending appeal is essential to the complete exercise of appellate jurisdiction, or is required in order to preserve to the defendant the fruits of his appeal.

[3] The test of whether appellate jurisdiction will be safeguarded is based upon a consideration of the respective rights of the litigants, which contemplates the possibility of affirmance as well as of reversal. Food & Grocery Bureau v. Garfield, 18 Cal.2d 174, 114 P.2d 579. The defendant asserts that the sale of products manufactured by him in his laboratory is greatly affected by advertising; that the enforcement of the injunction pending appeal will result in great financial loss to him, the amount of which cannot be computed; and that the stay pending appeal will not result in loss or damage to the plaintiff.

[4] It is not contended that the injunction prevents all advertising by the defendant. Its apparent operative effect in this case is to restrain that form of advertising which is claimed to invite the public to deal directly with the laboratory without the authorization or order of a duly licensed dental practitioner. Indeed, the defendant does not urge that the injunction is not so limited. However, whether the quoted advertisement has that effect is a question relevant to the merits of the appeal. For present purposes it is proper to note that the defendant is attempting to assert that he will suffer an incalculable financial loss if he may not, pending appeal, be permitted to publish the quoted advertisement. At the same time he represents as a fact that in no event does he accept any orders for dental laboratory work except from or through duly licensed dentists. Under the stipulated facts it does not appear that the continued publication of the quoted advertisement pending appeal is essential to the preservation of the defendant's rights in the event of a reversal. The defendant's contention that he will suffer incalculable loss, if pending appeal, he must conform to the injunction, is not supported by the record he presents. It follows that the showing made by the petition does not justify the issuance of the writ sought.

The application is denied.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.



COONEY v. COONEY et al.*

Civ. 3243.

District Court of Appeal, Fourth District. California.

Feb. 16, 1944.

Hearing Granted April 13, 1944.

1. Courts ⇐488(4)

Superior court to which proceeding to modify interlocutory divorce decree with respect to custody of children was transferred had jurisdiction on its own motion to order case transferred back to superior court of county in which divorce action originated. Code Civ.Proc. § 397; Civ.Code, § 138.

2. Courts ⇐483

A superior court having jurisdiction of subject-matter of action and of parties cannot transfer action to superior court of another county except as such a transfer is authorized by statute. Code Civ. Proc. § 397.

3. Venue ⇐61

Application to change place of trial on ground of convenience of witnesses must be made within a reasonable time. Code Civ.Proc. § 397.

* Subsequent opinion 153 P.2d 334.

4. Venue ⇐61

Application for change of venue made after action has been tried and a judgment entered is not made within a reasonable time. Code Civ.Proc. § 397.

5. Divorce ⇐152

Statute authorizing entry of final judgment one year after entry of interlocutory judgment in divorce action contemplates entry of both judgments by same court. Civ.Code, §§ 131, 132.

6. Divorce ⇐303(1)

Statute authorizing entry of order for custody of minor children of parties to divorce action and subsequent modification or vacation thereof authorizes court that tried divorce action to make such order, and clear implication is that the same court may later modify or vacate the order. Civ.Code, § 138.

7. Divorce ⇐164

An interlocutory decree of divorce is sufficiently final in nature that any application to modify it must be made to and heard by the same court that entered such decree. Civ.Code, §§ 131, 132, 138.

8. Courts ⇐483

A superior court, which properly assumed jurisdiction and tried a divorce action and entered an interlocutory decree of divorce, had no jurisdiction to transfer case to superior court of another county for entry of final decree or consideration of application to modify interlocutory decree with respect to custody of minor children. Civ.Code, §§ 131, 132, 138; Code Civ.Proc. § 397.

9. Courts ⇐488(4)

Superior court to which divorce action was improperly transferred after entry of interlocutory decree had jurisdiction only to order action transferred back to court of origin, and all other proceedings, in the matter in court to which action was improperly transferred, were void. Civ.Code, §§ 131, 132, 138; Code Civ.Proc. § 397.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action for divorce by Elna Cooney against Ernest Alfred Cooney, wherein defendant filed a cross-complaint. The cause was transferred to the superior court for San Bernardino County for trial of defendant's petition to modify interlocutory decree of divorce awarding custody of four children of the parties to probation officer of Placer County with reservation that custody of one of the children, June Marilyn Cooney, should be delivered by probation officer to F. J. Root. From an order of the San Bernardino superior court transferring the cause back to the superior court for Placer county, defendant appeals.

Order affirmed.

W. H. Weddell and Martin J. Coughlin, both of San Bernardino, for appellant.

F. J. Root, in pro. per., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order transferring this "action" to the Superior Court of Placer County.

On September 20, 1939, the plaintiff filed an action for divorce in the Superior Court of Placer County. The defendant filed an answer and cross-complaint. A trial was had, with evidence presented by both parties, and on November 20, 1940, an interlocutory decree of divorce was entered in favor of the plaintiff. This decree awarded the custody and control of the four children of the parties to the probation officer of Placer County, with a reservation with respect to one of these children which reads: "that the care, custody and control of June Marilyn Cooney be delivered by the said probation officer to F. J. Root."

On March 2, 1942, the defendant, who in the meantime had moved to San Bernardino, filed a petition in the same court asking that the interlocutory decree of divorce be modified by awarding the custody of the children to him. On March 4, 1942, that court issued an order directed to the plaintiff and the probation officer of Placer County ordering them to show cause on March 23, 1942, why such an order should not be made. The next thing that happened, insofar as disclosed by the record before us, was the entry of a minute order in the superior court of Placer County on March 25, 1942, which reads: "In the above cause the action is ordered transferred to San Bernardino County for trial."

On April 3, 1942, the papers were filed in the office of the clerk of the superior court of San Bernadino County. On the same day a final decree was there entered awarding the plaintiff a divorce and continuing "any provision" of the interlocutory decree insofar as the custody of the children was concerned. On April 29, 1942, the plaintiff filed objections to the defendant's petition for a modification of the interlocutory decree and also filed a "cross-petition" asking that the interlocutory decree be modified by giving her the custody of the children, and that the defendant be ordered to pay $60 a month for their support. On July 20, 1942, the defendant filed an answer to this "cross-petition".

On August 14, 1942, an order was entered in the superior court of San Bernardino County awarding the custody of three of these children to the defendant and providing that the custody of June Marilyn Cooney "still remain with the probation officer of the county of Placer," subject to the further order of the court. On August 28, 1942, the defendant filed a notice of intention to move for a "new trial" with respect to that portion of this order which related to the custody of June Marilyn Cooney. On October 14, 1942, the court entered an order vacating this part of its order of August 14, 1942, and ordering a further hearing of that matter with the provision that such hearing should be limited "to a determination of the rights, if any, of F. J. Root to the custody of said June Marilyn Cooney."

On October 20, 1942, the court issued an order to show cause directed to F. J. Root, who is a resident of Placerville, California, directing him to show cause on November 16, 1942, why an order should not be made modifying the interlocutory and final decrees of divorce by transferring the custody of June Marilyn Cooney to the defendant. Apparently, this order to show cause was not served on the plaintiff and she did not appear. On November 16, 1942, F. J. Root appeared with an attorney and objected to the hearing on the order to show cause on the ground that that court was without jurisdiction to proceed, and that the jurisdiction of the entire matter was in the superior court of Placer County. It appears that the question as to its jurisdiction had not theretofore been called to the attention of the superior court of San Bernardino County. After a long argument between counsel for Root and counsel for the defendant, in which the court participated, the objection was sustained and an order was made directing that the "action" be transferred to the superior court of Placer County. From this order the defendant has appealed.

[1] It is first contended that F. J. Root, the so-called respondent, "was not properly in the case and had no right to move for a change of venue." However, as the appellant himself points out in his brief no such a motion was made. While the court's order of transfer, as shown by the minutes of November 16, 1942, recites that it was made "on application of said respondent" there is nothing in the record to show that this was applied for by Mr. Root. The only thing bearing on this which appears in the reporter's transcript of the proceedings on that occasion is that in reply to a question asked by appellant's counsel as to how this matter could now be transferred back to Placer County the attorney for Mr. Root remarked that this could be done by an order of the court. In spite of many irregularities which appear in these proceedings, the order in question was one which the court could make on its own motion.

The appellant next contends that the superior court of Placer County "had jurisdiction to change the place of trial of actions", and that since this had been done the superior court of San Bernardino County had jurisdiction of the action and could not order the matter retransferred to Placer County because this order was made without notice and without any showing as to the convenience of witnesses, and because "the particular trial had already been partly heard" in that court. The appellant starts with the assumption that through the transfer previously made the superior court of San Bernardino County had jurisdiction of all remaining proceedings in this action, and argues that the manner in which that court acquired jurisdiction is immaterial. However, that court had no jurisdiction unless the superior court of Placer County had the right to transfer the "action" to San Bernardino County at the time that order was made. The record does not disclose the reason for this attempted transfer but there is some suggestion that it could have been done on the ground of convenience of witnesses.

[2-4] The superior court of Placer County had jurisdiction of the subject matter of this action and of the parties, tried the contested issues, and entered an interlocutory judgment. The matter being within the jurisdiction of that court it had no right to transfer the action to the superior court of another county except as such a transfer is authorized by statute. Section 397 of the Code of Civil Procedure provides when a court may change the place of trial. There is no contention that the superior court of the county of Placer was not the proper place for the trial of this action. Insofar as the convenience of witnesses is concerned it has been held that an application to change the place of trial on that ground must be made within a reasonable time. Willingham v. Pecora, 44 Cal.App.2d 289, 112 P.2d 328. Whatever a reasonable time would be for such an application it seems clear that it would be unreasonable to wait until the trial had been had and a judgment entered. Not only was there no statutory authorization for the transfer then made, but the thing actually done was not a change of the place of trial of the action but was merely the transfer to another court, for hearing, of an application for the modification of a judgment which had been already entered.

The most important question presented by this unusual situation, although it is not specifically raised by the parties, is whether a superior court, which has properly assumed jurisdiction in a divorce case and has tried the same and entered an interlocutory judgment, may transfer an application for a modification of that judgment to an entirely different court for hearing, and whether the court to which the matter is thus transferred may enter a final judgment and may modify the interlocutory judgment entered by the other court.

[5-7] Section 131 of the Civil Code provides that in an action for divorce the court must file its decision and conclusions of law, and if it determines that the divorce ought to be granted an interlocutory judgment must be entered to that effect. Section 132 provides that when one year has expired after the entry of such interlocutory judgment "the court" may enter a final judgment. It seems clear that this refers to the same court which entered the interlocutory decree. Section 138 provides that the court may, during the pendency of the action, at the final hearing or at any time thereafter during their minority, make an order for the custody of any minor children and "may at any time modify or vacate the same." This authorizes the court that tried the action to make an order relating to the custody of children, and the clear implication is that the same court may later modify or vacate that order. While there are superior courts in all of the counties of this state, they are not the same court in the sense involved here. An interlocutory decree of divorce is more or less final in nature in certain respects, except where it is modified or vacated as authorized by statutory provisions. Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582. We think it is sufficiently final in nature that when once entered any application to modify the same must be made to and heard by the same court which entered it.

[8, 9] No attempt having been made to transfer the trial of this action, and the case having been tried and an interlocutory decree of divorce entered, the superior court of Placer County not only had the duty of completing the matter, including both the entry of the final decree, if it became proper, and the consideration of any application to modify its interlocutory decree, but it had no authority to transfer the consideration of these matters to another court. It follows that the superior court of San Bernardino County had no authority or jurisdiction to consider these matters or to act upon them. The only proper order the latter court could make was to retransfer the entire matter back to the superior court of Placer County, and all of its other acts and proceedings herein are void.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

62 Cal.App.2d 958

In re HARDY'S ESTATE.

HARDY v. CALIFORNIA TRUST CO.

Civ. 14278.

District Court of Appeal, Second District, Division 1, California.

Feb. 18, 1944.

Rehearing Denied March 20, 1944.

Hearing Denied April 17, 1944.

1. Perpetuities ⇐6(4)

A testamentary trust, directing that income be paid to son for life and that, upon son's death, trust should terminate and trust property be distributed to heirs of testatrix, was not invalid as suspending power of alienation between son's death and payment to heirs.

2. Trusts ⇐284

Upon termination of every trust, trustee must pay over the corpus to those entitled thereto.

3. Wills ⇐473

Under testamentary trust directing that income be paid to son for life and that, upon son's death, trust should terminate and trust property be distributed to heirs of testatrix, the two provisions were separable and character or validity of the remainder interest could not affect the life interest.

4. Perpetuities ⇐9(5)

A testamentary trust, directing that income be paid to son for life in such installments as trustee should determine and that upon son's death the trust should terminate and trust property be distributed among heirs of testatrix, was not invalid as requiring accumulation of income beyond son's lifetime. Civ.Code, § 724.

5. Executors and administrators ⇐296

The court has no power to order executor to transfer income to beneficiary of a testamentary trust before distribution to the trustee, even though beneficiary be entitled to income accruing after testator's death.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Clara B. Hardy, deceased, wherein Lester E. Hardy petitioned for partial distribution, opposed by the California Trust Company, executor. From an order denying the petition, petitioner appeals.

Affirmed.

Lester E. Hardy and Victor A. Gillespie, both of Los Angeles, for appellant.

Reynolds & Painter, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from an order of the Superior Court denying appellant's petition for partial distribution.

The deceased, Clara B. Hardy, executed her last will and testament on April 19, 1927. She died July 17, 1942. The will recited, "Second: I declare that I am a widow, and that I have one child living, to-wit, a son, Lester Edwin Hardy." Following certain bequests, the pertinent part of the will provided, "(c) I direct that my said Trustee shall pay all of the net income from said trust estate to my said son, Lester Edwin Hardy, in such installments as my Trustee shall determine, as long as my said son shall live. (d) Upon the death of my said son, I direct that said trust shall terminate, and that all of the trust property then remaining in the hands of said Trustee shall be paid and distributed to my heirs-at-law, according to the Statute of Descents of the State of California, as the same shall then exist."

The court found as a fact that deceased "left no surviving spouse or issue or descendant of deceased issue except the petitioner, Lester E. Hardy, who is her sole surviving issue"; that petitioner had theretofore filed a petition to revoke the probate of said will; that said petition was denied. The court concluded as a matter of law that the wording of the will establishes a valid trust.

It is appellant's contention that the trust created by the will is invalid and that therefore distribution under the laws of succession should be ordered. It is also contended that the will provides for an unlawful accumulation of income.

[1, 2] It is argued by appellant that the trust is invalid because although the death of the beneficiary terminates the trust, nevertheless, the will further provides that "the trust property then remaining in the hands of said trustee shall be paid and distributed to decedent's heirs at law". Thus, it is argued, the power of alienation is

suspended between the date of the death of Lester E. Hardy and the date of payment. The contention is without merit. The will expressly provides that the trust shall terminate upon the death of Lester E. Hardy; and the intention of the testatrix, thus clearly expressed, must be carried out. If any trust could be said to exist after Lester Hardy's death, such trust would merely be one imposed by law because of the circumstances then prevailing. The resulting trust thus arising would be distinct from the testamentary trust created by Mrs. Hardy's will; and the testamentary trust could not therefore be said to extend beyond the life of Lester E. Hardy; and the resulting trust, if any, would not be within the statute against perpetuities. See: In re Estate of Steele, 124 Cal. 533, at page 540, 57 P. 564; In re Estate of Hamon, 136 Cal.App. 517, at page 520, 29 P.2d 326. Upon the termination of every trust it is the duty of the trustee to pay over the corpus of the trust to those entitled thereto; and since the will clearly provides that the trust shall terminate upon the death of Lester E. Hardy, the fact that the will also provides that the trust property remaining in the hands of the trustee shall be paid and distributed to decedent's heirs at law is without any greater significance than in the case of any such trust for the life of a particular individual.

[3] Appellant, by his argument, seeks to attack the validity of the trust created for his life by attacking the validity of the remainder interest created to take effect upon his death. In this, appellant must necessarily fail. The question as to the character or validity of the remainder interest can have no bearing upon the trust for the life of appellant, because the trust in question does not depend upon the nature of the remainder interest; and the two provisions are clearly separable. Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St. Rep. 227; In re Estate of Troy, 214 Cal. 53, at page 59, 3 P.2d 930. In re Estate of Murphy, 104 Cal. 554, 38 P. 543, the question of whether an estate for life can be defeated by an uncertainty as to what may come after the death of the tenant, was answered in the negative. Moreover, if the testatrix had not provided for disposition of the remainder interest, the trust for the life of appellant Hardy would still be valid. See: In re Reinhardt's Estate, 74 Cal. 365, 16 P. 13.

[4] Appellant's contention as to the accumulation of income under the trust is equally without merit. Section 724 of the Civil Code reads as follows: "An accumulation of the income of property may be directed by any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, objects or purposes, to commence within the time in this title permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law." It is obvious from the provisions of the will above quoted that accumulation of income from the trust could not extend beyond the life of appellant, as the trust itself terminates upon his death.

[5] Appellant claims that even though the trust is valid the court erred in denying appellant's motion for partial distribution, stating, "There is neither statute nor decision which can sustain a refusal to order the income from this trust delivered to the beneficiary." Respondent contends that where a will creates a valid trust, the court has no power to order the executor to transfer the income to the beneficiary prior to distribution to the trustee. Respondent's contention is directly upheld by In re Mackay's Estate, 107 Cal. 303, 40 P. 558; and is also sustained by In re Estate of Marré, 18 Cal.2d 184, 114 P.2d 586, and In re Estate of Dare, 196 Cal. 29, 235 P. 725. Respondent also correctly points out that the rule enunciated by In re Mackay's Estate, supra, is not affected by In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825, which latter case is concerned with the accrual of the income of a trust and the payment thereof from date of the testator's death in accordance with the provisions of section 160 of the Probate Code. Such a question is distinct from that of whether income may be distributed to a beneficiary before the trust estate is distributed to the trustee. While income may accrue, and a beneficiary be entitled to be paid income dating from a testator's death, it does not follow that the income shall be distributed to the beneficiary prior to distribution of the estate to the trustee. The two cases cited by appellant in support of his contention are not applicable here. In re Estate of Friedman, 171 Cal. 431, 153 P. 918, was concerned with a trust of an entirely

different nature than the trust here in question. The Supreme Court pointed out in the Friedman case, supra, that there is much authority of weight to the effect that a devise or bequest to the trustees or directors of a charitable institution is a devise or bequest to the institution itself. In that case there was a devise to a certain charitable society in trust for the purpose of building a hospital and suitable home. The devise there in question was more analogous to a direct gift than to a devise in trust for payment of income to a beneficiary. In re Estate of Cavarly, 119 Cal. 406, 51 P. 629, distribution was sought on the ground that the trust was void, the trial court so found and the judgment was affirmed.

The order is affirmed.

YORK, P. J., and WHITE, J., concur.



62 Cal.App.2d 873

PROGRESSIVE COLLECTION BUREAU v. WHEALTON.

Civ. 12370.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1944.

Rehearing Denied March 11, 1944.

Hearing Denied April 10, 1944.

1. Judgment ⇐829(3)

A federal court judgment quieting lessor's title to mining property, leased to defendant under a contract containing option to purchase, but refusing to cancel contract, was not res judicata as to subsequent state court action by lessor's assignee to recover payments under the contract. Code Civ.Proc. § 1911.

2. Quieting title ⇐52

A federal court judgment quieting lessor's title to mining property, leased to defendant under contract containing option to purchase, but denying lessor's right to cancel contract and setting forth how lessee could remedy his default, did not constitute an adjudication that contract was invalid, since a contract which is void cannot be given any effect whatever. Code Civ.Proc. § 1911.

3. Judgment ⇐829(3)

A federal court judgment quieting title in lessor to mining property, leased to defendant under a contract containing option to purchase, but which denied lessor right to cancel contract, was not res judicata as to lessor's right to recover payments under contract on ground that lessor could also have sought determination of issue as to payments, since such issue was not essential to federal court suit. Code Civ.Proc. § 1911.

4. Judgment ⇐948(1)

A plaintiff may avail himself of the remedy of res judicata even though he does not make it a part of his pleading.

5. Mines and minerals ⇐70(2)

Where a mineral lease containing option to purchase provided for fixed monthly payments until reduction plant was "in operation in 1936" and thereafter the sum of $1,000 on the first of each month, computing the $1,000 monthly rental as beginning in January, 1937, was not error.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Progressive Collection Bureau, Frank Cohen, doing business under the above name and style, against Harold Whealton, to recover payments allegedly due under a lease contract of option to purchase. From a judgment for plaintiff, defendant appeals.

Affirmed.

Sterling Carr and Lemuel H. Matthews, both of San Francisco (A. Da. Thomson, of San Francisco, of counsel), for appellant.

P. H. McCarthy, Jr., and A. T. Bridgett, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover payments due under a contract between plaintiff's assignor and defendant as well as taxes which had been paid by plaintiff's assignor. The cause was tried without a jury and plaintiff had judgment in the sum of $22,569, together with interest thereon and costs of suit.

Plaintiff's assignor was the Pine Grove Nevada Gold Mining Company, a California corporation. On or about July 3, 1936, it had entered into an agreement leasing and providing an option to purchase certain mining claims by defendant. The property as described was actually owned by plaintiff's assignor, but, through an inadvertence, the owner was described as "Pine Grove Gold Mining Company, a corporation." This company was an extinct Nevada corporation, but there is no showing of fraud on the part of plaintiff's assignor; the mistake appears to have been made unintentionally.

The contract consisted of a lease and an option to purchase the described mining claims for the sum of $117,500, payable $2,000 down and $500 on the first of each month thereafter, until "the reduction plant of second party (the defendant) upon the property herein described is in operation in 1936, and thereafter the sum of One thousand dollars ($1,000) on the first day of each month. * * *" In addition, defendant agreed to assume the taxes and also to make certain other payments, not here in issue. Defendant remained upon the premises until on or about July 19, 1938, but only made payments in the sum of $2,500 on the aforementioned contract, and he failed to pay taxes which accrued in the sum of $1,569.

Shortly after his entry under the contract, defendant defaulted in payments. In a letter dated September 1, 1936, plaintiff's assignor attempted to terminate the contract. Defendant claimed title in himself and thereafter plaintiff's assignor commenced an action to quiet title and to cancel the contract in the Federal District Court in Nevada. After judgment for plaintiff quieting title but refusing to cancel the contract, defendant appealed to the Circuit Court of Appeals for the 9th Circuit. Judgment was affirmed in a decision reported, Whealton v. Pine Grove Nevada Gold Mining Co., 104 F.2d 675.

[1] It is appellant's contention in the case at bar that respondent's cause of action is based on the contract; that the Federal Court found the contract "null and void," and that the issue is therefore res judicata. It is true that this suit is based solely on the contract, but we are not in accord with appellant's view that the Federal Court found the contract void. The Federal Court did find respondent's assignor, Pine Grove Nevada Gold Mining Co. could not cancel the option at the time it sought to do so for the reason that it had drawn the contract in the name of the wrong corporation and it thereupon gave the appellant an opportunity to correct his default under the contract. Appellant did not take advantage of that opportunity and since he was in default he thereupon forfeited his rights under the contract. In its opinion the District Court said: "It is Ordered, Adjudged and Decreed that the contract dated July 3, 1936, be not adjudged null and void and the same is hereby adjudged to be in full force and effect as the contract of plaintiff and defendant herein; that said contract is not terminated by the letter of date September 1, 1936, nor could it then have been so terminated by act of the plaintiff; that by reason of the error in the name of plaintiff used in said contract it was the duty of plaintiff to offer to make correction of said error and to endeavor to satisfy defendant in respect thereto; that by reason of such failure and the assertion of a forfeiture because of a noncompliance with the terms of said contract, defendant was relieved from his obligation to comply with the terms of said contract pending the determination of and subject to judgment or decree entered in this suit; that upon payment by defendant to plaintiff on or before July 1, 1938, of the sum of $6,000.00, and on or before August 1, 1938, of the further sum of $5,500.00, and the amount of taxes accrued upon said property and for which defendant is liable under the provisions of said contract said contract shall then be deemed to be in full force and effect and subject only to future compliance with the terms and conditions thereof; that if payments are not so made said contract shall be null and void and of no force and effect." The appeal to the Circuit Court of Appeals was addressed solely to that portion of the decree finding title in the Pine Grove Nevada Gold Mining Co. Whealton v. Pine Grove Nevada Gold Mining Co., 9 Cir., 104 F.2d 675, at page 676.

[2] The only issue before the Federal District Court, in addition to the quiet title proceeding, was to determine whether the plaintiff in the action could cancel the contract, and since it sets out in detail how the contract may be complied with, it cannot mean that the contract was actually void at its inception, but only that it was terminable at the option of the Pine Grove Nevada Gold Mining Company for fail-

ure of defendant to comply with its terms. A contract which is void cannot be given any effect whatever. A void contract is referred to in Garcia v. California Truck Co., 183 Cal. 767, 770, 192 P. 708, 709, as "* * * a mere 'scrap of paper,' without binding force, that could be entirely disregarded without any rescission. * * *" That is clearly not the holding of the federal court in this case.

The status of the contract was before the District Court in the federal suit, but in spite of a portion of the language used in the memorandum of the District Court, supra, as we interpret the opinion, the Court did not actually hold the contract to be void, and our interpretation of the holding appears to be in accord with that of the Circuit Court of Appeals for on page 677 of 104 F.2d the Court states: "The court (district court) justly thought that appellee was under the duty of correcting the error in nomenclature in the option contract, and having failed to offer satisfaction to appellant in this respect appellee was not entitled to declare a forfeiture as of the time it had undertaken to do so. For this reason *the court decreed that the contract remained effective.*" Emphasis ours. Since the contract was not declared void nor voidable at the option of this appellant in the federal suit, the defense of res judicata is of no aid to appellant in this action.

[3] It is appellant's contention that the doctrine of equitable estoppel or res judicata should apply on the ground that respondent's assignor might have pursued an action for rent in the former federal suit and thus determined the issue. There is no question but that this issue was not in litigation before the federal court; that at the time of the filing of the suit in the federal court the greater portion of the rent and unpaid tax installments sought here had not yet accrued; and that this determination was in no wise essential to the former suit.

The Code of Civil Procedure, sec. 1911, lays down the rule to be followed: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

Denning v. Green, 119 Cal.App. 102, 105, 6 P.2d 317, 318, was also an action for the collection for rent after a former quiet title proceeding between the same parties. The court states: "It is next contended that respondents are estopped and barred from maintaining the action, by the judgment rendered in the former action, which quieted respondents' title to said property. In that action the complaint and other pleadings do not mention rental. The complaint is the simple and ordinary form to quiet title. In the findings, however, the trial court finds that appellant collected and retained rental in the sum of $920. There is no mention of rental in the conclusions of law or in the judgment. The evidence in the former case is not before us. It thus appears, and we must conclude that the matter of rental was not an issue in the case. Matters not in issue in the previous action are not res judicata. 15 Cal. Jur., p. 134. The finding made upon the matter of rental was clearly outside the issues, and cannot constitute a bar to the present action. Furthermore, the finding was not necessary to the judgment, and hence was not conclusive upon respondents. Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982."

In Hutchison v. Reclamation Dist. No. 1619, 81 Cal.App. 427, 437, 254 P. 606, 610, the court says: "It is unnecessary to analyze the cases cited by respondent which support the general rule that a judgment is conclusive not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated in the action. It is sufficient to say that this rule is not always applicable literally, but that: 'What is really meant by this expression is that a judgment is conclusive upon the issues tendered by the plaintiff's complaint.' Concannon v. Smith, 134 Cal. 14, 18, 66 P. 40, 42; Brown v. Brown, 170 Cal. 1, 6, 147 P. 1168; Lang v. Lang, 182 Cal. 765, 768, 190 P. 181; Linforth v. Montgomery, 195 Cal. 49, 58, 231 P. 735. Thus, where a right has accrued subsequent to the former trial, and an issue was not tendered or determined in the former trial and was not necessary to a complete disposition of the issues tendered, it could not be said that the former judgment would, in every case, be conclusive as to that issue." See also Sanderson v. Niemann, 17 Cal.2d 563, 573, 110 P.2d 1025; Phillips-Hollman, Inc., v. Peerless Stages, Inc., 210 Cal. 253, 259, 291 P. 178; Hobson v. King, 94 Cal.App. 330, 271 P. 206.

[4] Respondent contends that the contract here in question was construed by the federal court and found to be a lease and

option to purchase. The entire proceeding in the federal court was placed in evidence in this case, and it is settled in this state that the plaintiff may avail himself of the remedy of res judicata even though he does not make it a part of his pleadings. Riverside Land, etc., Co. v. Jansen, 108 Cal. 146, 147, 41 P. 40; Wixson v. Devine, 67 Cal. 341, 345, 7 P. 776; Clink v. Thurston, 47 Cal. 21, 29.

On page 677 of 104 F.2d the Circuit Court of Appeals says: "Its unpatented claims were not open to location on the date Powell essayed to locate them. At that time appellant was in possession and was prosecuting work upon the claims as appellee's lessee." Whealton v. Pine Grove Nevada Gold Mining Co., supra. The issue of the leasehold nature of the contract was determined in the federal suit between the respondent's assignor and the appellant in this action, and as to that issue the doctrine of res judicata will apply. Bank of America v. McLaughlin, 22 Cal.App.2d 411, 71 P.2d 291, 72 P.2d 554; Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 509, 258 P. 387; Tiffany Productions, Inc., v. Superior Court, 131 Cal.App. 729, 22 P.2d 275; Charles H. Duell, Inc., v. Metro-Goldwyn-Mayer Corp., 128 Cal.App. 376, 17 P.2d 781.

Thus, the appellant in this action was the lessee under the contract from the time he entered on the premises until his eviction on July 19, 1938, and, as such is liable for the rental which accrued. Costello v. Martin Bros., 74 Cal.App. 782, 241 P. 588; Guiras v. Harry H. Culver & Co., 109 Cal. App. 743, 293 P. 705; Anheuser-Busch Brewing Ass'n v. American Products Co., 59 Cal.App. 718, 723, 211 P. 817, and cases there cited, Maurice Merc. Co. v. American Emp. Ins. Co., 140 Cal.App. 354, 358, 35 P.2d 1047.

[5] Appellant further complains as to the amount of the judgment which was awarded, directing his attention to certain ambiguous language contained in the contract. The language in question is contained in the first subdivision of the contract and reads as follows: "1. That the party of the second part shall pay to the party of the first part the sum of Two thousand dollars ($2,000.00) at this date, and the further sum of Five hundred dollars ($500.00) on the 1st day of August, 1936, and the sum of Five hundred dollars ($500.00) on the first day of each month next ensuing until the reduction plant of second party upon the property herein described is in operation in 1936, and thereafter the sum of One thousand dollars ($1,000.00) on the first day of each month until the full purchase price has been paid by the party of the second part."

As we construe this clause, the reduction plant was to be in operation in 1936. The judgment as awarded did not commence the $1,000 monthly rental until January 1, 1937. We do not see that appellant has any cause to complain of the judgment on this basis since the construction was in his favor.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.



62 Cal.App.2d 978

ROGERS v. WILCOX.

Civ. 14274.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1944.

1. Appeal and error ⇐82(1)

Where, after judgment on an award of Industrial Accident Commission was entered in superior court, an order for defendant's appearance was issued, an order denying defendant's motion to recall and quash appearance order on ground that judgment had been discharged in defendant's bankruptcy proceedings was not a "final order" and was not appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

2. Appeal and error ⇐66

Error in the course of a proceeding does not warrant a review.

3. Appeal and error ⇐82(1)

Neither an order for appearance of a judgment debtor nor an order for his examination adjudicates rights or establishes liabilities, and is not a "special order" made after final judgment which is ap-

pealable, but is a substitute for a creditor's bill. Code Civ.Proc. § 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order".

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Proceedings by Charles Rogers against O. C. Wilcox before the Industrial Accident Commission, wherein, after judgment was entered in the Superior Court, an order for defendant's appearance was issued, and defendant filed a motion to recall and quash the order. From an order denying defendant's motion, defendant appeals.

Appeal dismissed.

Fred E. Subith, of Los Angeles, for appellant.

Henry C. Rohr, of Los Angeles, for respondent.

MOORE, Presiding Justice.

On January 10, 1940, the Industrial Accident Commission awarded respondent the sum of $3,615, on account of injuries suffered in the course of his industrial employment by appellant. Judgment was entered in the office of the clerk of the court below on January 10, 1940. Order for appearance of the judgment debtor having issued May 21, 1943, motion to recall and quash the order was duly filed and presented on the ground that the judgment had been discharged in bankruptcy. The motion was denied on July 12, 1943. From the order of denial defendant brings this appeal.

On February 6, 1940, appellant was adjudicated a bankrupt, and on December 5, 1940, he was discharged. The judgment of respondent was included among appellant's scheduled debts as a provable claim, and notwithstanding respondent's objections appellant was discharged of the obligation thereunder.

[1-3] Two questions are presented by this appeal, namely, (1) whether it is an appealable order; (2) whether appellant was legally discharged. The order is not appealable. It was one of the steps taken in the course of a proceeding to obtain an order requiring appellant to disclose any property subject to execution. It did not constitute a final order. A court should not be interrupted in the exercise of its jurisdiction until its judgment has become final. Error in the course of a proceeding does not warrant a review. Ahrens v. Evans, 42 Cal.App.2d 738, 109 P.2d 991; Frost v. Superior Court, 41 Cal.App. 580, 183 P. 206. Neither an order for appearance of a judgment debtor nor the order for his examination is in itself an end. Each is merely a step reviewable only after a final order has been made. It adjudicates no rights; it establishes no liabilities. Watson v. Pryor, 49 Cal.App. 554, 557, 193 P. 797. It is not a special order made after final judgment though made subsequent to entry of the judgment. See Sec. 963, subd. 2, Code Civ.Proc. It bears no relation to the judgment. It is a separate proceeding in an original action which is a substitute for the creditor's bill. Kaltschmidt v. Weber, 136 Cal. 675, 676, 69 P. 497.

It is ordered that the appeal be and it is hereby dismissed.

W. J. WOOD and McCOMB, JJ., concur.



62 Cal.App.2d 917

PEOPLE v. SOURISSEAU et al.

Cr. 625.

District Court of Appeal, Fourth District, California.

Feb. 15, 1944.

Hearing Denied March 13, 1944.

1. Criminal law ⇐620(1)

Two rape prosecutions were not improperly consolidated for trial on ground that consent to consolidation on original informations which charged rape with force did not apply to amended informations which charged that prosecutrix was prevented from resisting by threats where consent applied to consolidation of numbered "cases" and filing of amended informations did not make new or different cases. Pen. Code, § 261, subds. 3, 4.

2. Criminal law ⇐1035(2)

Defendants who did not object to consolidation of rape prosecutions could not for first time on appeal claim error in consolidation. Pen.Code, § 261.

3. Criminal law ⇐1166½(10)

Where original informations charged rape with force and amended informations charged rape by preventing resistance through threats and after clerk erroneously read original informations to jury court ordered jury to ignore what had been read and clerk then read the amended informations and defendants' pleas thereto, defendants were not prejudiced. Pen.Code, § 261, subds. 3, 4.

4. Criminal law ⇐1040

Defendants who went to trial upon issues presented in amended informations, and did not object to form of verdict were not prejudiced by verdict finding defendants guilty as charged in the "information".

5. Criminal law ⇐999(1), 1023(12)

A commitment is not a judicial order made after judgment from which an appeal may be taken, but is only a certified copy of judgment as rendered. Pen.Code, §§ 1213–1216, 1237.

6. Criminal law ⇐1000, 1144(17)

When judgment of imprisonment is regularly entered, unless otherwise directed by court, clerk must forthwith make a certified copy of judgment certified by judge and clerk of court, and deliver it to proper officer, and in absence of proof to the contrary, it is assumed that clerk's duty was properly performed. Pen.Code, §§ 1213–1216, 1237.

7. Criminal law ⇐999(1)

A commitment need not necessarily be made or dated on same date that judgment is pronounced. Pen.Code, §§ 1213–1216, 1237.

8. Criminal law ⇐999(1)

Where defendants were arraigned for judgment and again rearraigned on following day when judgment was again pronounced, the first judgment was valid and so-called second judgment was ineffectual and there being nothing on face of commitments to show that they were not issued on judgment of first day, commitments were valid. Pen.Code, §§ 1213–1216, 1237.

9. Rape ⇐48(2)

In rape prosecution, testimony of details made to witnesses by prosecutrix was improperly admitted. Pen.Code, § 261.

10. Criminal law ⇐1169(5)

The admission of improper evidence is harmless if it is subsequently stricken and jury is told to disregard it since it will be presumed jury obeyed the instruction.

11. Criminal law ⇐1186(4)

In rape prosecution, error in admitting testimony of details of complaint made to witnesses by prosecutrix was not prejudicial where testimony was ordered to be disregarded by jury, and facts related were fully covered by other testimony. Pen. Code, § 261; Const. art. 6, § 4½.

12. Criminal law ⇐406(3)

An admission is not excludable because induced by statement that it would be better for defendant to tell the truth.

13. Criminal law ⇐406(1), 516

An "admission" relates to matters of fact that do not necessarily involve criminal intent, whereas a "confession" is restricted to acknowledgment of guilt, and does not include admissions of mere acts of guilty conduct or of subordinate facts not constituting guilt.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission" and "Confession".

14. Criminal law ⇐1169(12)

A defendant who admitted truth of his admissions and confessions could not claim prejudice because of their admission.

15. Criminal law ⇐736(2)

Whether a confession is voluntary is a preliminary question for trial court in its discretion.

16. Criminal law ⇐519(3)

A confession is not rendered involuntary and inadmissible merely because it was made to a police officer while accused was under arrest or under state of great excitement.

17. Criminal law ⇐519(1)

Accused's concealed hope that his statement would have effect of lightening his punishment does not render his statement inadmissible if hope is not improperly induced.

18. Criminal law ⇐1141(2)

Error in admitting confession must appear as matter of law from record.

19. Criminal law ⇐1144(12)

Where evidence is conflicting whether confession is voluntary, it must be assumed

that testimony concerning it was properly admitted.

20. Criminal law ⇐1169(12)

In rape prosecution, admission of alleged involuntary confession was not prejudicial where accused merely testified that he got the "impression" from officer's statements that it would be better for accused if he made the statement as given, and conviction was supported by other independent evidence. Pen.Code, § 261.

21. Criminal law ⇐829(10), 1173(2)

Failure to instruct on corroboration of accomplice's testimony was not error where evidence justified conviction independent of any testimony of alleged accomplice and court instructed that any confession of a codefendant or an accomplice was inadmissible against the other unless made in his presence.

22. Criminal law ⇐829(1)

Proffered instructions fully covered by instructions given were properly refused.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

Robert A. Sourisseau and Lee Thompson were convicted of rape, and they appeal.

Affirmed.

Joseph Seymour, of Riverside, for appellants.

Robert W. Kenny, Atty. Gen., and Thomas G. Negrich, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

On July 10, 1943, two separate informations were filed against defendants charging them with the violation of section 261 of the Penal Code (rape), alleging that on June 26, 1943, each did wilfully and unlawfully and with force and violence have and accomplish an act of sexual intercourse with the prosecutrix. The defendants were duly arraigned thereon. Thompson, in person, and Sourisseau, through his counsel, entered a plea of not guilty thereto. The minutes of the court in reference to the arraignment of Sourisseau show that on that date, July 12, 1943, "counsel stipulate that the *case* of the People of the State v. Thompson, No. 36616, may be consolidated with the within cause for trial" (Emphasis ours.) Defendant Thompson then consented to such "consolidation of said cases for trial" and upon motion of the district attorney the trial court consolidated the cases for trial and each was set for August 5, 1943. On July 14, 1943, the district attorney moved to file an amended information as to each defendant. The amended informations charged that each did, on the same date, accomplish an act of sexual intercourse against the will of the prosecutrix and that then and there she was prevented from resisting by means of threats of great and immediate bodily harm, accompanied by apparent power of execution. Each defendant was rearraigned on the amended information, entered a plea of not guilty, and the trial was set for August 5, 1943. The minutes of July 14, 1943, show that "Upon stipulation of counsel, court orders that the within case and the case of People v. Lee Thompson, No. 36616, be * * * consolidated for trial". No objection was made to this order by either party. On August 5, 1943, defendants appeared for trial. At that time counsel for Sourisseau, at the request of defendant Thompson, was appointed by the court to also represent him. They proceeded to trial. The trial court inquired if the cases had been consolidated. The district attorney announced that they had been. Without any objection as to the cases being consolidated, all parties proceeded to empanel the jury.

The reporter's transcript shows that the court clerk inadvertently read the original informations to the jury, at which time the district attorney requested the clerk to read the amended informations and counsel for defendants requested the court to instruct the jury to "ignore what has been read by the clerk". The court agreed and ordered the clerk to read the amended informations which the clerk did. In a later instruction the court directed the jury to disregard any evidence ordered stricken. No further objection was made nor motion to strike imposed. The district attorney then, in an opening statement, announced that the charge against defendants was rape under section 261 of the Penal Code and that one of the elements of the charge was that the act of sexual intercourse was against the will of the prosecutrix and "was done under threats of great bodily harm". The district attorney subsequently stipulated, in the presence of the jury, that the people were not "charging here force and violence" and that

no force or violence was used. After trial of the issues as thus presented and after the giving of instructions which included one in the following language: "You are instructed that section 261 of the Penal Code * * * reads in part as follows: 'Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: * * * 4. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution * * *'", the jury returned separate verdicts as follows: "We, the jury * * * find the defendant * * * guilty of a violation of section 261 of the Penal Code as charged in the information". No objection was then made by counsel for defendants to the form of the verdicts as thus returned. August 9, 1943, was fixed as the time for pronouncing sentence. Counsel for defendants then moved for a new trial and arrest of judgment in each case, which motions were continued to August 16, 1943, at which time defendants argued at length and each motion was denied. The trial judge arraigned each defendant for judgment, over objections of counsel, and orally announced that both defendants be confined in the state prison for the term prescribed by law. Oral notice of appeal was announced. On the following day, August 17, 1943, the defendants, for some reason not apparent from the record, except as may appear from the reporter's transcript, were returned into court "for re-arraignment and re-sentence" and "for the purpose of correcting any error as to form, which may have occurred at the time of pronouncing judgment yesterday." Over objection, they were re-arraigned and sentence was again pronounced as before. Both oral and written notice of appeal from each purported judgment and each order followed. The trial court then, on August 17, 1943, issued two separate commitments, one for each defendant, each commitment reciting that the defendant therein named had been duly found guilty of a felony, "violation of section 261 of the Penal Code", and committing him to state's prison, granted a five-day stay of execution, and remanded defendants to the custody of the sheriff.

The facts surrounding the alleged charge as established by the evidence and which support the verdict of the jury may be thus epitomized: The prosecutrix, Rosalie Boles, testified that she was 19 years old and had been married to Sergeant Boles for about 13 months prior to the trial; that her husband was stationed near Hemet with an antiaircraft outfit; that before June 26, 1943, she lived in Sage, located near Hemet, with a Mr. and Mrs. Jones; that on Saturday evening about 9 p. m., she took some of the Jones family and the cook to Hemet to see a show in the Jones pick-up truck; that after leaving them she was to call for them again at 11:30; that at that time she did not know just where her husband was stationed but knew it was west of town; that she proceeded out his way and stopped at a cafe; that a soldier (Thompson) and a civilian (Sourisseau) came up to the truck and said: "Excuse me; I thought you were someone else"; that she asked the soldier if he knew her husband; that he told her he did and would show her where to find him and that they were going right down that way as soon as they drank the beer they purchased in the cafe; that all three went into the cafe and the two men drank beer while she drank a bottle of pop; that they were in the cafe about 15 minutes and while there the two men went back into another room and were whispering; that the three started out the door to go to her husband's camp; that the civilian drove and she was seated between the two men; that they drove past the army camp and into a field where there was an old shack belonging to a relative of one of the boys; that she then became suspicious and asked them to take her back; that they continued on and she started screaming and begging them to take her back; that they arrived at the shack and the civilian got out and told her what he was there for; that the civilian said: "Get out or do I knock you in the head"; that she refused and the civilian clenched his hands and came at her throat with his hands apart saying: "Get out or do I choke you"; that the civilian threatened to strike her but the soldier only threatened her in words; that she got out and they took her into the cabin onto a cot and stripped her of her clothing; that each accomplished an act of sexual intercourse and the soldier was "talking about keeping me there all night". She then testified that she did not strike them nor kick them because she was "too scared"; that they started back in the truck as before, and both of the men were whispering to each other; that they went down past the army camp and came to the sentry; that they got out and talked to him; that while the men

were talking to the sentry she sneaked back to get in the truck and drive away but the civilian saw her and ran over and grabbed the steering wheel; that she ran back to the sentry and told him the defendants stole her car and drove her into the hills but that she did not go into details as to what happened; that the sentry called the M. P.'s; that she thought the defendants jumped into the truck and that the civilian drove away and later had an accident with it; that she remained with the sentry until a woman came along in a station wagon and took her back to town; that the following Monday she was able to see her husband and told him she was in some trouble and asked him to get a pass; that she saw him that evening and told him what had happened; that on Wednesday they reported the incident to the authorities and defendants were subsequently arrested. The sentry corroborated her story as to what happened at the sentry station and further testified that Mrs. Boles told him that the two "boys raped her" and related other statements made to him by her concerning the trip to the shack and how she met the boys. A motion was then made to strike all of those statements. It was denied. The trial court committed error in not striking the detailed portion of the complaint which was made to the sentry by Mrs. Boles, which was made in the absence of the defendants. We will later discuss this point. The sentry then testified that the civilian drove away in the pick-up truck but that the soldier left in another direction and went to bed.

Sergeant Boles testified that he saw his wife around 10 a.m. on June 20; that she commenced crying and said she had a wreck with the truck and emplored him to get a pass; that he had difficulty in getting such a pass until 6 p.m. ; that that evening his wife told him everything. The trial court erroneously, over objection, allowed the husband to relate the factual details of that conversation, which related facts were about the same as she stated on the witness stand. Counsel for defendants moved to strike the conversation. The trial court denied the motion and adjourned court for the day. The following morning the trial judge, of his own motion, told the jury about the motion to strike the entire testimony of Boles and Sergeant Stapp, and the court's ruling thereon, and then instructed the jurors to disregard their testimony "pertaining to the details of the crime related to them by the prosecutrix", but "you may consider any complaints made to the witness of the commission of the offense". Thereafter, counsel moved for a mistrial, which motion was denied.

A deputy sheriff testified that he talked to defendant Thompson on July 2, 1943, in the presence of a stenographer, and that defendant's statements were free and voluntary. On cross-examination he stated that he told defendant that "it was our belief it would be better for him" if he would talk and tell what happened; that it was his opinion that "honesty was the best policy" and to tell the truth would probably be better for him. He then related the conversation with defendant Thompson as to where he met the prosecutrix and about their departure in the truck. He testified that Thompson said the "victim did not go willingly"; that she refused to get out of the car at the shack; that Sourisseau asked her if she wanted "it the hard way or the easy way" and asked her to get out of the car "in quite a threatening voice"; that he said: "Will you take it the easy way, or will I have to bash your head in", and made other threatening remarks. The balance of the statement agreed generally with the story as related by the prosecutrix. A motion was made to strike the claimed statement on the ground that it was obtained under threats, menace, and inducements held out to the defendant, which motion was denied. A conversation was had by the same officer with defendant Sourisseau. He testified that he did not use any threats, menace or duress to cause him to give a statement, but that he may have possibly said in substance or inferred that it would be better for him to talk. He further testified that he read from the Penal Code the penalty for the offense and stated that the exact number of years was in the hands of the prison board. The officer, over objections, testified that Sourisseau related the details of the meeting with the prosecutrix, which details were about the same as told by her; that he said: "The reason the act of sexual intercourse took place was because of the threats he made her"; that she submitted on account of the impossibility of assistance at that location and the threatening voice he used; that Sourisseau said he wanted to tell the truth and "get it off his chest"; that he broke down, wept, and wanted to enter a plea of

guilty at that time. A motion to strike the above admissions was denied.

Over objections, the stenographer read the questions propounded and answers given by each defendant as reported by her, which were in effect factually the same as related by the deputy sheriff. The people then rested.

Defendant Thompson took the witness stand. His counsel propounded a question to him and asked him if he heard read his statement as reported by the stenographer. He replied that he did and that he made those statements because they were "the truth and facts" and that Sourisseau was present when he made them. Defendant Sourisseau then testified. He admitted the act of sexual intercourse, admitted making the statements as read by the stenographer, but claimed he made them because the officer in charge told him that it would be better to tell the story just as the girl had told it; that he was nervous and worried; that his reported statement was not true; that the officers made no promises, but he got the "impression" from their statements that if he told the truth (according to the girl's story) it would be better for him. On the witness stand defendants did not testify to any facts contrary to the story told by the prosecutrix respecting the acts of sexual intercourse at the shack. Sourisseau admitted a former conviction of the crime of robbery. The defense rested. After argument, verdicts of guilty were returned and proceedings were had as above related.

[1, 2] The first point to be considered by this court and which is raised by defendants, is counsel's claim that the two cases were improperly consolidated for trial. It is argued that even though there may have been a consent to a consolidation of the cases for trial on the original informations, such consent did not apply to the amended informations because the filing of the amended informations constituted a new action as to each defendant. The original stipulation and consent to consolidation applied to a consolidation of the cases numbers 36615 and 36616. The filing of amended informations did not make new or different cases against defendants as distinguished from the original informations filed against them. At any rate, the actions and conduct of both defendants were such that there was no doubt that the intention of the parties was that the cases against them should be tried together, with one jury, and under the same evidence. No objection was made as to the procedure followed until that point was raised for the first time on appeal. There is no merit to the first contention. People v. Fontana, 138 Cal.App. 379, 32 P.2d 160; People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970.

[3, 4] The second point presented involves the charges set forth in the original informations and those stated in the amended informations. The original informations apparently charged an act of rape under section 261, subdivision 3 of the Penal Code (by means of force and violence). The amended informations charged the same crime under subdivision 4 thereof (prevented from resisting by threats of great and immediate bodily harm). The clerk did erroneously read the original informations to the jury but the court, through counsel's suggestion, ordered the jury to ignore what had been read and the clerk then read the amended informations and the defendants' pleas thereto, upon which issues the defendants went to trial. We see no prejudicial error in that procedure. However, the verdicts as returned, do specify that the defendants were found "guilty of violation of sec. 261 of the Penal Code as charged in the information". To comply strictly with the pleadings as thus presented, the verdicts should have read "amended information". No objection was made to the verdicts as to their form when received. We do not believe defendants were misled as to the intention of the jury to find the defendants guilty as charged in the amended informations. The case of People v. Flohr, 30 Cal.App.2d 576, 86 P.2d 862, 864, is factually similar on this point. In disposing of the question the court there said: "The form of the verdict is to be regarded as immaterial, provided the intention to convict of the crime charged is unmistakably expressed", citing cases. See, also, People v. Du Fault, 1 Cal.App.2d 105, 36 P.2d 196.

The third point presented involves the actions of the trial court in arraigning the two defendants for judgment on August 16, 1943, and then on the following day rearraigning them and again pronouncing the same judgment and issuing a commitment on that day. It is defendants' argument that a separate judgment was imposed on each defendant on August 16, and a separate judgment was again imposed upon them on August 17, and if the judgment

of August 16th was valid the judgment of August 17 was void and that a commitment issued on a void judgment is also void and of no effect, citing In re Wilson, 202 Cal. 341, 260 P. 542; People v. Mess, 65 Cal. 174, 3 P. 670. In the Wilson case there were two judgments and a commitment issued on each judgment. It was there held that the first judgment and commitment thereon was valid and the second judgment and commitment were invalid. We must conclude in the present case that the first judgment pronounced on August 16 was valid. Therefore, the so-called second judgment was ineffectual. Defendants have appealed from the first judgments as well as the purported judgments of August 17, and from the orders denying them new trials. But one commitment, as to each defendant, was issued in the present case. It merely recites that defendants were found guilty; that they be punished by imprisonment in the state prison for the term prescribed by law, and that the sheriff deliver them to the warden. "Done in Open Court on August 17, 1943." The clerk certified each to be a true copy of the judgment duly made and entered in the minutes of the actions. The commitments do not state, nor in any way designate or specify on which one of the purported judgments they were issued. While it might be argued that from a statement of the clerk in one of the subsequent minute entries it may be reasonably construed that the commitments above described were issued upon the purported judgments of August 17, 1943, there is nothing on the face of the commitments that show they were not issued on the judgments of August 16, 1943.

[5-7] The defendants have heretofore endeavored to test the validity of those commitments by applications to the Supreme Court on writs of habeas corpus. A stay of execution was granted by the trial court pending the determination of that issue. The writs were denied. There is no irregularity in the commitments that would affect the validity of the judgments from which defendants have appealed, nor is there any defect therein as would give rise to a valid ground for a new trial. A commitment is not a judicial order made after judgment from which an appeal may be taken. Sec. 1237, Pen.Code; People v. Flannelly, 128 Cal. 83, 60 P. 670. Under sections 1213–1216, Penal Code, the commitment is only a certified copy of the judgment as rendered and pronounced. Application of Robbins, 27 Cal.App. 677, 151 P. 14; In re Woo Hah, 34 Cal.App. 35, 166 P. 851. Under the provisions of those sections it becomes the clerk's duty, when a judgment of imprisonment is regularly entered, unless otherwise directed by the court, to make forthwith a certified copy of the judgment, certified by the judge and clerk of the court, and deliver it to the proper officer. In the absence of proof to the contrary, it is assumed the clerk's duty was properly performed. People v. Bier, 59 Cal.App.2d 313, 138 P.2d 738. Such commitment need not necessarily be made or dated on the same date that judgment is pronounced. In re Nakanishi, 19 Cal.App. 552, 126 P. 508.

In People v. Wignall, 56 Cal.App. 423, 205 P. 881, it was held that matters of defect in the form or substance of commitment process cannot be reviewed on appeal and that if in fact a commitment defective in form had been made, a new and corrected one might be issued to conform with the judgment, and the presence of such an amended or new commitment in the hands of the custodian officer would be an answer to an application for discharge on habeas corpus.

[8] We therefore must conclude from the recited facts that no valid ground exists for reversing the judgments or ordering new trials upon the grounds presented under counsel's third point.

[9-11] The fourth point involves the erroneous admission of the evidence where the two witnesses were permitted, over objection, to relate the details of the complaint made to them by the prosecutrix. The trial court erred in admitting that evidence but later ordered the jury to disregard it. The original ruling was erroneous, and the delay in ordering the jury to disregard the testimony erroneously admitted no doubt was unfortunate, but it has been repeatedly held that the admission of improper evidence is harmless if it is subsequently stricken out and the jury is told to disregard it, and where it is so instructed it will be presumed it obeyed the instruction. People v. Prather, 134 Cal. 436, 66 P. 589, 863; 8 Cal.Jur. p. 618, sec. 599, and cases cited. The facts related in the stricken evidence were fully covered by testimony of other witnesses. No miscarriage of justice resulted. People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939; Art. VI, sec. 4½ Constitution.

Fifth, the defendants argue that the trial court erred in refusing to grant their motions for mistrial based upon the grounds set forth in point 4. For the reasons there expressed, the trial court properly refused to grant their motion.

[12-20] The sixth point involves the admissibility of the defendants' claimed confessions or admissions. In support thereof defendants cite People v. Leavitt, 100 Cal. App. 93, 279 P. 1056. There is a distinction between an admission and a confession. People v. Sprado, 72 Cal.App. 582, 237 P. 1087. An admission is not to be excluded because induced by a statement that it would be better for a defendant to tell the truth. The term "admission", as applied to criminal law, relates to matters of fact that do not necessarily involve a criminal intent, whereas, a "confession" is restricted to an acknowledgment of guilt, and it does not include admissions of mere acts of guilty conduct or of subordinate facts not constituting guilt. People v. Fowler, 178 Cal. 657, 174 P. 892; 8 Cal.Jur. 107, sec. 199, and cases cited. We will not dwell very long upon the question of the admissions or confessions of defendant Thompson. He took the stand, and "to the astonishment of his attorney", admitted the truth of them. He at no time repudiated the admissions made by him. Thompson cannot now claim he was prejudiced by the court's ruling. Defendant Sourisseau did testify that the alleged confessions and statements made by him were "not true" and that he got the "impression" from the officer's statements that it would be better for him if he made the statements as given; that he was placed in a cell by himself prior to making the statements and he "knew" that after making them he would be allowed to be in a tank with the other prisoners. He at no time told the jury what his version of the facts were surrounding the alleged acts but only repudiated the statements he made to the officers. Whether a confession is free and voluntary is a preliminary question addressed to the trial court and to be determined by it and a considerable measure of discretion must be allowed that court in determining the question. The admissibility of such evidence so largely depends upon the special circumstances connected with the confession that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. It is established law that a confession is not rendered involuntary or inadmissible in evidence merely because it was made to a police officer while the accused was under arrest or was under a state of great excitement. People v. Cokahnour, 120 Cal. 253, 52 P. 505; People v. Hadley, 175 Cal. 118, 165 P. 442. A mere concealed hope of the defendant that his statement would have the effect of lightening his punishment does not render his statement inadmissible if that hope is not improperly induced. People v. Luis, 158 Cal. 185, 110 P. 580. In the Leavitt case, relied on by counsel for defendants, the claimed confession was the only evidence outside of that of an accomplice tending to connect the defendant with the commission of the crime, and that evidence was not such as to clear the case from doubt as to what verdict should have been rendered. In the instant case there is overwhelming evidence, independent of the alleged confession, to establish defendants' guilt. The trial court allowed counsel full opportunity to examine the officers on voir dire, and fully considered the evidence as to whether the alleged confession was voluntary or involuntary. The jury was also instructed that if it believed the confessions of defendants were made under inducements or promises, it was its duty to disregard them. The same matters were again presented and considered by the court on the motions for new trial. In People v. Castello, 194 Cal. 595, 229 P. 855, it was held that a reviewing court cannot say that the trial court committed error in admitting the confession of guilt unless such error appears as a matter of law from the record presented, and where the evidence is conflicting on the subject it must be assumed that the testimony concerning defendant's confession was properly admitted and that where physical facts and circumstances corroborate confessions of guilt, the reasoning of the rule which would otherwise exclude involuntary confessions to this extent ceases to exist. See, also, People v. Lehew, 209 Cal. 336, 287 P. 337; People v. Hopkins, 57 Cal.App.2d 382, 134 P.2d 299; People v. MacDonald, 24 Cal. App.2d 702, 705, 76 P.2d 121; People v. Ellis, 33 Cal.App.2d 616, 92 P.2d 431. We cannot perceive how the admission into evidence of the claimed confession, under the facts of this case, operated as prejudicial error justifying a reversal of the judgment where the conviction was so overwhelmingly supported by other independent evidence.

Seventh, numerous exceptions have been taken to the rulings of the trial court on

questions propounded to several witnesses. Suffice it to say we have fully examined the record in respect thereto and find no prejudicial error.

[21] Eighth, the trial court's failure to give an instruction on the question of corroboration of the testimony of an accomplice is raised. Defendants offered no instruction on the subject. People v. Warren, 16 Cal.2d 103, 104 P.2d 1024, relied upon by defendants, is not applicable here. There it was said that when the jury might well have concluded that a witness was an accomplice and where the defendant would have been entitled to an acquittal by reason of lack of corroboration of the testimony of the witness, it was prejudicial error for the trial court to fail to give such an instruction. It was there held that the trial court should have given it on its own motion even though defendant did not request such an instruction. In the instant case there is an abundance of evidence justifying the conviction independent of any testimony that may have been given by any claimed accomplice. Therefore, the rule applied in People v. Warren, supra, does not apply here. The rule that is applicable is stated in People v. West, 4 Cal. 2d 367, 371, 49 P.2d 276. In the instant case the trial court did fail to give such an instruction but, at defendant's request, did give an instruction to the effect that any confession of a codefendant or an accomplice, after the commission of the crime, is inadmissible against the other defendant unless made in his presence. The trial judge even went so far as to tell the jury that "any confession or admission of * * * Thompson, in the present case, cannot be used against * * * Sourisseau." We see no prejudicial error in the failure of the trial court to give the suggested instruction.

[22] Ninth, the last objection which need be mentioned involves the failure of the court to give 13 of defendants' proffered instructions. Suffice it to say we have fully examined those instructions and have compared them with the instructions given. The subject matter is either fully covered by other instructions or they were otherwise properly refused.

The judgments and orders appealed from are affirmed.

BARNARD, P. J., and MARKS, J., concur.

62 Cal.App.2d 933

PEOPLE v. GILBERT et al.

Cr. 3762.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1944.

1. Criminal law ⇐945(1)

Where conviction of grand theft and burglary in second degree was based on circumstantial evidence in a very close case, denial of accused's motion for a new trial on ground of newly discovered evidence which might change result on new trial was abuse of discretion.

2. Criminal law ⇐911

A motion for new trial is addressed to sound legal discretion of trial court.

3. Criminal law ⇐1156(1)

Trial court's action in ruling on motion for new trial will not be disturbed on appeal unless abuse of discretion is clearly shown.

4. Criminal law ⇐945(2)

In a very close case, denial of accused's motion for new trial on ground of newly discovered evidence may work a hardship, as well as a possible miscarriage of justice, especially where the newly discovered evidence is not strictly cumulative but contradicts strongest evidence introduced against accused.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Cora Lee Gilbert was convicted of grand theft and burglary of second degree under a complaint jointly charging her and Charles Goode Wynn with such offenses, and she appeals.

Reversed and remanded.

Joseph L. Fainer and Russell E. Parsons, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

By an amended complaint containing two counts, the defendants were jointly charged with the crimes of grand theft and burglary, and the defendant Cora Lee Gilbert

was also charged with two prior convictions of the crime of larceny.

Upon arraignment both defendants pleaded "not guilty" to the offenses of grand theft and burglary, and defendant Gilbert admitted the prior convictions. Thereafter defendant Wynn withdrew his plea of "not guilty" to the charge of burglary, pleaded "guilty" thereto, the court finding the offense to be burglary of the second degree, and made his application for probation, whereupon his case was continued to a later date, but the record does not disclose what disposition was made thereof.

Meanwhile defendant Gilbert went to trial before the court sitting without a jury and was found guilty of the offenses charged in both counts of the information, the court fixing the burglary charge as of the second degree. Thereafter said defendant moved for a new trial which was denied. The court ordered the sentences on the two charges to run concurrently and found there was not sufficient evidence to declare said defendant an habitual criminal.

This appeal is prosecuted by defendant Gilbert from the judgment of conviction as well as from the order denying her motion for a new trial.

Appellant urges (1) that the evidence is insufficient to sustain the conviction; (2) the court erred in permitting an officer to relate a conversation with appellant before the corpus delicti was established; and (3) the court erred in denying her motion for a new trial.

The record herein discloses that on February 24, 1943, E. Lasner, Incorporated, dealers in furs, maintained an office and showroom in downtown Los Angeles which was in charge of its manager, Leonard Bachelis, and one other employee, the company's secretary, Lois Porter. The office was located in front and opened through an archway into a large storeroom where the company's stock of furs hung on racks. On the day in question, defendant Wynn called and told Mr. Bachelis he had an appointment with a furrier by the name of Crissman who was going to help Wynn select a fur coat for the latter's wife. Crissman, who was known to Bachelis, did not keep the purported appointment and Wynn remained about an hour looking all around the showroom examining the furs accompanied by the manager Bachelis.

Early in the afternoon of the following day, defendant Wynn returned to the showroom accompanied by appellant and another woman, whom Wynn said was his wife, and stated to Mr. Bachelis, "I have come back to look at the furs. I want to get something for my wife." The three persons remained about fifteen or twenty minutes, during which time Mr. Bachelis showed furs to defendant Wynn and the other woman, but was unable to produce the required size. Meanwhile, appellant Gilbert was walking about the showroom looking around and two or three times returned to the place where Bachelis was showing the furs to defendant Wynn and his so-called wife. Bachelis had no particular conversation with appellant, who was visible to him except for a few seconds when she was walking behind the fur racks. As they were leaving Mr. Bachelis expressed regret that he did not have a coat to fit defendant Wynn's wife, and suggested they might call at the shop of another furrier on the ninth floor of the same building. Mr. Bachelis left his office immediately after and was absent for about ten minutes. During this interval appellant defendant Wynn and the other woman returned and appellant asked Miss Porter for Mr. Bachelis' card, saying there were no furs upstairs and she would like to have his card. As soon as Mr. Bachelis returned to the office, he and Miss Porter started to take an inventory of the stock of furs and when it was completed the next morning, it was discovered that a two-skin silver fox scarf valued at $100 and a silver fox jacket valued at $185 were missing. Mr. Bachelis testified he had seen these two garments "just before the defendants came into the showroom" and that he did not give either of the defendants permission to take them.

On March 2, 1943, Mr. Bachelis again saw defendant Wynn and the appellant on the third floor of Bullock's Department Store, whereupon he called the house detective and the police department and followed defendants from the store. He was present when they were arrested by the police at the corner of Seventh and Hill Streets at three o'clock on said day.

Over the objection of appellant's counsel that no corpus delicti had been established, the testimony of B. W. Grant, one of the arresting officers, was admitted in evidence that appellant "offered us $500.00 to put her on the street * * * She said her record was so bad, she had two prior arrests, couldn't stand one more, it would

mean a long stretch and didn't want to be arrested. Officer Kopyteck answered and said, 'The price has gone up. She offers $500.00.' So I told her, 'Well, chicken-feed—I wouldn't listen to an offer of a thousand.'" This witness also testified to a conversation he and officer Kopyteck had with appellant at the Lincoln Heights Jail on March 4, 1943: "We told the defendant Gilbert that we had been out with Mr. Wynn and that we had asked him how we could recover the furs and he told us to talk to her and she could help us get them back. And we said we had talked to the owner of the furs and he would like to have them back and she said she didn't know where the furs were and couldn't say where the furs were now and she couldn't get them back, but she was willing to pay for them. We told her the furs were valued at $285 and she said she was willing to pay as much as $500 for the furs and also take care of us. It would be worth our while, she could get $1,200 for us. * * * We told her we were not interested in the money, we were interested in the furs. She said she didn't know how she could get hold of the furs. We asked her what had been done to the furs, if given to a friend, shipped out of town, or what, and she said, 'Get hold of Wynn, maybe he and his girl friend can help you.' She didn't know where they were."

On the same day said officers had a conversation with Wynn, and officer Grant testified Wynn said he did not know where the furs were because when he left the fur store he got in the back seat of the car and the two women in front; that he did not know where they went or what they did with the furs; that he would be willing to pay for the furs but he did not have the money himself, "but that he would see the women and they would take care of the furrier and us too." Said witness further testified that "on the 4th of March we asked him (Wynn) how Cora Lee Gilbert operated, we asked him if she used hooks, rubber bands or some contrivance about her person in which she could hold the merchandise up underneath her dress. He said no, she was heavy enough and she held the merchandise between her legs and it wouldn't fall out and she walked with it. * * * During the course of other conversations we asked her (appellant) if she used a hook or a rubber band * * * We asked her if she used hooks or rubber bands or a contrivance to hold the merchandise that she took from the store, and she said no, she never used any kind of device at all." In response to the question (on cross-examination), "Never at any time did she tell you she took furs from this man, did she?," the witness Grant replied, "She did not." So far as the record discloses, the furs were never recovered.

Appellant took the stand in her own defense and testified that she went to the Bachelis fur store for the first time on February 25, 1943; that on the day before she met defendant Wynn and arranged to drive him in her car to the fur store in the downtown district; that she took nothing from that store. "I told the officers when they arrested me, I says, 'What for?' he says, 'Grand theft.' I says, 'Grand theft of what?' He said: 'Stolen merchandise.' So I said I haven't stolen any merchandise, I don't want to get arrested because I have a record. I told them that and that is all the conversation." On the way to the central police station, she made the statement: "I still tell you I don't know anything about it, any furs"; that the thing to do was "to get in touch with Charlie Wynn, because I don't know anything about any furs, and I said to keep from being arrested for it, I would be willing to even pay for the furs. * * * I didn't want to be arrested for the furs. I didn't want to get in any trouble involving any furs, I didn't know anything about that." When asked if she had offered the officers $500 to put her on the street, she denied that she made them any offer, "I said I woulld be willing to pay for the furs, I didn't make any offer to pay any money."

Defendant Wynn testified on behalf of appellant to the effect that he took the furs the first time he visited the Bachelis store, to-wit, on February 24, 1943, and that he disposed of them before he met the appellant on the following day. He denied the context of the conversations testified to by the witness officer Grant.

In connection with her contention that the evidence is insufficient to sustain the conviction, appellant urges that the whole case against her "rests upon the fact that she had a possible opportunity for committing the crime, in that she went to the furrier's store together with Wynn and the co-defendant Johnson."

[1] From the foregoing resume of the facts and circumstances which form the basis of the instant prosecution, it appears that the evidence upon which appellant was convicted consisted mainly of circumstan-

tial evidence, and a review of the entire record reveals that the denial of appellant's motion for a new trial constituted an abuse of discretion.

[2-4] Of course, there is no question that a motion for a new trial is addressed to the sound legal discretion of the trial court and its action will not be disturbed on appeal except where an abuse of discretion is clearly shown. In a very close case, such as the one here made out against appellant, a denial of the motion made on the ground of newly discovered evidence might work a hardship as well as a possible miscarriage of justice. This is especially so, because of the fact that the newly discovered evidence, which does not come strictly within the class of cumulative evidence, would have the effect of contradicting the strongest evidence introduced against appellant. In fact, it is possible that a different judgment would have been rendered herein, had this so-called newly discovered evidence agreed with the statement thereof contained in the affidavits made in support of the motion for new trial.

For the reasons stated, the judgment, and the order denying appellant's motion for a new trial are reversed, and the cause remanded.

DORAN and WHITE, JJ., concur.

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SECOND SERIES

23 Cal.2d 681

ADAMS v. AMERICAN PRESIDENT LINES, Limited.

S. F. 16950.

Supreme Court of California.

Feb. 10, 1944.

1. Appeal and error ⇐302(6)

In reviewing an order granting a new trial, in absence of specification of insufficiency of the evidence to support the verdict, the Supreme Court was precluded from considering question whether the evidence was sufficient, unless it was without conflict and insufficient as matter of law. Code Civ.Proc. § 657.

2. Seamen ⇐29(1)

Recovery of damages by an employee under the Jones Act is predicated on negligence of the employer. Jones Act, 46 U.S.C.A. § 688.

3. Master and servant ⇐179

The Federal Employers' Liability Act abrogates the common-law rule that an employee must bear the risk of injury or death through the fault or negligence of a fellow servant, and applies the principle of respondeat superior against the employer. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

4. Seamen ⇐29(5)

Before seaman could recover against his employer, under the Jones Act and the Federal Employers' Liability Act, for the negligence of the employer's servant, seaman was required to show that the act of negligence was committed within the scope of the servant's employment. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

5. Seamen ⇐29(3)

A master is not liable, under the Jones Act and the Federal Employers' Liability Act, for injury to a seaman arising from the negligence of a servant acting beyond the scope of his employment. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

6. Appeal and error ⇐977(3)

Appellate court will reverse an order granting a new trial only on a clear showing of abuse of discretion.

7. Master and servant ⇐287(7)

What acts are within the scope of the employment is a "question of law."

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

8. Master and servant ⇐87

The Federal Employers' Liability Act must be construed liberally to fulfill the purposes for which it was enacted. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

9. Seamen ⇐29(3)

Where seaman sustained injuries when he slipped on orange peel on a stairway in ship, the eating of fruit and disposal of the peelings by the fellow seamen on the deck and stairway were acts within the "scope of their employment", for which the shipowner was liable. Jones Act, 46 U.S.C.A. § 688; Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

See Words and Phrases, Permanent Edition, for all other definitions of "Scope of Employment".

10. Seamen ⇐29(3)

Where seaman sustained injuries from slipping on an orange peel on a stairway in ship, fact that throwing of peel on deck and stairway, was contrary to regulations would not make the act one not within the "scope of fellow seamen's employment", so as to relieve the shipowner from liability. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60; Jones Act, 46 U.S.C.A. § 688.

11. Master and servant ⇐185(24)

An employer is liable for acts of his employee within the scope of the employment, notwithstanding they are done in violation of rules.

12. Seamen ⇐29(5)

In action against shipowner for injuries sustained when seaman slipped on orange peel on stairway in ship, seaman made out a prima facie case when he introduced evidence from which jury could infer that presence of peel was due to an act of negligence of a fellow seaman, and it was for the employer to go forward with evidence tending to prove facts which would take the act outside the scope of the fellow seamen's employment. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60; Jones Act, 46 U.S.C.A. § 688.

13. Trial ⇐285

Courts will not consider an instruction as merely an abstract statement of legal principles, but will measure it by the circumstances of the case in which it was given.

14. New trial ⇐41(3)
Trial ⇐252(11)

In action against shipowner for injuries sustained when seaman slipped on an orange peel on a stairway in ship, in absence of evidence that presence of peel on stairway was due to some act without the scope of fellow seamen's employment, failure to instruct that the negligent act of the fellow seaman in causing the peel to be on the stairway must have been committed in the course of his employment was not error, or, if error, was not so prejudicial as to authorize grant of new trial. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60; Jones Act, 46 U.S.C.A. § 688; Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by O. D. Adams against American President Lines, Limited, for personal injuries. From order granting defendant's motion for a new trial after jury returned a verdict for plaintiff, plaintiff appeals.

Order reversed.

Prior opinion 140 P.2d 47.

John J. Taheny, of San Francisco, for appellant.

Treadwell & Laughlin, of San Francisco, for respondent.

SHENK, Justice.

The plaintiff, a seaman, sought to recover damages for the alleged negligence of his employer, under the Federal Employers' Liability Act, 45 U.S.C.A., §§ 51–60, which is made applicable to seamen by the Jones Act, 46 U.S.C.A. § 688. The jury returned a verdict in favor of the plaintiff in the sum of $1,750. The trial court granted the defendant's motion for a new trial. The plaintiff appealed from the order.

[1] The order granting a new trial specified, as the sole grounds therefor, errors of law occurring at the trial and excepted to by the defendant. In the absence of the specification of insufficiency of the evidence to support the verdict, we are precluded from considering the question whether the evidence was sufficient to sustain the verdict unless it was without conflict and insufficient as matter of law. Code Civ.Proc. sec. 657; Pitt v. Southern Pac. Co., 121 Cal. App. 228, 9 P.2d 273; Springer v. Sodestram, 54 Cal.App.2d 704, 129 P.2d 499. The evidence was conflicting on the issue of the employer's negligence, and it cannot be said to be insufficient as matter of law. Under the rule, therefore, we must accept the following facts as fully supported by the evidence:

The plaintiff, 39 years of age, was employed as a seaman on defendant's passenger vessel, The President Pierce, making a trip from San Francisco to the Orient and return between April 4 and May 26, 1941. On May 22d, on the return voyage, while acting in the course of his employment, the plaintiff was ascending a stairway from D deck to C deck with a case of canned goods on his right shoulder. He was holding the railing with his left hand. At the fourth or fifth step from the top his foot slipped on an orange peel which he did not observe until later, and he fell forward. He extended his right hand to guard his face from contact with the stair, and in doing so the case of canned goods fell on his right hand, severely injuring two fingers, one of which was almost severed. Only officers and members of the crew used that particular stairway, which was inside the ship and inaccessible to passengers, or to anything which could or might have been discarded by passengers from B deck. The stairway

was not fully lighted. The top light was placed on C deck about five feet from the entrance to the stairway, and the rays from that light and from the light near the bottom did not shine directly on the stairs where the plaintiff fell. There was evidence that it was a daily custom for members of the crew to foregather on C deck about or near the stairway after meals and, while standing around talking, to eat oranges taken from a pan of fruit placed in the messroom at meal times for their consumption. It was a common thing for them to discard the peels of the fruit on the deck or to aim for but miss the garbage receptacle maintained for their use on C deck near the head of the stairway. It was not unusual for the plaintiff and other members of the crew to pick up fruit peels, cigaret butts and the like from C deck near or on the stairway and place them in the garbage receptacle. There was no direct evidence, however, as to how the orange peel on which the plaintiff slipped happened to be on the stairway.

[2-5] Recovery of damages by an employee under the Jones Act is predicated, on negligence of the employer. The Federal Employers' Liability Act abrogates the common law rule that an employee must bear the risk of injury or death through the fault or negligence of a fellow servant, and applies the principle of respondeat superior to impose liability on the employer. Jamison v. Encarnacion, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082. Before the plaintiff may recover damages for the negligence of the employer's servant, he must show that the act of negligence was committed within the scope of the servant's employment. The master is not liable for injury to a seaman arising from the negligence of a servant acting beyond the scope of his employment. In re Southern Pac. Co., D. C., 30 F.2d 723.

On the hearing of the motion for a new trial the defendant's only contention was, and it is now contended, that the trial court committed prejudicial error in omitting from certain "formula" instructions the element that the negligent act of the member of the crew causing the orange peel to be on the stairway must have been committed in the course of his employment. In granting a new trial the court was apparently of the opinion that the omission was error which resulted in a miscarriage of justice. Sec. 4½, art. VI, Cal.Const.

The court by separate instructions limited the plaintiff's right to a recovery only in case the negligent act of a crew member was committed within the scope of his employment. But it is unnecessary in this case to consider whether the omission from the criticized formula instructions was cured by such other instructions.

[6, 7] It has been said that an appellate court will rarely disturb an order granting a new trial and then only on a clear showing of abuse of discretion. Scott v. Times-Mirror Co., 178 Cal. 688, 174 P. 312; Campanella v. Campanella, 204 Cal. 515, 522, 269 P. 433. If applying the claimed erroneous instructions to the facts, it be disclosed that no error was committed, the order granting a new trial was improper. Springer v. Sodestrom, supra. Such will be the result here if it must be said that under the evidence presented, the fellow employee, when he discarded the orange peel on the stairway, was acting within the scope of his employment. The question of what acts are within the scope of the employment is one of law.

The problem may be resolved by the application of what is considered within the scope of employment when the actor in that employment is the applicant for redress or compensation for injuries arising out of the employment. Cases under workmen's compensation laws are typical.

In Whiting-Mead Commercial Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 1106, 5 A.L.R. 1518, this court approved a rule derived from the consideration of other decisions and which was stated to be: "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents." The rule was applied in that case to a situation where the employee temporarily ceased his labor and struck a match for the purpose of lighting a cigaret which ignited a turpentine saturated bandage on his hand.

The rule that necessary incidents of life do not necessarily suspend the employer-

employee relationship has been applied in cases where the employee was required to sleep or otherwise remain on the premises of the employer. In Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744, 745, this court stated the general rule to be that when the contract of employment required that the employee sleep on the premises of the employer, he should be considered to be performing services growing out of and incidental to the employment during the time he was on the premises of the employer; and determined that the rule applied where "the employer places the employee in such circumstances that his time is never his own, where he has no discretion as to where he shall sleep and where he shall eat. Under such circumstances the workman must be considered in the employ of the employer all of the time, or at least performing a service which is incidental to the employment he is engaged in." In Union Oil Co. v. Industrial Acc. Comm., 211 Cal. 398, 295 P. 513, the rule was said to apply even though the employee was not at work at the time.

In Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089, the employee was required to live on the employer's premises. She suffered injury while she was in her own room engaged in shortening a street dress she was wearing. It was determined that the injuries occurred in the course of and arose out of the employment. Many other cases to similar effect were reviewed by the court in that case. In Zurich General Accident & Liability Ins. Co. v. Brunson, 9 Cir., 15 F.2d 906, 908, the employee was eating luncheon on the side of a precipitous mountain where he had been engaged in clearing land for a lumber company. It was held that an injury suffered during that period of relaxation was compensable as an injury sustained in the course of the employment. The court said: "Necessary incidents of life enter into the employment and do not suspend the relation * * *, including eating lunch on the premises. * * *"

[8] That the foregoing principles apply to a seaman while on the vessel on which he is employed becomes obvious. His employment requires him to spend his entire time on the vessel while it is at sea. His time is never wholly his own. On his hours off he is subject to call to duty in an emergency. Necessary incidents of life, therefore, such as sleeping, eating, washing, etc., are contemplated to be within the scope of the employment. It has been said that the Federal Employers' Liability Act must be construed liberally to fulfill the purposes for which it was enacted. Jamison v. Encarnacion, supra. In compliance with the injunction of liberal construction, the foregoing principles have heretofore been applied in defining what is the scope of employment intended by the act.

In States S. S. Co. v. Berglann, 9 Cir., 41 F.2d 456, 457, a seaman crossed the well deck to get water to wash with after the day's work. He was injured on his return. The court said: "The employment of a seaman includes not only the performance of the physical tasks required of him, but also includes the performance of such ordinary tasks for his own comfort and convenience as are incident to and necessarily connected with the employment."

In Meyer v. Dollar S. S. Line, 9 Cir., 49 F.2d 1002, it is stated that a seaman is in the service of the ship, that is, in the line of duty, at all times he is subject to call, even when off duty. The court noted an exception to the rule when the seaman engaged in good natured scuffling and, by his own volition, created an extraneous circumstance.

In Wong Bar v. Suburban Petroleum Transport, Inc., 2 Cir., 119 F.2d 745, it was said that a seaman is in the course of employment until he has left the place of employment.

[9] It follows that in the present case the eating of fruit and disposal of the peelings on the deck were acts within the scope of the seaman's employment as matter of law unless the jury could find from the evidence that the throwing of the orange peel was the result of some extraneous circumstance.

[10, 11] The defendant makes two contentions bearing upon the claimed extraneous nature of the occurrence. It is contended that the act of throwing the peel on the deck was contrary to regulations and in disobedience of orders. If that was so, the fact does not change the character of the act as one within the scope of employment. The rule is that an employer is liable for acts of his employee within the scope of the employment notwithstanding they are done in violation of rules,

orders or instructions. Ruppe v. City of Los Angeles, 186 Cal. 400, 402, 199 P. 496; Johnson v. Monson, 183 Cal. 149, 190 P. 635; 35 Am.Jur., p. 993, sec. 559.

[12] The defendant's second contention in this respect is that the omission of the disputed element from the quoted instructions deprived it of the benefit of any inference which the jury might have drawn that the presence of the peel on the stairway was the result of malice or scuffling, and that the omission was therefore prejudicial. As we have noted, there was no direct evidence as to how the orange peel came to be on the stairway. The plaintiff met the requirements of proof on his part when he introduced evidence from which the jury properly could infer that the presence of the orange peel was due to an act of negligence within the scope of employment. He was not required to negative any defense by which the defendant might successfully rebut his prima facie case. Rather it was for the defendant to go forward with evidence tending to prove that the presence of the orange peel was due to the perpetration of some act of malicious mischief or good natured scuffling which would take the act outside the scope of the employment. Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 721, 195 P. 398, 16 A.L.R. 275; Kruse v. White Brothers, 81 Cal. App. 86, 253 P. 178. No such evidence was introduced, and in the absence thereof, the evidence may not be said to support a reasonable inference that the act was without the scope of the employment.

[13, 14] Standing alone as a statement of an abstract principle of law, it is true that the instructions complained of omitted an element essential to recovery under the Jones Act. But while an instruction gives the law of the case to the jury, its applicability and correctness cannot be divorced from the evidence in the case. The courts will not consider an instruction as merely an abstract statement of legal principles. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P. 1109; Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388. It must be measured by the circumstances of the case in which it was given. So measured in the present case the conclusion follows that the omission in the instructions complained of was not error, or, if error, was not prejudicial as matter of law, and that the trial court abused its discretion in granting the defendant's motion for a new trial.

The order granting a new trial is reversed.

GIBSON, C. J., CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.



23 Cal.2d 676

In re WAITS' ESTATE.

In re MILLER'S ESTATE.

ATCHISON, T. & S. F. RY. CO. v. LEET (two cases).

S. F. 16906, 16907.

Supreme Court of California.

Feb. 10, 1944.

1. Executors and administrators ⇐10

Generally, courts of a state other than that in which decedent was domiciled cannot appoint administrator of his estate, if there are no assets thereof within jurisdiction.

2. Executors and administrators ⇐12

A cause of action for wrongful death, enforceable by decedent's personal representative within jurisdiction of probate court of another state than that of decedent's domicile, is an "asset" within such jurisdiction, so as to entitle such court to appoint administrator of decedent's estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Asset".

3. Executors and administrators ⇐11

An administrator of decedent's estate may be appointed to enforce cause of action for decedent's death under Federal Employers' Liability Act, though there are no other assets of decedent in jurisdiction of court making appointment. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and servant ⇐253

A suit against carrier under Federal Employers' Liability Act may be brought by aggrieved party in any state wherein car-

rier does business. Federal Employers' Liability Act § 6, 45 U.S.C.A. § 56.

5. Executors and administrators ⇐11

An estate must exist before an administrator can be appointed.

6. Executors and administrators ⇐11

Since only administrator of decedent's estate can enforce cause of action under Federal Employers' Liability Act for decedent's wrongful death, such cause of action is "estate" justifying administrator's appointment in state wherein such action may be brought. Probate Code, § 301; Code Civ.Proc. § 1913; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Estate".

7. Death ⇐11

Any cause of action arising in consequence of a person's death is independent of any other cause of action which deceased might have.

8. Executors and administrators ⇐11

The fact that cause of action matures concurrently with a person's death does not mean that no administrator of his estate should be appointed to enforce it.

9. Executors and administrators ⇐11

Any assets controlled by administrator of decedent's estate, such as cause of action for decedent's wrongful death, should be regarded as an "estate" within statute authorizing appointment of administrator of decedent's estate.

10. Death ⇐31(3)

A cause of action for wrongful death is vested exclusively in deceased's personal representative.

11. Executors and administrators ⇐11

A debt will be regarded as "asset" of deceased creditor's estate in whatever jurisdiction debtor is subject to suit therefor.

12. Executors and administrators ⇐12

A cause of action against carrier under Federal Employers' Liability for wrongful death of employee residing in another state has situs in county wherein carrier does business for purposes of administration of decedent's estate. Probate Code, § 301; Federal Employers' Liability Act § 6, 45 U.S.C.A. § 56.

In Bank.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

In the matters of the estates of Frederick Albert Waits and Ivan R. Miller, deceased. From orders denying motions by the Atchison, Topeka & Santa Fe Railway Company to set aside the appointment of Charlotte E. Leet, as administratrix of the estates, the Railway Company appeals.

Affirmed.

For prior opinions, see, Cal.App., 140 P.2d 857; 140 P.2d 860.

J. C. Gibson, Leo E. Sievert, H. K. Lockwood, and L. W. Butterfield, all of Los Angeles, for appellants.

Hildebrand, Bills & McLeod, of Oakland, and Louis H. Brownstone, of San Francisco, for respondents.

TRAYNOR, Justice.

Petitioner, the Atchison, Topeka & Santa Fe Railway Company, appeals from two orders denying motions to set aside the appointment of Charlotte E. Leet as administratrix of the estate of Ivan R. Miller and of the estate of Frederick Albert Waits. These appeals have been consolidated because they involve substantially the same facts and the same legal question. The petitions for letters of administration were filed in the Superior Court of Alameda County on August 15, 1942. The petition in the Miller estate alleged that Ivan R. Miller was a resident of Albuquerque, New Mexico, where he died, and that "it is necessary that an Administratrix be appointed in order to prosecute a claim for damages against said Atchison, Topeka and Santa Fe Railroad Co., for the death of said deceased, under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.; that under the provisions of said act, such suit, although prosecuted in the name of the Administratrix, is for the benefit of the mother of said decedent, and that any recovery in such action belongs to the mother of said decedent as his heir at law, and is not a part of the estate of said decedent. * * *" The petition also alleged that the foregoing claim is the sole estate of said decedent. The allegations of the petition in Estate of Waits were identical, except that there it appeared that Frederick Albert Waits, who died in Albuquerque, New Mexico, was a resident of

Navajo County, Arizona, and that any recovery under the liability act would be for the benefit of his wife and minor son. On September 18, 1942, these petitions were granted, and letters of administration were issued to Charlotte Leet. On October 3, 1942, in the Contra Costa County Superior Court, Charlotte Leet, as administratrix of the Estate of Ivan R. Miller, brought suit against petitioner for negligently causing the death of Miller. On the same date she brought a similar action against petitioner for causing the death of Waits. On October 15, 1942, petitioner moved to set aside the appointment of respondent as administratrix. On January 4, 1943, both motions were denied.

Petitioner contends that the probate court lacked jurisdiction to appoint respondent as administratrix. This contention must be sustained unless the cause of action for wrongful death can be regarded as "estate" within Alameda County, for the Probate Code authorizes administration only in the county in which the decedent was a resident, or where he left estate. Prob.Code, § 301.

[1-3] It is generally recognized that the courts of a state other than that in which the decedent was domiciled cannot appoint an administrator if there are no assets within the jurisdiction. See 21 Am.Jur. 395; Restatement, Conflict of Laws, § 467. It is also generally recognized that a cause of action for wrongful death, which is enforceable within the jurisdiction, and which the personal representative is charged with enforcing, is such an asset. State v. Probate Court, 149 Minn. 464, 184 N.W. 43; Lancaster & Wallace v. Sexton, Tex.Civ. App., 245 S.W. 958; Southern Pac. Co. v. De Valle Da Costa, 1 Cir., 190 F. 689, 111 C.C.A. 417; Jordan v. Chicago & Northwestern Ry. Co., 125 Wis. 581, 104 N.W. 803, 1 L.R.A.N.S. 885, 110 Am.St.Rep. 865, 4 Ann.Cas. 1113; McCarron v. New York Cent. R. Co., 239 Mass. 64, 131 N.E. 478; Lund v. City of Seattle, 163 Wash. 254, 1 P.2d 301; Berry v. Rutland Railroad Co., 103 Vt. 388, 154 A. 671; In re Mayo's Estate, 60 S.C. 401, 38 S.E. 634, 54 L.R.A. 660; Howard v. Nashville, C. & St. L. Ry. Co., 133 Tenn. 19, 179 S.W. 380, L.R.A.1916B, 794, Ann.Cas.1917A, 844; see 3 Beale, Conflict of Laws 1935, p. 1457 et seq.; 21 Am.Jur. 396; 59 A.L.R. 92; Restatement, Conflict of Laws, § 467. It has thus frequently been held that an administrator may be appointed to enforce a cause of action for death under the Federal Employers' Liability Act even though there are no other assets in the jurisdiction. State v. Probate Court, supra; Lancaster & Wallace v. Sexton, supra; McCarron v. New York Cent. R. Co., supra; Howard v. Nashville, C. & St. L. Ry. Co., supra.

[4-6] The Federal Employers' Liability Act authorizes suit by the aggrieved party in any state where the carrier does business. 45 U.S.C.A. § 56; Miles v. Illinois Central R. Co., 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129. Since a suit requires the appointment of a personal representative (American R. R. Co. v. Birch, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879), which is ordinarily allowed to sue only in the state of his appointment (see Code Civ. Proc. § 1913), refusal to appoint an administrator in a state where suit is authorized by the act would nullify the very right the act grants. See Howard v. Nashville, C. & St. L. Ry. Co., supra. An estate must exist before an administrator can be appointed, for if there were no estate there would be no function for the administrator to perform. See Restatement, Conflict of Laws, comment to § 467. Enforcement of a cause of action for wrongful death under the Federal Employers' Liability Act is a function that can be performed only by the administrator, and such a cause of action should therefore be regarded as an estate justifying his appointment.

[7-9] Petitioner relies on language in Michigan Central Railway Co. v. Vreeland, 227 U.S. 59, 68, 33 S.Ct. 192, 57 L.Ed. 417, Ann.Cas.1914C, 176, to the effect that the cause of action provided by the act is independent of any other that the deceased might have. This reasoning applies to any cause of action consequent to the death of the decedent such as a cause of action for the payment of life insurance on a policy executed for the benefit of the estate. If a cause of action matures concurrently with the decedent's death, it does not follow that no administrator should be appointed to enforce it. Petitioner relies also on language in Lindgren v. United States, 281 U.S. 38, 41, 50 S.Ct. 207, 74 L.Ed. 686, to the effect that the cause of action under the act is not part of the estate of the deceased, and on similar statements in Ruiz v. Santa Barbara Gas, etc., Co., 164 Cal. 188, 128 P. 330; Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A.L.R. 509, and Costa v. Superior Court, 137 Cal. 79, 69 P. 840, concerning the

California wrongful death statute. In the Lindgren case, however, the court held merely that no suit could be brought under the act unless one of the designated beneficiaries survived. In Ruiz v. Santa Barbara it was held only that a special administrator could commence and maintain an action under the California statute, and that the general administrator could subsequently be substituted as plaintiff. In making the statement on which petitioner relies, the court was concerned only with the fact that the cause of action for wrongful death is for the benefit of persons who may not necessarily share in the remainder of the estate. The other California cases cited were likewise concerned with the fact that the cause of action for wrongful death is for such statutory beneficiaries and that the recovery is divided according to principles other than those ordinarily governing decedents' estates. In these respects the cause of action for wrongful death differs from most of the assets constituting the estate, but it resembles such assets in being held by the administrator and enforced by him on behalf of the beneficiaries. This resemblance is significant. Any assets controlled by the administrator should be regarded as an estate within the meaning of the code section authorizing the appointment of the administrator.

[10-12] Petitioner contends that the situs of a debt is properly the domicile of the creditor, and that even if this cause of action is regarded as an estate it does not have its situs in Alameda County. The cause of action for wrongful death, however, is vested exclusively in the personal representative of the deceased (American R. Co. v. Birch, supra), and the logical result of this contention would be that this cause of action had no situs until an administrator was appointed. An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it. It has therefore been widely held that a debt has its situs at the domicile of the debtor for purposes of administration, since it may be necessary to sue him there and to have an administrator appointed to bring suit. See 3 Beale, Conflict of Laws (1935), p. 1452; see 23 Minn.L.Rev. 221. By the same reasoning a debt will be regarded as an asset wherever the debtor is subject to suit. New England Mutual Life Ins. Co. v. Woodworth, 111 U.S. 138, 4 S.Ct. 364, 28 L.Ed. 379; Equitable Life Assurance Soc. v. Vogel's Executrix, 76 Ala. 441, 52 Am.Rep. 344; see 23 Minn.L.Rev. 221. The Federal Employers' Liability Act makes defendant subject to suit on this cause of action wherever defendant does business. Since defendant does business in Alameda County the cause of action has a situs in Alameda County for purposes or administration.

The orders are affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concur.



63 Cal.App.2d 102

KINKLE v. FRUIT GROWERS SUPPLY CO.

Civ. 6872.

District Court of Appeal, Third District, California.

Feb. 29, 1944.

1. Logs and logging ⇐10(3)

In action for balance due for cutting and hauling logs, evidence that defendant did not use proper method of measurement and that, although plaintiff's check scale only covered about 1/18th of logs hauled, plaintiff was prevented from scaling greater proportion of logs by ignorance of defendant's error, assurance that error would be remedied, and mingling of logs, authorized recovery based on plaintiff's check scale.

2. Contracts ⇐284(4)

Where parties expressly agree to abide by quantity, quality or value of property or services to be determined by specifically designated party, his judgment or estimate thereof may be binding in absence of fraud or mistake.

3. Contracts ⇐291

A mistake which will justify rejection of arbiter's decision is not a mere error in judgment, but must amount to actual or constructive fraud.

4. Logs and logging ⇐10(1)

Under contract for cutting and hauling logs, providing that correct scale should be made by defendant's scaler according to certain rule, that check scale might be made at any time on demand of either party, and that defendant should cause daily record to be furnished to plaintiff, measurements of defendant's scaler, not made in accordance with agreed rule, were not conclusive.

5. Accord and satisfaction ⇐25(1)

The doctrine of accord and satisfaction, as defined by the Civil Code, is ordinarily available as defense only when it is specially pleaded. Civil Code, §§ 1521–1523.

6. Accord and satisfaction ⇐26(1)

When complaint is based on common count and payment on account of claim sued on is alleged and evidence of payment is received without objection, defense of accord and satisfaction may be available without special plea thereof. Civil Code, §§ 1521–1523.

7. Accord and satisfaction ⇐26(3)
Compromise and settlement ⇐23(3)

In action for balance due for cutting and hauling logs, evidence did not establish defense of accord and satisfaction, based on plaintiff's acceptance and cashing of checks bearing statement that they were in full receipt for indebtedness shown by reports rendered, where defendant was using improper method for measuring logs hauled. Civil Code, §§ 1521–1523.

8. Accord and satisfaction ⇐1
Appeal and error ⇐1001(1)

The question of existence of accord and satisfaction depends on mutual intention, and unless there is a lack of evidence to support finding of jury or decision of trial court, determination of that issue will not be disturbed on appeal. Civil Code, §§ 1521–1523.

9. Account stated ⇐8, 19(3)

An account stated is not absolutely conclusive but merely furnishes prima facie evidence of accuracy, and may be impeached by fraud, omission or mistake.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action by E. A. Kinkle against the Fruit Growers Supply Company for the balance due for cutting and hauling logs for defendant. From a judgment for plaintiff, defendant appeals. A motion to dismiss the appeal was denied, 53 Cal.App.2d 706, 128 P.2d 420.

Affirmed.

Farrand & Farrand, and Leonard B. Slosson, Tebbe & Correia, for appellant.

Huston, Huston & Huston and Daniel Dennis, J. Everett Barr, for respondent.

THOMPSON, Justice.

The plaintiff brought suit on a contract for the balance due to him for cutting and hauling logs from defendant's timber land at an agreed price per thousand board feet, together with damages resulting from forced delay in fulfillment of the contract. The answer admits that defendant owes plaintiff the sum of $7,359.55 which was withheld by the defendant pending the litigation, as a guaranty of faithful performance. There is no controversy regarding the last mentioned sum. The cause was tried with a jury. Judgment was rendered in favor of the plaintiff, on account of discrepancies in defendant's measurements of logs, in the sum of $6,777.30, together with damages in the further sum of $376.60, and said withheld amount. From that judgment this appeal was perfected.

The defendant is a corporation engaged in cutting and manufacturing timber. It owns timber land in Siskiyou County, California, upon which there was a large stand of fir, pine and cedar trees. The corporation maintained a mill pond at Hilt, some distance from the lumber camp, to which the logs were hauled and into which they were dumped. The plaintiff is a contractor who has had many years of experience cutting and logging timber. October 18, 1937, he executed, as party of the second part, a written contract with the defendant to cut and deliver at the mill pond at Hilt 12,000,000 board feet of fir, pine and cedar logs within a specified time, for the agreed price of $9.00 per thousand feet for fir and cedar and $9.75 per thousand feet for sugar or ponderosa pine. The answer concedes that the defendant cut and hauled, pursuant to contract, 14,718,950 board feet of logs. The plaintiff contends that the defendant failed to measure the logs according to Scribner's Decimal "C" Scale Rule, as required by the contract, and that defendant's erroneous measurements deprived plaintiff of credit to

which he is entitled for delivery of logs, containing in excess of 1,000,000 feet of lumber more than the defendant's reports concede. Having learned of defendant's erroneous measurements, the plaintiff procured expert lumber checkers to measure numerous loads of logs after their delivery at the Hilt mill pond, and compared the results with defendant's reports upon the same logs. From plaintiff's check scaling of logs it was estimated that he cut and delivered logs containing in the aggregate over 15,894,000 feet of lumber. The jury returned a verdict in favor of plaintiff on that issue of erroneous measurements, equivalent to a sum, based on a shortage of only 753,000 feet of lumber, at the minimum price of $9 per thousand. The verdict was for $6,777.30.

The contract contains the following provisions:

"4. A correct scale of the logs so delivered shall be made at the first party's mill pond at Hilt, California, before the logs are placed in the pond. Scribner's Decimal 'C' scale rule is to be used in the measurement of the logs, and will be scaled by a scaler in the employ of the first party, fifty-five percent of whose salary shall be paid by the first party, and the other forty-five percent will be paid by the contract loggers according to percent of logs delivered by each.

"5. * * * Said first party hereby agrees to cause a daily record to be kept of the loads delivered at its said mill pond, which records shall be furnished daily to second party by said first party; and a check scale may be made at any time upon the demand of either party to this agreement.

"Said first party hereby agrees to pay said second party for all logs properly felled, bucked, limbed and delivered in accordance with the terms and specifications of this agreement * * *."

The appellant contends that (1) the plaintiff is bound by the terms of the contract to the measurements of logs by the corporation's scaler, (2) the court erred in rendering judgment for total shortage of lumber based on an estimate derived from check scaling only a comparatively small proportion of the logs, (3) the acceptance and cashing of checks in payment for delivery of logs in accordance with accompanying reports constituted an accord and satisfaction, (4) failure to object to defendant's statements rendered, resulted in accounts stated which bars the plaintiff from disputing the measurements of logs contained therein, and (5) the evidence fails to support the implied findings of the jury or the judgment of the court with respect to the balance due plaintiff.

[1] The judgment is adequately supported by the evidence. The defendant's checker admitted that he did not conform to the Scribner's Decimal "C" Scale Rule as it was defined by other expert scalers. There is evidence that defendant's method of scaling logs resulted in a loss to plaintiff of a sum in excess of the amount of the judgment on that issue as a result of measurements in conflict with said agreed rule. The actual measurements of logs by expert scalers employed by plaintiff showed a loss of 63,540 feet of lumber as compared with defendant's reports of those same logs. An estimate of total shortage on the same ratio far exceeds the amount for which judgment was rendered on that account. The plaintiff did not discover the defendant's uniform shortages in measurements of logs until he had delivered a large quantity of logs in the spring of 1938. When he reported those discrepancies to defendant's superintendent he assured him that the corporation would adjust all such errors. Relying upon that assurance, the plaintiff continued to deliver logs. The plaintiff actually measured about ⅛th of all logs, but was prevented from measuring a greater proportion of them because they were dumped into the mill pond and mingled with other logs before he had the opportunity to do so.

[2-4] It is true that where the parties, by the express terms of their contract, agree to abide by the quantity, quality or value of property or of services to be determined by a specifically designated party, his judgment or estimate thereof may be binding, in the absence of fraud or mistake. California Sugar & White Pine Agency v. Penoyar, 167 Cal. 274, 279, 139 P. 671; American-Hawaiian Engineering & Construction Co. v. Butler, 165 Cal. 497, 513, 133 P. 280, Ann.Cas.1916C, 44; Moore v. Kerr, 65 Cal. 519, 4 P. 542; 12 Am.Jur. 898, § 342; 46 A.L.R. 864, note. A mistake which will justify a rejection of an arbiter's decision is not a mere error in judgment, but, on the contrary, it must amount to actual or constructive fraud. California Sugar & White Pine Agency

v. Penoyar, supra. In the present case, however, the contract does not provide that the estimates of defendant's scaler shall become conclusive. It specifically provides that "a correct scale of the logs so delivered shall be made" according to the customary "Scribner's Decimal 'C' Scale Rule"; that a "check scale may be made at any time upon the demand of either party" and that the defendant Company shall "cause a daily record to be kept * * * which record shall be furnished daily to second party."

Mr. Bert A. Mitchell, who was in the employ of the defendant Company, scaled the logs. He violated the contract by measuring the logs contrary to the agreed Scribner's Decimal "C" Scale Rule, to the plaintiff's detriment. That rule required the actual measurement of logs showing a fraction above one-half inch to be accepted as an added full inch. Mr. Harrison, an expert scaler of logs having had thirty-five years of experience in that business, testified that the rule requires that "anything a half inch or under in diameter is scaled as the next inch below; anything over a half inch is scaled as the next inch above." Mr. Mitchell, however, admitted that he did not follow that rule, but asserted that he gave his employer the benefit of the fraction when the logs scaled below three-quarters of an inch. He said in that regard:

"Q. Now, Mr. Mitchell, * * * what was your practice as to whether you dropped fractions or went up to the next higher inch? A. Well, if it was up to the three-quarter inch, I would jump to the next figure.

"Q. If it was below the three quarter inch, what was your practice? A. If it was below that, I would drop back to the next inch."

Mr. William Simpson, logging superintendent of the Brisard Brockwood Pine Company at Lakeview, Oregon, who had thirty-two years' experience in the logging business, testified that the variance from the Scribner's Decimal "C" Scale Rule, as above stated, would result in a substantial loss to the logging contractor. He said it would make a difference of seventy lumber feet in one sixteen foot log forty inches in diameter. It was estimated that difference would amount to a loss of 5.7 per cent of the lumber contained in logs. On a contract involving over 15,800,000 board feet of lumber, at the minimum price of $9 per thousand, that percentage of difference would result in a loss far in excess of the amount of the judgment on that account. The judgment was rendered on that issue for the sum of $6,777.30. That figure represents only a loss of 753,000 feet of lumber at the minimum price of $9 per thousand. The foregoing evidence therefore supports the findings and judgment in that regard.

The plaintiff delivered only a comparatively few logs in the fall of 1937. He began delivery of larger quantities of logs at the mill pond at Hilt in the spring of 1938. In May and June of 1938, Leonard Shelton, an experienced logging man in the employ of plaintiff, watched the defendant's scaler measuring several carloads of logs, and charged that he failed to properly measure them. He informed the plaintiff of that fact. The plaintiff then became suspicious of the measurements and employed expert scalers to check the defendant's reports of the board feet of lumber contained in certain shipments. In comparing plaintiff's measurements with those of the defendant of twelve truck loads and two car loads of logs delivered in May and June, as shown by the statement thereof which was received in evidence, it was discovered defendant's measurements of nearly every load were short. The aggregate shortage in those loads amounted to 5,790 lumber feet. The plaintiff then complained of the shortages to Waldemar Holmberg, the manager and superintendent of defendant company, who repeatedly assured him, "If there's any difference in this scale, we will adjust it." With those assurances the plaintiff continued to deliver logs at the mill pond, but from time to time he measured a total number of fifty car loads and fifty-two truck loads of logs delivered prior to November 1, 1939, aggregating 852,280 board feet of logs, in which he found a total shortage of 63,540 feet of lumber. The defendant's reports allowed the plaintiff on those same loads of logs only 789,270 board feet of lumber, which resulted in a loss to plaintiff of over 7½ per cent. Estimated at that same rate he would sustain a loss on the entire 15,800,000 odd feet of 1185 thousand board feet of lumber. Figuring that estimated loss at the minimum sum of $9 per thousand, the result far exceeds the amount for

which judgment was rendered on that account. The judgment is therefore sustained by the evidence.

The appellant contends that there is no evidence justifying the jury in finding that there was any shortage in the scaling of the large proportion of logs which the plaintiff did not actually measure. In other words, the Corporation asserts there is no legal authority for applying the ratio of 7½ per cent loss, ascertained by plaintiff's check scaling of logs containing only 852,280 feet of lumber, to the much larger proportion of the logs which he did not actually measure. In support of that claim the appellant relies on the case of McCann v. Doherty, 98 Wis. 335, 73 N.W. 782, 783, in which it is said: "The test was made by scaling 710 logs taken promiscuously from different rolls, and they were found to contain 21,720 feet more than [was] represented by Gallagher's measurement. It was contended by counsel on the argument that, even if such shortage existed as to the 710 so rescaled, yet it did not follow that there would be a corresponding shortage on the 27,868 logs which were not rescaled; and some of us were impressed with such argument. But upon careful consideration we are forced to the conclusion that the verdict does not rest wholly upon such test. On the contrary, there was a number of other tests, and there was evidence tending directly to impeach the good faith of Gallagher's scale. The evidence of such tests was admissible. In fact, no objection appears to have been made to its admission. After being banked, the logs passed into the possession of the defendant, so as to render complete remeasurement by the plaintiffs very difficult, if not impossible."

The reasons for accepting the same proportionate ascertained shortage as the basis of loss with respect to the logs which were not actually rescaled, which are suggested in the McCann case, supra, also appear to exist in the present case. There is evidence in this case that plaintiff was not able to rescale the balance of the logs because they had been dumped in the mill pond and mingled with other logs; that the invariable shortage in all logs rescaled indicated a lack of good faith on the part of defendant's scaler; that the defendant violated the express terms of the contract by failing to follow the Scribner's Decimal "C" Scale Rule in measuring all logs. There is evidence to the effect that defendant's method of allowing plaintiff an additional inch in diameter measurements of logs only when they exceeded the three-fourths fraction would uniformly result in a loss of approximately 5½ per cent of the total amount of lumber contained therein. Applying that uniform percentage to the entire output of lumber, the result obtained from a mere mathematical calculation shows a total shortage far in excess of the board feet of lumber upon which the jury estimated its award, even at the minimum agreed price of $9 per thousand feet. There is therefore substantial evidence to support the verdict in that regard. We think the verdict is adequately supported with respect to the total shortage determined by the jury.

[5, 6] It is true that the doctrine of accord and satisfaction, as defined by Sections 1521–1523 of the Civil Code, is ordinarily available as a defense to an action only when it is specially pleaded. Berger v. Lane, 190 Cal. 443, 447, 213 P. 45; Russell v. Riley & Peterson, 82 Cal.App. 728, 256 P. 557; Wallace v. Crawford, 21 Cal. App.2d 394, 403, 69 P.2d 455; 1 C.J.S., Accord and Satisfaction, p. 551, § 47c. But, as an exception to that rule, when the complaint is based on a common count and payment on account of the claim sued upon is alleged therein and evidence of the payment in question is received without objection, as it was in the present case, the defense of accord and satisfaction may be available without a special plea to that effect. B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 177, 137 P. 624; Russell v. Riley & Peterson, supra; Wallace v. Crawford, supra. In the present case, while the defendant did not specially plead accord and satisfaction as a defense, the complaint alleged the payment, on account of the entire indebtedness due, of the sum of $138,608.12, and the defendant offered in evidence, without objection, the checks in question with proof of the endorsements thereon that "This voucher check will constitute a full receipt for the account stated on the voucher of corresponding number." That defense is therefore available to the defendant under the circumstances of this case.

[7] However, in spite of the defendant's reports of measurements of the logs which were periodically received by the plaintiff, and his acceptance and cashing of the checks in question, upon the backs of which there were printed the statement

that they were "in full receipt" for the indebtedness shown by the reports rendered, the record in this case contains substantial evidence of facts and circumstances adequately supporting the special findings of the jury that a controversy then existed between the parties regarding the correct measurements of the logs and the balance due to the plaintiff, and that he did not thereby intend to, nor did he, accept the payments as full compensation for the amount due to him under the contract.

[8] We are of the opinion there is adequate evidence of circumstances in this case to support the special findings of the jury and the judgment in favor of the plaintiff to the effect that his acceptance and cashing of certain checks and his receipt of reports of measurements of logs by the defendant did not constitute an accord and satisfaction precluding the plaintiff from recovering judgment for the balance found to be due to him on account of erroneous measurements. Hansen v. Fresno Jersey Farm Dairy Co., 220 Cal. 402, 31 P.2d 359; Wallace v. Crawford, supra; 23 R.C.L. 1445, § 269; 1 C.J.S., Accord and Satisfaction, p. 510, § 31c. The question as to whether the acceptance and cashing of checks in payment of installments of indebtedness on account of a series of numerous deliveries of logs under a contract continuing over a period of many months amounts to an accord and satisfaction, even though the checks contain the printed endorsement that they "will constitute a full receipt of the account stated on the voucher of corresponding number", depends on the circumstances of the transaction and the conduct of the parties. The question of the existence of an accord and satisfaction depends on the mutual intention of the respective parties, and unless there is a lack of evidence to support the finding of the jury or the decision of the trial court in that regard, their determination of that issue will not be disturbed on appeal. Everhardy v. Union Finance Co., 115 Cal.App. 460, 466, 1 P.2d 1024; Wallace v. Crawford, supra.

In the present case the evidence shows that the plaintiff discovered that the defendant was erroneously measuring the logs and called defendant's attention to that fact in May and June, 1938. The superintendent of defendant's corporation then assured plaintiff that any differences in measurements which might exist would be adjusted. That was notice that the plaintiff did not accept defendant's measurements of the logs. Plaintiff thereafter measured about one-eighteenth of the entire number of logs involved in the contract, and found that, in 852,280 board feet of logs, defendant failed to credit him with 63,540 feet of lumber. Upon evidence of that fact the jury estimated that the defendant erroneously failed to credit plaintiff with a total amount of some 753,000 board feet of lumber to which he was entitled and awarded him a judgment of $6,777.30 on that account. The logging enterprise and the delivery of logs under the contract extended over a period of at least two years. Pursuant to the contract the defendant reserved fifty cents per thousand on all logs delivered, aggregating a sum in excess of seven thousand dollars, to insure faithful performance of the contract, which sum was not paid to plaintiff. The reports and partial payments for logs delivered were made monthly. The transaction was not completed at the time plaintiff received the checks. The plaintiff claimed that he was forced to accept partial payments to enable him to finance his logging enterprise, and that he was assured the defendant would adjust all differences in measurements of logs.

Under proper instructions special issues were submitted to the jury upon questions regarding the facts involved in the asserted account stated and with respect to the claimed accord and satisfaction. Those issues were specifically determined against the defendant. The jury expressly found that a controversy existed between the parties regarding the measurements of the logs and the balance due to plaintiff. The jury also found that plaintiff did not accept defendant's reports as correct, and did not intend to acknowledge full payment and satisfaction of his claims by signing and cashing the checks in question. The court adopted those findings and rendered judgment accordingly.

It is true that the acceptance and cashing of checks in payment of indebtedness, upon which checks there is endorsed "This voucher check will constitute a full receipt for the account stated on the voucher of corresponding number", should be considered, and, under some circumstances, may be very persuasive evidence of stated accounts. Wallace v. Crawford, supra; 75 A.L.R. 905, note. But the authorities appear to hold those facts are not necessarily conclusive. 1 Am.Jur. 285, §

30. An account stated is based primarily on the question as to whether both parties intend the transaction to become a full and final settlement of the entire indebtedness represented thereby. That is usually a question to be determined by the jury or the trial court from all the circumstances of the case. We may not hold, as a matter of law, from the facts of this case, that the plaintiff intended to accept those payments as full compensation. He then had no knowledge of the fact that defendant's scaler had violated the contract by failing to measure the logs according to the Scribner's Decimal "C" Scale Rule. His conduct, declarations and measurements of a large number of logs, the frequent prior and subsequent controversies over the erroneous scaling of the logs and the instituting of this suit furnish substantial evidence refuting his acquiescence in defendant's reports and partial payments as a complete settlement of his claim. In the case of Budd v. Hough, 100 Cal.App. 103, 279 P. 1074, 1075, it is said with respect to the conclusiveness of an alleged account stated that: "As uniformly held, an account stated does not operate as an estoppel, but may be impeached for fraud or mistake; and if either of those elements [is plead], and the evidence adduced in support of the pleading proves that there has been any mistake, fraud, or undue advantage, by which the account is in truth vitiated, and the balance incorrectly fixed, the account is not conclusive upon the parties. Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; Vaughan v. County of Tulare, 56 Cal.App. 261, 205 P. 21; Gardner v. Watson, 170 Cal. 570, 150 P. 994; 1 Am. & Eng.Encyc. of Law (2d Ed.) 463."

[9] An account stated is not absolutely conclusive, but merely furnishes prima facie evidence of its accuracy. It may nevertheless be impeached by fraud, omission or mistake. Union Lumber Co. v. J. W. Schouten & Co., 25 Cal.App. 80, 142 P. 910; White v. Thompson, 40 Cal.App. 447, 180 P. 953; Vaughan v. County of Tulare, 56 Cal.App. 261, 268, 205 P. 21; Western Talc Co. v. Blaufuss, 25 Cal.App.2d 270, 77 P.2d 479; Green v. Thornton, 96 Cal. 67, 30 P. 965; 11 A.L.R. 597, note; 75 A. L.R. 1287, note.

In 1 American Jurisprudence, § 31, at page 286, it is said with respect to the conclusiveness of an account stated that: "An account stated may be impeached or opened and rectified for fraud, mistake, or error, unless, in arriving at the agreed balance, there has been some concession made upon items disputed between the parties so that the balance is the result of a compromise, or some act has been done or forborne in consequence of the accounting and in reliance upon it, which would put the party claiming the benefit of it in a worse position than if it had not been had, so as to bring the case within the principles of an estoppel in pais."

In the present case, while the plaintiff knew defendant's measurements of logs were inaccurate and wrong, he relied on the assurance that those errors would be adjusted, and he did not know when he accepted and cashed the checks in question that the defendant was violating the contract by its failure to measure the logs according to the Scribner's Decimal "C" Scale Rule, to his great detriment. That failure constituted constructive fraud, or at least mistake which rendered competent plaintiff's evidence impeaching the alleged conclusiveness of the asserted stated account.

Since there is substantial evidence supporting the special findings of the jury to the effect that there was a valid controversy between the parties and that the plaintiff did not accept and cash the checks with the intention of waiving his claim of violation of the contract and erroneous measurements of the logs, or as complete satisfaction of the balance due to him, we are bound by the findings of the jury in that regard. In 1 American Jurisprudence 271, § 15, it is said in that regard: "Under the general rule that if there is any credible evidence from which a reasonable inference can be drawn in support of the claim of either party, the question must be left with the jury, where different conclusions may reasonably be drawn by different minds from the same evidence as to whether an account is a mutual account, the question is one for the jury."

We conclude that the alleged stated account is not binding on the plaintiff so as to estop him from recovering the balance due to him on account of the errors, fraud or mistakes of the defendant.

The judgment for damages in the sum of $376.60, based on the second cause of action, is adequately supported by the evidence. It sufficiently appears that plaintiff's cutting and delivery of logs pursuant to the contract was delayed and prevented

during several periods of time in 1938 and 1939, by direction of the defendant, and that those delays required plaintiff to reconstruct and repair his logging roads at a cost in excess of the amount of that judgment.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.



62 Cal.App.2d 945

CAMINETTI, Insurance Commissioner of California, v. PRUDENCE MUT. LIFE INS. ASS'N.

Civ. No. 13918.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1944.

Hearing Denied April 13, 1944.

1. Insurance ⇐44

On application by an insurance company to set aside an order appointing insurance commissioner as conservator of the business of the company, burden of proof is on the company making the application. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

2. Trial ⇐296(13)

Error of trial court in placing burden of proof on insurance commissioner on application by insurance company to set aside order appointing insurance commissioner as conservator of its business was not ground for reversal, where court subsequently vacated such ruling and it did not appear that either party was prevented from producing all available evidence. St.1935, p. 541, § 1012; St.1937, p. 2563, § 1011.

3. Appeal and error ⇐931(1)

Reviewing court must presume, where trial court vacated its erroneous ruling on burden of proof, that court weighed and considered evidence in light of the proper rule.

4. Corporations ⇐298(5)

Rule that a corporate director is disqualified from voting on any matter in which he is interested was modified by statute validating certain contracts between corporation and its directors. Civ.Code, § 311.

5. Corporations ⇐308(10)

Trial court's approval of compromise whereby claim of officers and directors of corporation for back salary was settled must be upheld on ground that it was just and reasonable to corporation. Civ.Code, § 311.

6. Corporations ⇐308(2, 6)

An officer who renders beneficial service to corporation, without any lawful action of board of directors fixing compensation, but under circumstances negativing an intent that they were to be gratuitous, may recover reasonable value of services.

7. Corporations ⇐308(1)

Fact that books of association showed no claim of officers and directors for further compensation and that it did not appear that they made any express protest against amount received would not necessarily effect a waiver of right to compensation in excess of that received.

8. Corporations ⇐308(10)

Where payment to officer and director on compromise in respect to back salary when added to what he had already received for services covered by compromise resulted in receiving no more than reasonable value of those services, the compromise must be regarded as just and reasonable.

9. Appeal and error ⇐1008(1)

The question as to what is reasonable value of services rendered by officer and director of corporation is one of fact and the decision of trial court upon it is binding on reviewing court.

10. Evidence ⇐601(1)

Where services rendered are within common knowledge, the trial court or jury may fix the value of services without any expert testimony on that point.

11. Insurance ⇐56

Evidence consisting of testimony by officer and director of corporation that he rendered services for corporation as manager and secretary principally in promoting, getting agents and settling death claims was sufficient to warrant judgment of trial court approving compromise settlement in respect of claim for services.

12. Insurance ⇐44

On an application by an insurance company to set aside an order appointing insurance commissioner as conservator, the insurance company had burden of proving that the insurer could properly resume title and possession of its property and the conduct of its business as required by statute. St.1935, p. 541, § 1012.

13. Insurance ⇐44

Whether insurance company seeking to set aside an order appointing insurance commissioner as conservator of its property could properly resume title and possession of its property and conduct of its business as required by statute was primarily for discretion of trial court whose decision is binding unless without any support in evidence. St.1935, p. 541, § 1012.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

On rehearing.

Judgment affirmed.

Prior opinion, 142 P.2d 41.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, and Ralph H. Lewis, of Sacramento, for respondent.

SHAW, Justice pro tem.

Appellant, as Insurance Commissioner of the State of California, obtained from the Superior Court of Sacramento County an order under section 1011 of the Insurance Code, St.1937, p. 2563, appointing him as conservator of the business of the respondent, Prudence Mutual Life Insurance Association, and pursuant to this order took over its property and business. The respondent is a corporation organized to do life insurance business on the mutual benefit assessment plan. As soon as this order was made, the proceeding was transferred to Los Angeles County. Later, on application of respondent, a hearing was had under section 1012 of the Insurance Code, St.1935, p. 541, at the conclusion of which the Superior Court of Los Angeles County entered a judgment cancelling and terminating the former order, dissolving the conservatorship and directing the restoration to respondent of its property and business. From this judgment the Insurance Commissioner appeals.

[1-3] At the outset of the hearing the trial court was asked to rule upon the question where lay the burden of proof, and after extended argument it announced its opinion that the burden rested on the Insurance Commissioner. Appellant now complains of this as reversible error. The court's declaration of law was erroneous, for it is now settled that on application by an insurance company under section 1012 of the Insurance Code for the setting aside of an order made under section 1011 of that Code, the burden of proof is on the company making the application. Caminetti v. Guaranty Union L. Ins. Co., (1942) 52 Cal. App.2d 330, 337, 126 P.2d 159; Caminetti v. Imperial Mut. L. Ins. Co., (1943) 59 Cal. App.2d 476, 487, 139 P.2d 681. But this error does not in itself afford ground for a reversal, under the circumstances of this case. As a result of this declaration of the trial court the commissioner's evidence was produced first, but it does not appear that either party was prevented by it from producing all available evidence, or desired to or could obtain or present anything further. The hearing appears to have been a "full hearing," as required by section 1012 of the Insurance Code. After the taking of evidence, and just before the entry of judgment, the trial court made an order vacating the submission of the case and reopening it for the purpose of making and did make a further order vacating its ruling on the burden of proof and declaring that it had heard, considered and weighed all of the evidence of both parties and that "regardless of where the burden of proof lay, the decision of this court would not be affected." This order was made seven days after the filing of the first of the decisions on burden of proof above cited and we are informed by the briefs that it was made by reason of that decision. However that may be, it shows that the court vacated its ruling on the burden of proof. We must therefore presume, nothing now appearing to the contrary, that the court weighed and considered the evidence in the light of the proper rule as to the burden of proof. The only remaining effect of its former ruling is that the appellant was required to proceed first with the production of evidence. But an error in that respect does not ordinarily result in a miscarriage of justice, where all the evidence of both parties is

fully presented, and we think it did not here.

Section 1011 of the Insurance Code enumerates among the conditions, the existence of which affords ground for an order appointing the Insurance Commissioner as conservator of an insurance company, the following: "(d) That such person is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy holders, or creditors, or to the public. * * * (h) That any officer or attorney-in-fact of such person has embezzled, sequestered, or wrongfully diverted any of the assets of such person." The word "person" here, as elsewhere in the Code, by definition includes corporations and associations. The commissioner's application for the order in this case states as a ground therefor that two of the officers of respondent, Charles E. Fielder and his wife, Eunice H. Fielder, had wrongfully diverted assets of the association to themselves. While the ground provided in subdivision (d) of section 1011 is also stated in general terms in the application, the allegations regarding it are such as to make it dependent for support upon the allegations just referred to regarding the diversion of assets. The charge of diversion is based on the compromise and payment of claims for back salary made against the association by the Fielders. During the whole time covered by the inquiry Charles E. Fielder was a director and general manager of the association and also held either the office of president or that of secretary and his wife, Mrs. Eunice H. Fielder, was office manager and vice president and also a director. In February of 1931, 1932, 1933 and 1934, the board of directors of the association consisted of three persons, of whom Mr. and Mrs. Fielder were two, and in each of these months the board adopted a resolution fixing the salary of the "secretary and general manager" at $400 per month and another resolution fixing the salary of the "vice president and assistant secretary" at $200 per month. Apparently all the directors voted for all of these resolutions. The next action taken by the board of directors on officers' salaries was a resolution adopted on September 7, 1935, fixing the salaries of the officers at a maximum of $200 per month "during the existing emergency." In August, 1935, Mr. and Mrs. Fielder signed waivers of all unpaid salaries up to July 31, 1935. No further action regarding officers' salaries was taken up to the time of the compromises hereinafter mentioned. From July 31, 1936, to August 1, 1939, C. E. Fielder drew a salary of $200 per month and Mrs. Fielder drew a salary of $75 per month. On September 5, 1939, Mr. and Mrs. Fielder presented to the board of directors claims for back salaries, Mr. Fielder's for $5,000, and Mrs. Fielder's for $4,775, each of them also making an offer to compromise for $2,550. Mr. Fielder's claim covered the period from May, 1937 to August 3, 1939. On September 13, 1939, the board of directors, at a meeting at which Mr. and Mrs. Fielder and one other director were present, adopted separate resolutions, for which all the directors voted, authorizing the acceptance of these offers of compromise and the compromise of each of these claims for $2,550. Following these resolutions the amounts of the compromises were paid to Mr. and Mrs. Fielder.

The original salary fixing resolutions under which Mr. Fielder made his claim did not fix a salary for him personally, but merely fixed the salary of "the secretary *and* general manager." (Emphasis ours.) He held these two positions when the resolutions were adopted, but he ceased to be secretary and became president on November 3, 1937 and so remained until August 3, 1939. This interregnum extended over nearly the whole period of time for which he claimed back salary, and during it the salary fixing resolutions did not apply to him. No resolution fixing a salary for the president alone or for the general manager alone, or for both officers together, or otherwise fixing a salary for Mr. Fielder, during this interval, appears to have been passed. Hence the $2,550 payment made to him cannot be upheld as merely a payment of amounts due him under original salary fixing resolutions. Such a justification of the payment also appears doubtful by reason of the resolution limiting all salaries to $200 "during the existing emergency." This resolution did not specify the nature of the emergency, and the board never passed a resolution declaring it ended, except as the compromise resolution may have had that effect. The rightfulness of the payment to Mr. Fielder depends entirely on the validity of the compromise. The payment to Mrs. Fielder, however, was within the terms of the original salary fixing resolutions and needs no compromise to uphold it.

[4] The law in California formerly was that a director was disqualified from voting on any matter in which he was directly and personally interested and could not be one of a majority essential to the adoption of such a resolution. 6A Cal.Jur. 1107; Angelus Securities Corp. v. Ball, (1937) 20 Cal.App.2d 423, 432, 67 P.2d 152. That rule was somewhat modified by the adoption of section 311 of the Civil Code, which as it now stands declares that no contract or other transaction between a corporation and one of its directors, or between a corporation and any corporation, firm or association in which one of its directors is financially interested, shall be void or voidable by reason of the fact that such director is present at the meeting at which the contract or transaction is authorized or approved or that his vote is counted for that purpose, if (a) the fact of his interest is known to the board and the contract or transaction is authorized or approved "in good faith by a vote sufficient for such purpose" without counting that of such director, or (b) the contract or transaction is approved or ratified, with knowledge of the director's interest, by a majority of the shareholders, or (c) the "contract or transaction be just and reasonable as to the corporation at the time it was authorized or approved."

[5-7] We pass without discussion the possible application of subd. (a) and subd. (b) of section 311 to the compromise here, because we conclude that the trial court's approval of it must be upheld under subd. (c) on the ground that it was just and reasonable as to the corporation. An officer who renders beneficial service to a corporation, without any lawful action of the board of directors fixing his compensation, but under circumstances negativing an intent that they were to be gratuitous, may recover the reasonable value of those services. Bassett v. Fairchild, (1901) 132 Cal. 637, 64 P. 1082, 52 L.R.A. 611; King v. Grass Valley Gold Mines Co., (1928) 205 Cal. 698, 699, 272 P. 290. Here it is clear that the services were not intended to be gratuitous. The appellant contends that the Fielders both waived any compensation in excess of what they had already received, but we find nothing requiring such a conclusion. It is true the books of the association showed no claim for further compensation and it does not appear that they made any express protest against the amount received, but neither of these would necessarily effect a waiver. It does not appear that any of the payments were tendered or received as full payment.

[8-11] If the payment to Mr. Fielder on the compromise, when added to what he had already received for the services covered by the compromise, resulted in his receiving no more than the reasonable value of those services, the compromise must be regarded as just and reasonable. The question what is the reasonable value of services is one of fact, and the decision of the trial court upon it is binding here, even though we might be disposed to exercise a different judgment upon the evidence, unless we can say that upon no possible reasonable view of the evidence and the inferences to be drawn therefrom can the trial court's decision be supported. On rehearing we have carefully examined the transcript of the evidence, with special attention to the portions of it cited by the parties, and have concluded that we cannot say there is not sufficient support in it for the trial court's decision. Regarding his services Mr. Fielder testified:

"Q. Mr. Fielder, indicating the year 1939 as an example, will you tell the Court what services you rendered to the company during that time—that is, the services you rendered from day to day; what you did. A. It was almost impossible. My work would be principally in promoting, getting agents, settling death claims. In 1939, conditions were bad. The agents—it had been nosed around that we were going to transform from Chapter 8 to a Chapter 9, and everybody we approached to get to represent us would say, 'Oh, I will wait until you get your transformation and a new contract.' And there has been quite a lot of money and time, during the time we made application for transformation up to August of last year. So, the last year we were not in a position to write any new business, and I devoted all my time to trying to conserve the business that was on the books, or had failed to make their monthly payments, to come back and get them on.

"Q. During 1939 do you recall how much new business was written by the Company? A. Very little. * * *

"Q. How much of your time did you spend on this new business—roughly? A. Oh, I wouldn't write any—I wasn't writing anything myself. Most of that time I would go out, go to the records and get a

list of people that did not pay in this month, and go out and see what the trouble was.

"Q. You did not spend any time on the new business, then? A. No, I didn't. * * *

"Q. About how many lapsed members did you contact during the month? A. I couldn't tell you that.

"Q. Well, just give us an idea, roughly. A. I don't—I cannot give you an estimate of that because I never kept track of it. It is according to how long I talked to each member."

He further testified that in 1939 the association "got out quite a bunch of policy forms," copying forms of another company, and that he "sat in on it," that he looked over all business correspondence, and "used to go out and investigate" applications for membership himself. He further testified:

"Q. How much time did you spend in the office? A. Oh, I don't know. Hard to tell. I never had to report to anyone but myself.

"Q. Were you there every day? A. In the office every day? If I was in town I was, yes.

"Q. Well, how often were you in town, then? A. You know, I could have saved myself a lot of trouble if I had known I was going to be asked these questions, and kept a diary.

"Q. I just wanted an approximation, not an exact computation of the number of days you spent in the office in 1939. I want to know about how many days you were in the office? A. Some weeks more than others.

"Q. Is that the closest you can tell us the amount of time you spent in the office? A. Yes. I never took any record. I didn't punch any clock. * * *

"Q. Were your duties prior to the year 1939 and subsequent to September, 1935, substantially the same as they were in 1939? A. Very much the same. It was getting tough right after 1935 in September, after Judge Caminetti had ordered the Association turned back to the directors. We lost half our members, and there was a tremendous lot of unpaid death claims. And it kept us busy, I'll tell you. They had passed a law which went into effect the coming year that we had to have our claims paid or else sufficient money on hand to equal our largest outstanding claims, and so forth, and so on. Pretty strenuous."

Some other matters appear that seem of small consequence, but probably helped to fill in the details of the picture for the trial court, which was that Mr. Fielder had active supervision of the general affairs of the company. The total compensation received by him for the period covered by the compromise, including the compromise payment, amounted to only $294.45 per month. There was no direct evidence of the reasonable value of Mr. Fielder's services; but where the character and extent of the services rendered are shown, and they are such services as are within common knowledge, the trial court or jury may fix the value of the services without any expert testimony on that point. Nylund v. Madsen, (1928) 94 Cal.App. 441, 448, 271 P. 374; Spellmire v. Buttress & McClellan, Ltd., (1935) 6 Cal.App.2d 550, 44 P.2d 649; Kimes v. Davidson Inv. Co., (1929) 101 Cal.App. 382, 387, 281 P. 639; Lundberg v. Katz, (1941) 44 Cal.App.2d 38, 46, 111 P.2d 917. Here the services were of such character as to come within this rule, and while the evidence as to the extent of the services is somewhat meager and not as detailed as could be wished, yet it did present a picture of Mr. Fielder's activities. It would obviously be impossible for one in his position to give, several years later, a detailed account of all his activities in behalf of the corporation. The trial court accepted this evidence as sufficient, and we think we would be going beyond the scope of appellate review if we reversed its decision in that respect.

[12, 13] Finally, section 1012 of the Insurance Code, requires that before an order such as that here appealed from can be made it shall appear that the insurer "can properly resume title and possession of its property and the conduct of its business." On this issue, also, the respondent had the burden of proof, and appellant insists that there is no evidence justifying a finding in respondent's favor thereon. This is a matter primarily for the consideration and discretion of the trial court, whose decision is binding on appeal unless without any support in the evidence. Caminetti v. Guaranty Union L. Ins. Co., supra, (1942) 52 Cal.App.2d 330, 336, 126 P.2d 159; Caminetti v. Imperial Mut. L. Ins. Co., supra, (1943) 59 Cal.App.2d 476, 486, 139 P. 2d 681. While there is evidence here which would have supported a finding against the respondent on this issue, we

cannot say there is no reasonable view of the evidence which would support the trial court's implied finding in its favor.

The judgment appealed from is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



62 Cal.App.2d 954

PRUDENCE MUT. LIFE INS. ASS'N v. CAMINETTI, Insurance Commissioner of California.

Civ. No. 13890.

District Court of Appeal, Second District, Division 3, California.

Feb. 17, 1944.

Hearing Denied April 13, 1944.

1. Insurance ⇐64

Where order appointing insurance commissioner as conservator for insurance company organized to transact business of life insurance under mutual benefit assessment plan was cancelled and terminated, a judgment awarding writ of mandamus against insurance commissioner requiring him to issue a renewal certificate of authority was proper so far as authorizing business under the mutual assessment plan. St.1935, p. 657, § 10640 et seq.

2. Insurance ⇐64

An insurance company organized under statute authorizing it to transact life insurance business under mutual assessment plan was not entitled to an approval of its proposed transformation into mutual and disability insurer, where company did not make the required deposit with state insurance commissioner. St.1935, pp. 657, 666, 671, 672, §§ 10640 et seq., 10739, 10740, 10810 et seq., 10830.

3. Insurance ⇐64

Testimony by general manager that association was ready, willing and able to deposit cash sum with state insurance commissioner did not show an offer to make deposit within statute requiring deposit before operating as mutual life and disability insurer. St.1935, p. 671, § 10810 et seq.

On rehearing.

Judgment modified, and, as modified, affirmed.

Prior opinion, 142 P.2d 48.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for appellant.

Chas. R. Thompson and Sherman & Sherman, all of Los Angeles, and Ralph H. Lewis, of Sacramento, for respondent.

SHAW, Justice pro tem.

This is a proceeding in mandate, brought by petitioner, which is a corporation organized to transact the business of life insurance under the mutual benefit assessment plan provided for by chapter 8 of part 2, division 2, of the Insurance Code, St.1935, p. 657, to compel the defendant Insurance Commissioner to issue to it a renewal certificate of authority to do business under that chapter and also to approve proceedings taken by it to transform itself into a mutual life and disability insurer operating under chapter 9 of said part of the Insurance Code, St.1935, p. 671, and issue it a certificate of authority to do business under chapter 9. By the judgment the petitioner was awarded the writ which it sought, and the Insurance Commissioner appeals.

[1] This case was tried with Caminetti v. Prudence Mut. Life Ins. Ass'n, 146 P.2d 15, this day decided by us, and was submitted to and decided by the superior court on the evidence in that case. The record shows that after issuing to petitioner one or two temporary certificates to continue in business under chapter 8 of the Insurance Code, the Insurance Commissioner obtained an order appointing him conservator of its business and took over the business. This order was considered in Caminetti v. Prudence Mutual Life Insurance Association, supra, which is referred to for further details regarding it. If this order stands, the petitioner is not entitled to a certificate of authority to do business, under either chapter 8 or chapter 9, for by it petitioner's business was turned over to the Insurance Commissioner as conservator, and in consequence it can do no business. By the judgment appealed from in Caminetti v. Prudence Mutual Life Insurance Association, supra, the order appointing the conservator was "cancelled and terminated." By our decision in that matter the judgment there appealed

from it affirmed. Consequently, the judgment here is proper, so far as the certificate of authority under chapter 8 is concerned. Imperial Mut. L. Ins. Co. v. Caminetti, (1943) 59 Cal.App.2d 494, 498, 139 P.2d 693.

[2, 3] But the judgment, so far as it directs a writ to compel the commissioner to approve the transformation and issue to petitioner a certificate of authority to do business under chapter 9 is erroneous. Such a transformation is authorized and provided for by article 10 of chapter 8 above mentioned. Section 10739 of this article provides that when an association "has accumulated a fund of twenty-five thousand dollars or more in excess of all liabilities for undisputed claims or expenses incurred and taxes" it may transform itself so as to do business under chapter 9. Section 10740 of the same article provides that "Any such association, at its option, instead of depositing twenty-five thousand dollars as provided for in section 10739 of this chapter, may, on or before August 1, 1941, deposit five thousand dollars at the time of transformation, and the balance of twenty thousand dollars" over a period of four years. Section 10740 is manifestly in error in referring to section 10739 as providing for a deposit of twenty-five thousand dollars, but we need not decide what is the effect of this error. A deposit of that sum with the commissioner is required by section 10830, a part of chapter 9, before an insurer operating under chapter 9 can issue policies. Petitioner never did have a fund of twenty-five thousand dollars, as required by section 10739, nor did it ever deposit that amount; hence it was not authorized to make the transformation, unless relieved from the limitations of section 10739 by the provisions of section 10740. Section 10740 clearly limits the option granted by it so that it must be exercised by making the first five thousand dollar deposit "on or before August 1, 1941." It is undisputed that petitioner did not make such a deposit on or before that date. Hence it is not entitled to a writ requiring an approval of its transformation or the issuance of a certificate to do business under chapter 9. To escape this conclusion it claims, and the court found, that before that date it offered to deposit with the commissioner the sum of five thousand dollars, and that the defendant's refusal to approve the transformation or issue a certificate therefor was not based on failure to make such deposit. The latter part of this contention cleary has no force. The Insurance Code definitely requires the deposit to be made before the date stated, and the commissioner cannot extend the time, either expressly or by merely failing to object to a default in that respect. Assuming, for the purpose of this case only, but not deciding, that petitioner is correct in arguing that an offer of the deposit, made in time and when its transformation proceedings are tendered for approval, must be deemed equivalent to a deposit and petitioner does not lose its rights by the commissioner's delay or refusal to act, the defendant contends that no such offer was made. There is a finding of such an offer but we can find no support for it in the evidence. The only testimony cited by petitioner in its support is this testimony of Mr. Fielder, the general manager of petitioner: "Q. * * * was the Association at all times ready, willing and able to deposit with the Commissioner the sum of $5000.00 cash? A. Yes." We have searched the transcript and can find nothing coming nearer to support of the finding than this. It is insufficient. It shows no offer at all, but only a state of mind of the association plus financial ability to pay. As far as appears, this state of mind was entirely undisclosed and it did not constitute an offer.

It appears that no further evidence could be produced on this question of an offer, so it is proper for this court to make a finding upon it, for the purpose of ending the case, and this court now finds that the petitioner never offered to the Insurance Commissioner, in connection with its transformation proceedings mentioned in the petition, to deposit with him the sum of $5,000.

The judgment is modified by striking therefrom the paragraphs numbered 1 and 2 and as so modified it is affirmed, appellant to recover its costs of appeal herein.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

63 Cal.App.2d 61

URIBE v. McCORKLE.

Civ. No. 2593.

District Court of Appeal, Fourth District, California.

Feb. 28, 1944.

Hearing Denied April 27, 1944.

1. Automobiles ⇐209

Violation of duty imposed by law, such as statute requiring motorist to give signal of his intention to make left turn continuously during last 50 feet traveled by automobile before turning, is "negligence." Vehicle Code § 544(a, b), St.1935, p. 185.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

2. Negligence ⇐82

An injured person's negligence, not contributing to injury, does not bar his recovery of damages therefor.

3. Negligence ⇐136(31)

In personal injury suit, whether plaintiff's negligence contributed to injury is generally fact question for jury, not one of law for court to dispose of on motion for nonsuit.

4. Negligence ⇐56(1)

A person's negligence will not render him liable to another for injuries not proximately caused by such negligence.

5. Negligence ⇐136(25)

Whether a person's negligence was proximate cause of injury to another is generally question of fact, not of law.

6. Automobiles ⇐245(15, 60, 90)

In action for death of plaintiff's minor child, riding in automobile driven by plaintiff when it was struck in rear by automobile driven by defendant while plaintiff was making left turn into private road outside business or residence district, whether plaintiff's negligence in failing to give signal of his intention to make turn for 50 feet before turning, as required by statute, contributed to collision, and whether defendant was guilty of negligence, proximately causing collision, in failing to give audible warning before overtaking and attempting to pass plaintiff's automobile, were fact questions for jury under evidence. Vehicle Code, §§ 528(b), 544(a, b), St.1935, pp. 182, 185.

7. Automobiles ⇐244(59)

In action for death of plaintiff's minor child as result of automobile driven by defendant striking rear of automobile driven by plaintiff while plaintiff was making left turn, "last clear chance" doctrine was inapplicable, in absence of showing that defendant had clear chance to avoid accident in brief moment between time when plaintiff gave signal of intention to make turn and time of collision. Vehicle Code, § 544(a, b), St.1935, p. 185.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Frank Uribe against Eugene McCorkle for the death of Nadine Uribe, a minor, as the result of an automobile collision. Judgment for defendant, and plaintiff appeals.

Reversed.

Tarance S. Magee, of Sanger, for appellant.

Hoge, Pelton & Gunther, of San Francisco (A. Dal. Thomson, of San Francisco, of counsel), for respondent.

MARKS, Justice.

This is an appeal from a judgment for defendant entered after his motion for nonsuit had been granted. It would appear that the motion was granted because the trial judge was of the opinion that plaintiff was guilty of contributory negligence as a matter of law.

Plaintiff was the father of Nadine Uribe, four years old, who was fatally injured in an automobile collision which occurred at about 6:30 o'clock P. M. on May 14, 1939, on Ventura Avenue, east of Centerville, in Fresno County. The action was brought to recover damages caused by the death of Nadine.

Just before the accident plaintiff was driving west on Ventura Avenue which runs east and west at the point in question. He saw a sign on the north side of the road which advertised tomato plants for sale. This was near a private farm road leading from Ventura Avenue northeasterly to a farm house. Desiring to buy some plants, plaintiff drove west on Ven-

tura Avenue about one-tenth of a mile beyond the junction of the farm road with Ventura Avenue, looked in both directions, saw no approaching vehicle, made a "U" turn and proceeded east toward the farm road. Just west of the turning point Ventura Avenue curves to the north so the extent of his view to the west and north is not made clear. In making the "U" turn the automobile was driven to the south edge of the twenty-foot Ventura Avenue pavement and perhaps the right wheels went off the pavement and onto the shoulder. After turning east plaintiff gradually bore to the left and approached the center line of the pavement. When between 12 and 15 feet west of the point of collision, which was opposite the private road, plaintiff drove his car over the center line and started his left turn into the farm road. He gave a signal for the left turn just as his car crossed the center line. When he had proceeded between 12 and 15 feet, and when his car was between 62 and 64 inches north of the center line of Ventura Avenue, the right rear bumper of defendant's car caught the left rear fender or bumper of plaintiff's car which turned over on its side pinning Nadine under it causing her death. Defendant's car was passing plaintiff's during the left turn made by plaintiff. Defendant swerved his car to the left and it came to rest on the private road about 20 feet from Ventura Avenue. Plaintiff testified that he heard no horn nor other warning that defendant intended to pass him. Plaintiff was driving not over 15 miles an hour and defendant was driving about 40 miles an hour.

It is clear that plaintiff violated the provisions of subdivisions (a) and (b) of section 544 of the Vehicle Code, St.1935, p. 185. Subdivision (a) prohibits a driver from making a turn unless he can do so with reasonable safety and then only after giving the signal of his intention to do so. Subdivision (b) requires a driver intending to make a left turn to give the appropriate signal "continuously during the last fifty feet traveled by the vehicle before turning." Plaintiff gave the signal as he started the left turn but not for fifty feet before turning.

The accident happened outside a business or residence district. This is made clear by photographs in the record. Subdivision (b) of section 528 of the Vehicle Code, St.1935, p. 182, provides that "The driver of a motor vehicle, when traveling outside of a business or residence district and under other conditions where necessary to insure safety, shall give audible warning before overtaking a vehicle proceeding in the same direction." There is evidence to support the conclusion, if drawn, that defendant did not give audible warning before overtaking and attempting to pass plaintiff's car. At least this evidence presented a question of fact as to the negligence of defendant in passing without giving warning.

[1] We have a situation here where the trier of fact may have found defendant guilty of negligence in failing to give any warning before attempting to pass plaintiff's car, and where plaintiff admittedly was guilty of disobeying two provisions of the Vehicle Code. Practically without deviation, since the commencement of the judicial history of California, the violation of a duty imposed by law has been held to be negligence. That is still the law unless it was the intention of the Supreme Court to modify it in the recent case of Clinkscales v. Carver, Cal., 136 P.2d 777. In view of the long line of cases supporting the rule we would hardly expect its modification without a definite and clear and positive holding to that effect so we must still regard it as in force in California. We therefore conclude that plaintiff was guilty of negligence in failing to obey the requirements of subdivisions (a) and (b) of section 544 of the Vehicle Code, and that defendant may have been guilty of negligence in failing to give a warning before overtaking plaintiff's car and in attempting to pass it.

[2-5] The conclusion that plaintiff was negligent, and that the jury may have concluded that defendant was negligent, does not dispose of the case. A plaintiff may be negligent but if that negligence did not contribute to his injury his recovery is not barred. In recent years it has been held that the question as to whether the admitted negligence of a plaintiff contributed to his injury is generally a question of fact for the trier of fact and not one of law for the court to be disposed of on a motion for nonsuit. Hart v. Farris, 218 Cal. 69, 21 P.2d 432; Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93; Blodget v. Preston, 118 Cal.App. 297, 5 P. 2d 25; Hupp v. Griffith Co., 127 Cal.App. 63, 15 P.2d 211. It is also the rule that the negligence of a defendant, if any, will

not render him liable if that negligence was not the proximate cause of the injury. The question of proximate cause is generally one of fact and not of law. Thompson v. Stevenson, 52 Cal.App.2d 250, 126 P.2d 127; Matsuda v. Luond, 52 Cal. App.2d 453, 126 P.2d 359.

[6] Under these circumstances the motion for nonsuit should have been denied.

[7] Plaintiff argues that the doctrine of last clear chance is applicable here. We cannot agree with the argument, for, under the evidence now before us it does not appear that defendant had a clear chance of avoiding the accident in the brief moment that elapsed after plaintiff made it apparent he was going to make a turn and the time the collision occurred. Rasmussen v. Fresno Traction Co., 138 Cal.App. 540, 32 P.2d 1091; Stewart v. Langer, 9 Cal.App.2d 60, 48 P.2d 758.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



62 Cal.App.2d 962

BURNS v. MASSACHUSETTS BONDING & INS. CO.

Civ. 12525.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1944.

Hearing Denied April 20, 1944.

1. Insane persons ⇐45

Action may not be maintained on bond of incompetent's guardian until probate court has made a final order determining amount owed by guardian to ward, and action against surety is premature if no such order has been made, or time for appeal from such order has not elapsed or appeal is pending.

2. Guardian and ward ⇐182(3)

The statute requiring action against sureties on guardian's bond to be brought within three years from discharge or removal of guardian is strictly construed to avoid barring action before it has accrued. Probate Code, § 1487.

3. Guardian and ward ⇐182(3)

Where action on guardian's bond falls within statute requiring action within three years after discharge or removal of guardian, cause will be held barred before it has accrued, even though delay in securing order fixing amount of guardian's default occurred in trial court. Probate Code, § 1487.

4. Guardian and ward ⇐179

A ward must secure a final order against guardian before he may commence an action against surety on guardian's bond.

5. Insane persons ⇐45

An order restoring incompetent to capacity, terminating guardianship, and revoking guardian's letters of guardianship was "discharge or removal" of guardian within statute requiring action against sureties on guardian's bond to be commenced within three years therefrom. Probate Code, § 1487.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharge or Removal".

6. Insane persons ⇐45

The three-year statute of limitations against action on bond of incompetent's guardian was tolled during appeals of guardian and ward from order settling guardian's accounts. Probate Code, § 1487.

7. Statutes ⇐174, 181(2)

Courts have duty, within the framework of statutes, to interpret them so as to make them workable and reasonable.

8. Constitutional law ⇐70(1)

In determining whether statute of limitations against action on guardian's bond is tolled during appeals from orders settling guardian's accounts, it is not "judicial legislation" but within courts' powers of construction to assume that Legislature must have known that appeal tolls statute of limitations and that legislature did not intend to deprive ward of benefits of the bond. Probate Code, § 1487.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Legislation".

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by May G. Burns, executrix of the estate of Mary O'Connor, deceased,

against the Massachusetts Bonding & Insurance Company, on a guardian's bond. From an adverse judgment, defendant appeals.

Affirmed.

Thomas E. Davis, of San Francisco, for appellant.

James M. Thomas and Jewell Alexander, both of San Francisco, for respondent.

PETERS, Presiding Justice.

In 1930 Mary O'Connor was declared to be an incompetent, and Joseph P. Donohue was appointed her guardian. The Massachusetts Bonding and Insurance Company as surety and Donohue as guardian executed a bond as required by the court in the sum of $17,000. Later the ward was restored to competency and, after an accounting, it was ascertained that the guardian owed the ward an amount which, with interest, exceeded $17,000. Thereafter, this action against the bonding company on its bond was instituted. The trial court entered its judgment in favor of the executrix of Mary O'Connor's estate in the sum of $17,000 plus interest. From this judgment both plaintiff and the bonding company have appealed. The present opinion is concerned only with the appeal by the bonding company. The appeal by plaintiff is considered in a separate opinion (Cal.App., 146 P.2d 29). The sole contention of the bonding company on its appeal is that the cause of action against it is barred by the statute of limitations provided for by § 1487 of the Probate Code.

Section 1487 of the Probate Code provides: "No action may be maintained against the sureties on a bond given by a guardian unless commenced within three years from the discharge or removal of the guardian; but if at the time of such discharge the person entitled to bring the action is under any legal disability to sue, the action may be commenced at any time within three years after the disability is removed."

[1] By the terms of this section, the statute of limitations starts to run in favor of the surety upon the "discharge or removal" of the guardian. But the cause of action against the surety may not be in existence at that time. This is so because it is the settled law of this state that an action may not be maintained on the bond until the probate court has made a final order determining the amount owed by the guardian to the ward. If no such order has been made, or if such order has been made but the time for appeal has not elapsed, or if it is appealed and such appeal is pending, any action against the surety is premature. Cook v. Ceas, 143 Cal. 221, 77 P. 65; Graff v. Mesmer, 52 Cal. 636; Allen v. Tiffany, 53 Cal. 16; Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 19 P.2d 1018; Nickals v. Stanley, 146 Cal. 724, 81 P. 117; Elizalde v. Murphy, 4 Cal.App. 114, 87 P. 245; Brandon v. Anglo-California Trust Co., 177 Cal. 699, 171 P. 956; Ferris v. Independence Indemnity Co., 124 Cal.App. 154, 12 P.2d 148; Keck v. Keck, 16 Cal.App.2d 521, 61 P.2d 79; Maloney v. Massachusetts Bonding & Ins. Co., 20 Cal.2d 1, 123 P.2d 449; Richardson v. Royal Indemnity Co., 21 Cal.2d 557, 134 P.2d 1; see annotation 119 A.L.R. 83. When this rule of law is considered in connection with the provisions of § 1487 of the Probate Code above quoted, a somewhat anomalous situation is presented. Frequently the guardian is removed for misconduct before he renders his final account. If the guardian's account is not filed, or is not acted upon by the court within three years of the discharge or removal of the guardian, the action against the surety is barred before it could have been commenced. Under such circumstances the period of limitations under § 1487 has started and fully run before the cause of action has accrued.

[2, 3] The obvious injustice of a rule of law that bars an action before it has accrued, has resulted in the courts strictly construing the provisions of § 1487. Thus, it has been held that the section only applies where the guardian has been removed or discharged by court order, and has no application to a removal by operation of law, such as by the ward reaching the age of majority or being restored to competency. Cook v. Ceas, 143 Cal. 221, 77 P. 65; Maloney v. Massachusetts Bonding & Ins. Co., 20 Cal.2d 1, 123 P.2d 449. But where a case falls within the statute, the cause will be held barred before it has accrued even though the delay in securing the order fixing the amount of the guardian's default may have occurred in the trial court. Keck v. Keck, 16 Cal.App.2d 521, 61 P.2d 79.

[4] The order that the ward is required to secure before he may properly commence an action against the surety is a final order. If the trial court has rendered such an order, and that order is not final—i. e., the time for appeal therefrom has not

elapsed, or the order is pending on appeal —any action against the surety is premature. Cook v. Ceas, 143 Cal. 221, 77 P. 65. The precise question presented on the present appeal is whether, when the guardian is removed by court order, and the ward secures an order fixing the amount of default, and both the ward and guardian appeal from that order, is the three-year statute of limitations provided for by § 1487 of the Probate Code tolled during the period the cause is pending on appeal? The trial court answered this question in the affirmative.

Before the respective contentions of the parties can be understood some more detailed reference must be made to the facts.

[5] Mary O'Connor was adjudged incompetent in 1930. Her brother, Joseph Donohue, was appointed guardian, and he and appellant executed a bond in the sum of $17,000. On June 21, 1935, May G. Burns, the present respondent, acting as a friend, filed a petition in the probate court for the restoration of Mary O'Connor to capacity, and at the same time filed a petition for the removal of Joseph P. Donohue as guardian. On June 29, 1935, the guardian, Joseph P. Donohue, also filed a petition for restoration and also proffered his resignation as guardian. All the petitions were heard at one time. On July 16, 1935, the court made and entered its order restoring Mary O'Connor to capacity, terminating the guardianship, and revoking the letters of guardianship issued to Joseph P. Donohue. Although respondent contends to the contrary, we have no doubt that this order constituted a "discharge or removal" of the guardian within the meaning of § 1487 of the Probate Code. Cook v. Ceas, 143 Cal. 221, 77 P. 65. Thus we start with the premise that the three-year period provided for in that section commenced to run on July 16, 1935. The present action against the surety was filed on May 3, 1940, two months less than five years after the statute started to run. It is obvious, therefore, that the action was barred, unless the statute was tolled for at least twenty-two months of that period.

During this period of four years and ten months the following occurred: On August 20, 1935, within a little over a month after she was restored to competency, Mary O'Connor served on the guardian's attorneys exceptions to his five annual accounts. A referee was appointed and many hearings had. This consumed nearly two years in the trial court. Finally, on July 1, 1937, the trial court made its order settling the guardian's accounts and determining the amount of the indebtedness of the guardian. Had this order become final without an appeal, the cause of action would have accrued against the surety sixty days after July 1, 1937. Thus the ward would have had ten months more within which to file her action against the surety before the three-year period of limitations which had started on July 16, 1935, would have expired. But the order of July 1, 1937, did not immediately become final. Both the ward and the guardian appealed. The ward contended that she was entitled to compound interest on the sums misappropriated by the guardian. The trial court had denied this allowance. The guardian contended that as to certain items found to be misappropriated, the evidence was insufficient to support the findings. The appeals were separately heard. Mary O'Connor was successful in her appeal. Guardianship of O'Connor, 28 Cal.App.2d 527, 83 P.2d 65. The appeal of the guardian was summarily disposed of adverse to his contentions. Guardianship of O'Connor, 37 Cal.App.2d 63, 98 P.2d 769. The remittitur on the appeal of Mary O'Connor was filed in the superior court on November 27, 1938, and in the appeal of the guardian on April 3, 1940. This action against the surety was commenced on May 3, 1940.

Thus the pertinent dates are as follows:

July 16, 1935: Guardian removed by court order, thus starting the statute of limitations on any action against the surety.

August 20, 1935: Mary O'Connor filed exceptions to guardian's accounts.

July 1, 1937: Amount of misappropriations of guardian fixed by court order.

November 27, 1938: Remittitur on Mary O'Connor's appeal filed in superior court.

April 3, 1940: Remittitur on guardian's appeal filed in superior court.

May 3, 1940: This action against surety commenced, about four years and ten months after the order of July 16, 1935.

An examination of the above table discloses the following facts: Although the three-year statute provided for by § 1487 of the Probate Code commenced to run in favor of the surety on July 16, 1935, Mary O'Connor's cause of action against the surety did not accrue until April 3, 1940, when the order fixing the amount of the misappropriations by the guardian became

final. Thus, if the statute was not tolled by the appeals, plaintiff's cause of action against the surety was barred before it arose. Another fact is also apparent. Of the period of about four years and ten months elapsing between the date of the order removing the guardian and the date this action was filed, some two years and nine months (July 1, 1937, to April 3, 1940) were consumed on the two appeals. If the statute of limitations was tolled for that period, and this period of two years and nine months therefore be deducted from the four-year and ten-month period, it is obvious that this action was commenced within two years and one month from the date the guardian was removed, and was therefore commenced within the three-year period fixed by § 1487 of the Probate Code.

[6] The trial court held that during the period consumed by the appeals the statute of limitations was tolled. With that holding we agree. It is true, as urged by appellant, that § 1487 contains no express provision tolling the statute during an appeal. The only exception contained in the statute is where the ward "is under any legal disability to sue." That exception obviously refers to a ward who is under age or incompetent. But the fact that the statute contains no express provision tolling the statute during an appeal is not conclusive. Although there is no case interpreting § 1487 of the Probate Code on this question, there are many cases holding that such implied exception must or should be read into other statutes. One of the closest analogies is to be found in the cases interpreting § 583 of the Code of Civil Procedure. That section makes it the mandatory duty of the trial court to dismiss an action if it is not brought to trial within five years after the date it is filed, with one exception—that is, where the parties have stipulated in writing that the time may be extended. In Christin v. Superior Court, 9 Cal.2d 526, 530, 71 P.2d 205, 207, 112 A.L.R. 1153, it was held that where, after plaintiff filed his action, the defendant secured a change of venue, and plaintiff successfully appealed from the order granting the change of venue, the time consumed on the appeal should not be considered in determining whether the five-year period had elapsed. The court stated: "Petitioners relying upon the general language of such cases as Miller & Lux v. Superior Court, supra [192 Cal. 333, 219 P. 1006], and Rosefield Packing Co. v. Superior Court, supra [4 Cal.2d 120, 47 P. 2d 716], argue that in the light of the plain language of the statute there is only one circumstance that can suspend the running of the period, and that is the written stipulation provided for by the section itself. These decisions cannot, however, be so narrowly interpreted. It may be true that they absolutely deny any means of suspension, save by written stipulation, where it is *possible* to bring the cause to trial. But, despite the mandatory language of the statute, *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial. Thus, where an appeal from a judgment is taken, the trial court has no jurisdiction to proceed in the cause during the pendency of the appeal, and consequently the time consumed on appeal is not considered as part of the statutory period. Kinard v. Jordan, 175 Cal. 13, 164 P. 894. And where contestants of a will were induced by fraud to consent to a dismissal of their contest, and later had the dismissal vacated, the court held that the time between the dismissal and the reinstatement of the action was to be excluded in computing the five-year period. Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102. See, also, Allyne v. Superior Court, 200 Cal. 661, 254 P. 564."

The court concluded its discussion as follows (page 533 of 9 Cal.2d, page 208 of 71 P.2d, 112 A.L.R. 1153: "Counsel for plaintiff, in prosecuting his appeal from the void order, and in taking no steps toward a futile trial in San Francisco, nor any futile steps toward a trial in Los Angeles, acted reasonably and with due regard to the interests of his client and the courts. There was no way in which he could secure a speedier decision by the appellate court. If the actual time on appeal had consumed the whole of the five-year period, could plaintiff have been held barred from going to trial? This would be an amazing miscarriage of justice, penalizing conduct entirely reasonable, and inducing procedure detrimental to the interests of both court and litigants. And the same is true where not the whole period, but a substantial part of it is consumed on appeal. We are therefore led to the conclusion that under the circumstances of this case, the time consumed by the appeal from the order changing venue is not to be counted as part of the five-year period specified by section 583 of the Code of Civil Procedure."

In Archer v. Edwards, 19 Cal.App.2d 253, 65 P.2d 115, it was claimed that an action on a common count was barred by the statute of limitations. The action was not commenced until after a decision of the Supreme Court in a prior action had fixed the rights of the parties. The court summarily disposed of the contention that the action was barred in the following language (page 256 of 19 Cal.2d, page 116 of 65 P.2d): "As to the claim of appellant that the action is barred by the statute of limitations, the record discloses that the statute of limitations was tolled by the action of the parties and the decision of the trial court, together with the time taken by the Supreme Court in deciding the appeal, up to and including the date that the decision of said Supreme Court became final, to wit, May 30, 1934."

In Dillon v. Board of Pension Commrs., 18 Cal.2d 427, 431, 116 P.2d 37, 39, 136 A.L.R. 800, the Supreme Court cites the Christin case, supra, and many other cases, for the rule that: "It is well recognized that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights."

In Westphal v. Westphal, Cal.App., 143 P.2d 405, 407, it is stated: "It is settled that the time during which it is impossible to bring a case to trial because of the pendency of an appeal should be excluded in determining whether a case has been brought to trial within five years of the filing of the complaint."

See, also, Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; Kinard v. Jordan, 175 Cal. 13, 164 P. 894; see cases collected 37 Cor.Jur. p. 1041, § 449; 34 Am.Jur. p. 198, § 242.

We think the reasoning of these cases is applicable to the present situation. Any other rule would place the defrauded ward at the mercy of the fraudulent guardian so far as the cause of action against the surety is concerned. Where the guardian has been false to his trust, the only practical right of recovery exists against the bond, which is required by law to be given to protect the ward against just such a situation. After a guardian is removed by court order because of his fraudulent acts, it frequently takes a long period of time in the trial court, particularly if the guardian desires to be dilatory, to secure an account and an order fixing the amount of the misappropriations. All during this period the statute of limitations is running in favor of the surety, but until the order becomes final the ward cannot sue the surety. If the guardian appeals, and continues to pursue dilatory tactics, far more than the three years will have elapsed before the order becomes final. Until relatively recently, even where an appeal was diligently pursued, it took several years for the appellate or supreme courts to act upon an appeal. Thus, in nearly every case, a fraudulent guardian could defeat the ward's action against the surety by appealing from the order fixing the guardian's liability. In nearly every case, if appellant's interpretation is correct, no matter how diligent the ward might be, the ward's action would be barred before it arose. There would be no way the ward could protect himself. It cannot be assumed that the legislature intended any such harsh and inequitable result. In providing that guardians must give a bond to protect the ward, we must assume that the legislature intended that such protection should be reasonably effective. It cannot be assumed that the legislature intended to deprive the ward, in most cases, of such protection by the provisions of § 1487 of the Probate Code.

The same reasoning applies where the ward appeals from the order. Certainly, where, as in the present case, the trial court in fixing the liability of the guardian erroneously deprived the ward of a material portion of her recovery, it cannot be assumed that the legislature intended that if the ward appealed to correct the judicial error, she should be deprived of her action against the surety, if, perchance, the appeal extended the period beyond three years. Such a result would mean that the ward would be without power to correct judicial error.

[7, 8] Appellant urges that to hold that the period consumed on an appeal is not to be included in computing the three-year period provided by § 1487 of the Probate Code is to "judicially" legislate, that the legislature has expressly created but one exception, and the courts are without power to create another by implication. The same objection could have been, and was, made in the Christin case, supra. Moreover, it is the duty of the courts, within the framework of the statutes passed by the legislature, to interpret the statutes so as to make

them workable and reasonable. In the present case we must interpret § 1487 of the Probate Code together with the other sections of that code requiring the giving of a bond and regulating the enforcement of rights against the bond. It is not straining the powers of construction given the courts to assume that the legislature must have known of the general principle applicable to statutes of limitation that an appeal tolls the statute. The legislature may well have assumed, if it thought of the matter at all, that it was not necessary to expressly provide for such a situation. Moreover, it is not an unwarranted assumption that the legislature did not intend to deprive the ward of the benefits of the bond.

For these reasons, on the appeal of defendant, the judgment is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.



62 Cal.App.2d 972

BURNS v. MASSACHUSETTS BONDING & INS. CO.

Civ. 12526.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1944.

Hearing Denied April 20, 1944.

1. Principal and surety ⇐73

A surety may be held liable for interest although the effect is to bring surety's total liability to an amount in excess of the bond.

2. Principal and surety ⇐73

For interest which does not bring total liability beyond penalty of the bond, surety is liable for principal's debt, so that interest runs as against the principal, usually from the date when principal violates the obligation secured, but, for other interest in excess of face of the bond, surety can be held liable only for its own default.

3. Principal and surety ⇐73

For interest in excess of the penalty of the bond, surety is liable from the time performance becomes due from it, as damages for its own withholding, meaning its failure to pay the penalty when due.

4. Insane persons ⇐45

When obligation of incompetent's guardian, including principal and interest, on date of filing of remittitur after affirmance of guardian's appeal from order settling guardian's accounts, exceeded the penalty of the bond, surety first became liable on the ensuing day and interest in excess of the penalty should date therefrom.

5. Principal and surety ⇐140

Action may not be maintained on bond until court has made a final order fixing principal's obligation, and action against surety is premature if no such order has been made, or such order has been made but is not final.

6. Insane persons ⇐45

A demand for payment against surety on bond of incompetent's guardian, made when surety was not subject to suit, was ineffectual, but bringing of suit was sufficient demand.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by May G. Burns, executrix of the estate of Mary O'Connor, deceased, against the Massachusetts Bonding & Insurance Company to recover on bond of incompetent's guardian. From a judgment for plaintiff in an allegedly insufficient amount, plaintiff appeals.

Affirmed.

James M. Thomas and Jewell Alexander, both of San Francisco, for appellant.

Thomas E. Davis, of San Francisco, for respondent.

PETERS, Presiding Justice.

This is a companion case to Burns v. Massachusetts Bonding & Insurance Co., Cal.App., 146 P.2d 24. The present appeal is by plaintiff from that part of the judgment fixing the amount of interest to which she is entitled, it being her contention that she is entitled to interest in a much larger amount than that allowed by the trial court.

In order to understand the respective contentions of the parties, the following dates and facts are pertinent:

July 1, 1937: Probate court determined that the guardian owed the ward $13,601.84. This sum included $12,116.09 for the guardian's misappropriations, $1,000 referee's fee, $425.50 reporter's fee, and $60.25 costs. No interest was allowed on the sums misappropriated.

July 6, 1937: Plaintiff filed a demand with the surety, the exact amount of such demand not appearing in the record.

January 27, 1939: The probate court made an order allowing the plaintiff interest as against the guardian in the sum of $6,831.94 and costs in the amount of $356.65. When these sums are added to the amount fixed by the order of July 1, 1937, the total is $20,790.43, which is the amount of the indebtedness of the guardian to the ward on January 27, 1939. This order fixing interest was made in compliance with the decision rendered in Guardianship of O'Connor, 28 Cal.App.2d 527, 83 P.2d 65, allowing the ward compound interest from the date of the misappropriations. On the date this order was made the appeal of the guardian from the order of July 1, 1937, was still pending.

April 3, 1940: The remittitur was filed in the lower court in the guardian's appeal from the order of July 1, 1937. Guardianship of O'Connor, 37 Cal.App.2d 63, 98 P. 2d 769.

May 3, 1940: Plaintiff filed her complaint in the present action against defendant surety. In her complaint plaintiff asked for judgment for $17,000, the full amount of the bond, plus 7% interest from July 1, 1937, the date the trial court made its order that $13,601.84 was due from the guardian.

April 7, 1943: The trial court entered its judgment in the present action in favor of plaintiff for $17,000, the full penal sum of the bond, plus 7% interest from April 4, 1940 (one day after the remittitur was filed in the appeal by the guardian), to April 7, 1943.

It is the contention of plaintiff that she is entitled to interest from July 1, 1937, or July 6, 1937, or at least from January 27, 1939, and that such interest should be computed on the sum of $20,790.43.

[1-3] There can be no doubt that, in this state, and in the majority of other states, a surety may be held liable for interest, and that such liability exists although the effect is to bring the surety's total liability to an amount in excess of the bond. Trumpler v. Cotton, 109 Cal. 250, 41 P. 1033. However, there is a fundamental distinction between the liability of the surety for interest when the accumulated interest on the principal's obligation when added to the principal's obligation is less than the amount of the bond, and when it exceeds the penal amount of the bond. For interest which does not bring the total liability beyond the penalty of the bond the surety is liable under the bond obligation for the principal's debt. In such event, interest runs the same as it does against the principal, which usually means that the interest starts to run from the date the principal violates the obligation the bond is given to secure. Thus, in the present case the misappropriations by the guardian, together with certain costs, totaled $13,601.84. But, as was held in Guardianship of O'Connor, 28 Cal.App.2d 527, 83 P.2d 65, as against the guardian the ward was entitled to compound interest from the date of each misappropriation. This interest totaled $6,831.94, which, when added to the amount misappropriated, exceeds $17,000, the amount of the bond. Up to the face amount of the bond the surety is liable for interest the same as the principal. For any other interest in excess of the face of the bond the surety can be held liable only for its own default, and cannot be held for the default of the principal. If the surety fails to pay when it should pay, then it is liable for the full amount of the penalty of the bond plus interest from the date when performance was due from it. Stated another way, for interest in excess of the penalty of the bond the surety is liable for interest from the time performance becomes due from it, as damages for its own withholding, that is, for its failure to pay the penalty when payment was due from it.

A leading case on this subject is Bank of Brighton v. Smith, 12 Allen Mass., 243, 90 Am.Dec. 144. At page 251 of 12 Allen, at page 146 of 90 Am.Dec., it is stated: "The defendant claims that judgment can only be rendered for the penalty of the bond without interest. In suits against sureties the limitations which by the contract they make to their liability are to be strictly upheld. It may be that as between the principal and the plaintiffs in this case interest from the time of the misappropriation of the funds intrusted to him might be recovered of the principal as constituting a part of the damages occasioned by his misconduct. Or if the extent of the defalcation and interest so added had in this case fallen short of or did not exceed the penalty in the defend-

ant's bond, such interest might be taken into account in ascertaining for what portion of the penalty judgment should be rendered. But the measure of the principal's liability ceases to operate as the rule against the surety when that liability exceeds the penalty agreed on. The surety has a right to say, I agreed to be liable for such losses as may be occasioned by the principal only to the extent fixed, although that loss is in part made up of interest on money wrongfully taken. But it does not follow that the surety can in no case be held liable for interest upon the penalty. The true rule seems to be that the surety may be liable for interest on the penalty, not as part of the debt for which he originally became responsible, but as damages for its detention."

James v. State, 65 Ark. 415, 46 S.W. 937, is another leading case on the subject. It holds, and cites other cases holding, that for interest in excess of the penalty of the bond the liability is predicated on the theory that the surety has failed to meet its own obligation, not because it has failed to pay the principal's. See, also, Trumpler v. Cotton, 109 Cal. 250, 41 P. 1033; cases collected in 8 Am.Jur. p. 740, § 88; 25 Am.Jur. p. 126, § 202; 11 C.J.S., Bonds, p. 511, § 132; annotations Ann.Cas.1914C, 1194; 55 L.R.A. 392; 19 L.R.A.,N.S., 84.

[4] In the instant case the position of the defendant surety, upheld by the trial court, is that under the rule of Cook v. Ceas, 143 Cal. 221, 77 P. 65, no action could have been brought against the defendant as surety until the remittitur had been filed in the trial court on April 3, 1940, after judgment of affirmance on the appeal by the guardian, and therefore payment was not due from it until that date. On that date the guardian's obligation, including principal and interest, exceeded $17,000. The court held, therefore, that April 4, 1940, was the date the surety first became liable to pay, and that interest in excess of the penalty of the bond should date from that date. This holding necessarily follows from the conclusion that interest exceeding the penalty of the bond is allowed for the surety's failure to perform its obligation when it is under a duty to perform.

[5] The rule is well settled in this state that no action may be maintained against the surety until a final order has been made by the trial court fixing the obligation of the principal. If no such order has been made, or, if such order has been made but it is not final, any action against the surety is premature. Cook v. Ceas, 143 Cal. 221, 77 P. 65; Graff v. Mesmer, 52 Cal. 636; Allen v. Tiffany, 53 Cal. 16; Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 19 P.2d 1018; Nickals v. Stanley, 146 Cal. 724, 81 P.2d 117; Elizalde v. Murphy, 4 Cal.App. 114, 87 P. 245; Brandon v. Anglo-California Trust Co., 177 Cal. 699, 171 P. 956; Ferris v. Independence Indemnity Co., 124 Cal.App. 154, 12 P.2d 148; Keck v. Keck, 16 Cal.App. 2d 521, 61 P.2d 79; Maloney v. Massachusetts Bonding & Ins. Co., 20 Cal.2d 1, 123 P.2d 449; Richardson v. Royal Indemnity Co., 21 Cal.2d 557, 134 P.2d 1; see annotation 119 A.L.R. 83. These cases demonstrate that on July 1, 1937, when the probate court determined the amount of the debt owed by the guardian to the ward, and on January 27, 1939, when the probate court fixed the amount of interest that the guardian owed to the ward, the surety was not in default. The surety was not a party to these proceedings and had no control over them. As long as these orders were on appeal the surety had no way of knowing the amount of its obligation. It did not become liable to action until the remittitur was filed on April 3, 1940. That is when its liability was first fixed. That is when it became in default. Obviously, therefore, for interest in excess of the penalty of the bond, that is the earliest date that could be chosen.

[6] It could be argued that even after the order fixing the guardian's liability became final no liability attached to the surety until a demand was made on the surety thereafter. The demand of July 6, 1937, was ineffectual because at that time the surety was not subject to suit. The bringing of suit is, of course, a sufficient demand. There is authority for the proposition that even after the surety's liability attaches it is liable for interest in excess of the penalty of the bond only from the date of demand or the filing of suit. Trumpler v. Cotton, 109 Cal. 250, 41 P. 1033; Democa v. Barasch, 212 Cal. 293, 298 P. 17. If this rule applied, since there was no proper demand until the filing of suit on May 3, 1940, interest on the $17,000 would start from that date. However, we do not find it necessary to pass on this point because the defendant surety has not appealed from this portion of the judgment, and does not object to this one month's excess of interest.

The portion of the judgment from which the plaintiff appeals is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.

DELAY v. BRAUN et al.

Civ. 14323.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1944.

As Corrected March 6, 1944.

Rehearing Denied March 14, 1944.

Hearing Denied April 20, 1944.

1. Negligence ⇐32(2)

An entry upon land of another is privileged in so far as it is pursuant to the possessor's free consent.

2. Negligence ⇐32(1)

Owner of land is ordinarily liable to an invitee for failure to use reasonable care for his safety.

3. Negligence ⇐32(2)

Every man by implication invites others to come to his house as they may have proper occasion.

4. Negligence ⇐32(2)

One who enters premises pursuant to a general invitation to discuss employment is an "invitee" and entitled to protection as such.

5. Negligence ⇐32(3)

When an invitee deviates from purpose which took him to premises, he becomes a trespasser or a licensee, and the owner's duty to exercise ordinary care as to him ceases.

6. Appeal and error ⇐1008(1)

Whether an invitee while on the premises made an excursion beyond the limits of his original purpose is a question of fact to be determined by the trial court.

7. Appeal and error ⇐1010(1)

Finding on issue as to whether invitee while on premises made an excursion beyond limits of original purpose is final when supported by facts or reasonable inferences.

8. Negligence ⇐32(2)

A mere licensee on premises is lawfully there.

9. Animals ⇐68

Where plaintiff was bitten by dog owned by defendant while calling at the defendant's residence in connection with tutoring niece of plaintiff at time she was proceeding around side of house when no one appeared after ringing the doorbell, she was at all times an "invitee" if invitation included privilege of making an inquiry at rear of the house. Gen.Laws 1937, Act 384a.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

10. Animals ⇐68

An invitation to make inquiry at rear of house in respect of person bitten by dog when proceeding around side of house may have been manifested by arrangement of premises, by nature of vocation of residents of house, and by purpose of the visit. Gen. Laws 1937, Act 384a.

11. Appeal and error ⇐1008(1)

In action to recover for injuries when bitten by dog when calling at residence of defendant in connection with tutoring of plaintiff's daughter and when plaintiff was proceeding around side of the house after no one answered ring of doorbell, whether plaintiff had deviated from purpose of visit when she walked toward rear of house was a question of fact for trial court.

12. Animals ⇐74(5)

In action to recover for injuries to plaintiff bitten by dog belonging to defendant when calling at defendant's residence in connection with tutoring of plaintiff's daughter, facts and reasonable inferences were sufficient to support finding that plaintiff was not a trespasser at time she was attacked by dog, when she was proceeding around side of house after no one had answered ring of doorbell. Gen.Laws 1937, Act 384a.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Nora Irene Delay against W. M. Braun, William Braun, Helen Braun and others to recover damages for injury as result of being bitten by a dog owned by defendants. Judgment for plaintiff, and the last two named defendants appeal.

Judgment affirmed. Order denying defendant's motions to vacate judgment affirmed.

Joseph A. Spray and Henry P. Walker, both of Los Angeles and Edgar B. Harvey, of San Diego for plaintiff and respondent.

Baldwin Robertson, of Los Angeles, for defendants and appellants.

MOORE, Presiding Justice.

Prior to June 5, 1942, plaintiff's daughter, Thelma Lloyd, consulted Helen Braun with reference to tutoring her niece, Darlene DeLay. On that day plaintiff, accompanied by her daughter, Mrs. Lloyd, and her granddaughter, Darlene, called at the home of defendants on Camarillo Street in Van Nuys, a part of greater Los Angeles. Her purpose then was to discuss further with Mrs. Braun the assistance to be rendered Darlene. Plaintiff left her automobile at the curb and entered the premises alone. Having reached the front porch by walking on the driveway she rang the doorbell. No one appearing, plaintiff stepped into the driveway which extends northerly along the east side of the house from the street to the garage in the rear. She took five or six steps toward the garage. At that point for the first time she saw defendant's dog approaching her. It jumped upon plaintiff, knocked her down and with its teeth severely lacerated plaintiff's hand and held it until in answer to her screams her two companions arrived.

The award of damages to plaintiff was based upon Act 384a, Deering's General Laws, which provides that the owner of a dog shall be liable for damages suffered by a person who in any public place or while lawfully in a private place is bitten by the dog. No question is raised as to the amount of the judgment. Neither is the status of plaintiff's presence on entering the premises put in doubt. The only contention made on this appeal is that plaintiff, in "strolling" along the driveway from the front porch toward the rear of the house, became a trespasser.

[1-8] An entry upon the land of another is privileged in so far as it is pursuant to the possessor's free consent. Sec. 167 Rest. of the Law of Torts. The owner of land is ordinarily liable to an invitee for failure to use reasonable care for his safety. 16 Cal.Jur. 282. "Every man by implication invites others to come to his house as they may have proper occasion." Cooley on Torts, Fourth Edition, Sec. 248. One who enters premises pursuant to a general invitation to discuss employment is an invitee and entitled to protection as such. 45 C.J. 820. When an invitee deviates from the purpose which took him to premises he becomes a trespasser or a licensee and the owner's duty to exercise ordinary care as to him ceases. Means v. Southern Cal. R. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206; Bush v. Weed Lumber Co., 63 Cal.App. 426, 433, 218 P. 618; Powers v. Raymond, 197 Cal. 126, 131, 239 P. 1069; Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am.St.Rep. 153; Lawand v. California Products Co., 9 Cal. App.2d 147, 48 P.2d 979; Medcraft v. Merchants' Exchange, 211 Cal. 404, 295 P. 822; Mazey v. Loveland, 133 Minn. 210, 158 N.W. 44, L.R.A.1916F, 279; Spellman v. Dyer, 186 Mass. 176, 71 N.E. 295. Whether an invitee while on the premises made an excursion beyond the limits of his original purpose is a question of fact to be determined by the trial court. Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 96 P.2d 196; Bush v. Weed Lumber Co., 55 Cal.App. 588, 592, 204 P. 24. Where there are facts or reasonable inferences to support a finding on that issue it is final. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183. A mere licensee on premises is lawfully there. But since we have concluded that respondent continued to be an invitee, it is unnecessary to discuss the rights of a licensee.

[9, 10] If respondent's invitation included the privilege of making an inquiry at the rear of the house, she was at all times an invitee. Stewart v. Lido Cafe, 13 Cal.App.2d 46, 56 P.2d 553. Such invitation may have been manifested by the arrangement of the premises (Herzog v. Hemphill, 7 Cal.App. 116, 93 P. 899), by the nature of Mrs. Braun's vocation and by the purpose of the visit.

[11, 12] It was therefore in this case a question of fact for the trial court to determine from the evidence whether Mrs. DeLay had deviated from the purpose of her visit when she walked toward the rear of the house. McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 599, 43 P.2d 560. The facts and reasonable inferences were sufficient to support the finding that she was not a trespasser at the time she was attacked by the dog. On stepping into the driveway she saw that the garage was open and she looked to ascertain whether the automobile was there. It was a reasonable inference that plaintiff was in the act of reassuring herself as to whether Mrs. Braun was at home. Such measures are customary in calling at

a residence. She was therefore at the time of the dog's attack lawfully on the premises of defendants.

Judgment affirmed.

It is also ordered that the order denying defendants' motion for an order setting aside and vacating the judgment theretofore made herein, and to enter another and a different judgment in favor of defendants is also affirmed.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.



63 Cal.App.2d 11

McNEAR v. PACIFIC GREYHOUND LINES et al.

Civ. 12523.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1944.

Rehearing Denied March 25, 1944.

Hearing Denied April 20, 1944.

1. Automobiles ⇐245(6, 72)

In pedestrian's action against bus company whose driver, on straight road well lighted by headlights on clear night and with no other traffic, struck pedestrian without ever seeing him, driver's negligence and pedestrian's contributory negligence were for jury.

2. Automobiles ⇐242(8)

A pedestrian who by reason of loss of memory because of accident was unable to testify to events preceding impact with bus and who produced no witness who could do so was entitled to benefit of presumption that he was taking ordinary care for his own safety.

3. Appeal and error ⇐1002

The weight of conflicting evidence is not for the appellate court.

4. New trial ⇐9

Trial court may grant new trial on issue of damages alone.

5. New trial ⇐9

Where a substantial but inadequate award of general damages is made, question whether new trial should be limited to issue of damages alone rests within discretion of trial judge, but where award is so small as to indicate that some jurors believed defendant not liable but agreed to award to arrive at some verdict, it is an abuse of discretion to so limit the new trial.

6. New trial ⇐9

Under conflicting evidence as to extent and permanency of plaintiff's disability, allowance of over $5,000 for general damages did not show that jury acted in bad faith so as to constitute a grant of a new trial on issue of damages alone an abuse of discretion.

7. New trial ⇐75(1)

In passing on motion for new trial on ground that damages awarded are inadequate, trial judge may reweigh the evidence, and upon concluding that damages are inadequate may grant new trial on that ground.

8. Automobiles ⇐160(1), 216

Motorist and pedestrian are bound to use degree of care of a person of ordinary prudence acting under similar circumstances, but amount of care necessary to reach standard of ordinary care is greater in case of motorist than in case of pedestrian.

9. Automobiles ⇐246(4)

In action for injuries to pedestrian struck by bus, instruction that amount of care required of driver was "far" greater than amount of care required of pedestrian was proper.

10. Trial ⇐295(6)

An instruction that a motor vehicle is a "dangerous instrumentality capable of inflicting serious and often fatal injuries" was proper, notwithstanding a motor vehicle is not a "dangerous instrumentality" in sense of imposing unusual liability on its owner or operator, where taken as a whole jury could not have misunderstood the instructions.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Instrumentality".

11. Evidence ⇐5(2)

It is common knowledge that a motor vehicle is an instrumentality capable of inflicting serious and often fatal injuries.

12. Negligence ⇐22

In reaching degree of "ordinary care", the care to be exercised in use of any in-

strumentality is proportionate to possibilities arising from its careless use.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Care".

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Miller McNear against the Pacific Greyhound Lines, a corporation, and another, to recover for injuries sustained when plaintiff was struck by named defendant's bus. After verdict for plaintiff, plaintiff moved for new trial limited to issue of damages and defendants moved for new trial on all issues, and from an order denying defendants' motion and granting plaintiff's motion, defendants appeal.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellants.

John Elliott Cook, of San Francisco, for respondent.

DOOLING, Justice pro tem.

After a verdict for $8,200 for personal injuries the plaintiff made a motion for new trial limited to the issue of damages alone and the defendants moved for a new trial on all issues. The trial court denied defendants' motion for new trial and granted a new trial limited to the issue of damages pursuant to the plaintiff's motion. From the order so made the defendants appeal.

Appellants argue that the evidence is not sufficient to support the verdict in two particulars: (1) That it fails as a matter of law to sustain a finding of appellants' negligence; and (2) that it establishes as a matter of law respondent's contributory negligence.

The evidence shows that respondent, McNear, on the night of the accident was taking a load of furniture from San Francisco to his home in Marin County. A friend, Mrs. Plunkett, talked to him in front of her apartment in San Francisco at about 9:40 P.M. that night. His light Ford truck was then loaded with furniture. The accident occurred at about 10:40 P.M. At 10:30 P.M. respondent had telephoned to his wife and after the accident his Ford truck with its load of furniture was found parked at the side of the road about 750 feet away from the scene of his injuries with its gas tank empty. These facts, sketchy though they are, were all that were produced concerning respondent's movements before the accident, because by reason of brain injury respondent has lost all memory of events occurring during the period of at least three days immediately preceding his injury.

Respondent was struck by a Greyhound bus bound from San Francisco to Fairfax and driven by the appellant Wade. The accident occurred on the 101 Highway at a point about 2 miles south of the Tiburon "Y." The night was clear and visability good. The headlights of the bus were on high beam and illuminated not only the road ahead but the shoulder and dirt on the right side of the highway. There were no other automobiles in sight. The driver felt the impact of the bus striking respondent but at no time saw him until after he had stopped the bus and gone back to the point where he was lying, entirely off the highway, with his head six feet from the edge of the pavement. The impact was with the right headlight near the right front corner of the bus and the witness Fairfax, a passenger on the bus, testified that the bus had been traveling on the outer part of the outside lane and just before the impact "there was a veering of the bus to the right." "It looked to me as though we were going right into the guard rail * * * The guard rail came into my vision suddenly, and at the same time the guard rail came into my vision, there was an impact." A rule of the respondent required its bus drivers to stop to take on passengers at any time signaled except within the incorporated limits of a city.

[1-3] The evidence above outlined is ample to support the implied findings of appellants' negligence and respondent's freedom from contributory negligence. The jury could hardly fail to find appellants negligent. The driver on a straight road well lighted both in front and to the side by his headlights on a clear night and with no other traffic on the highway, struck respondent with the right front corner of his bus without ever seeing him. No more need be said on that subject.

On the subject of contributory negligence appellants point to the testimony of one witness produced by appellants, Mrs. Rutledge, a passenger on the bus, who testified that just before the impact a figure

moved into the path of the bus and that she did not see its face. This is the only witness who testified seeing respondent before the impact. From this testimony appellants argue that respondent must have stepped in front of the bus while walking with his back to it. The evidence was not such as to compel the jury to reach this conclusion. Respondent by reason of his loss of memory was unable to testify to any of the events preceding the impact of the bus with his body. He produced no witness who could do so. He was entitled to the benefit of the presumption that he was taking ordinary care for his own safety. Satariano v. Sleight, 54 Cal.App. 2d 278, 281, 129 P.2d 35; Hoppe v. Bradshaw, 42 Cal.App.2d 334, 339, 340, 108 P. 2d 947; Scott v. Sheedy, 39 Cal.App.2d 96, 101, 102 P.2d 575. Added to this presumption was the testimony of Fairfax that the bus veered to the right just before the impact. The jury was entitled to weigh the evidence of Fairfax with that of Mrs. Rutledge and might reasonably conclude that the bus did veer to the right as testified by Fairfax and that the sudden appearance of respondent in front of the right front corner of the bus gave Mrs. Rutledge the impression that respondent moved into its path. Her failure to see his face was readily explainable by her testimony that the whole occurrence took no longer than the snapping of one's fingers. Appellants' attempt to argue the weight of conflicting evidence is futile before an appellate court.

The special damages amounted to $3,-108.62. This left an amount exceeding $5,-000 referable to general damages. Appellants cite Keogh v. Maulding, 52 Cal.App. 2d 17, 125 P.2d 858; Chinnis v. Pomona Pump Co., 36 Cal.App.2d 633, 98 P.2d 560; Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398; and Schuerholz v. Roach, 4 Cir., 58 F.2d 32, in support of their claim that the trial court erred in granting a new trial on the issue of damages alone.

[4, 5] The right to grant a new trial on this single issue is well settled. The only limitation imposed on the trial court in this particular by the cases cited by appellants is that it is an abuse of discretion to limit a new trial to the issue of damages when the amount awarded by the jury is so small in view of the damages proved that it must be concluded that the verdict is the result of some of the jurors sacrificing their conscientiously held view that the defendant was not liable and agreeing to a small but inadequate award for the plaintiff in order to arrive at some verdict. The whole subject is fully discussed and the earlier California cases analyzed in Hughes v. Schwartz, 51 Cal.App.2d 362, 124 P.2d 886. At page 368 of that opinion in 51 Cal.App.2d, at page 888 of 124 P.2d, this court announced its conclusion that "where, as in the instant case, a substantial but inadequate award of general damages is made, the question as to whether the new trial should be limited rests within the discretion of the trial judge." Cf. Cox v. Tyrone Power, etc., Inc., 49 Cal.App.2d 383, 390, 121 P.2d 829.

An award in excess of $5,000 for general damages must be regarded as substantial. A comparison of the awards made in the cases relied upon by appellants with the verdict in this case affords ready demonstration that none of them were at all comparable to the award made herein. In Keogh v. Maulding, supra, 52 Cal.App.2d page 18, 125 P.2d page 858, the jury allowed $291.23 for general damages in a case where "it is undisputed that the injuries are permanent. The tibia and fibula had been fractured, and the tibia, which had failed to unite, required further surgery of a major character." In Chinnis v. Pomona Pump Co., supra, the appellate court exercised its discretion to order a new trial on all issues as to one plaintiff. The jury had awarded her $750 for serious, and in part permanent, injuries described on page 642 of 36 Cal.App.2d, 98 P.2d 560. The amount was obviously trifling for the injuries incurred. In Wallace v. Miller, supra, the verdict was for $120.25, the exact amount of the plaintiff's hospital and doctor bills. The jury allowed nothing for general damages and failed to include a stipulated item of $203.64 for damage to plaintiff's automobile. In Bencich v. Market St. Ry. Co., supra, 20 Cal.App.2d page 522, 67 P.2d page 400, the court said of the award of $5,000 that "it is patent that at the very most the amount awarded by the jury barely, if at all, repays appellant his special damages." In Schuerholz v. Roach, supra, the jury allowed plaintiff only $625 for the loss of an eye.

[6] In the case before us the extent and permanency of respondent's disability was sharply disputed. One medical witness testified that by reason of brain damage

the respondent would never be able to pursue a gainful occupation again. Another testified that the symptoms of his brain injury should gradually disappear and within six months to a year he will probably be able to go back to his regular work. One medical witness testified that the injuries to his scapula were such that he could never do sustained lifting. Another testified that while he may have some permanent disability in his shoulder "I think he can use his shoulder all right." Under the evidence we cannot hold that in allowing over $5,000 for general damages the jury did not in good faith award what they considered an adequate compensation for the injuries as they found them.

[7] In passing on a motion for new trial on the ground that the damages awarded are inadequate the trial judge is entitled to reweigh the evidence and exercise his independent judgment thereon and if he concludes that the damages proved are not adequately compensated by the amount awarded he may grant a new trial on that ground. Belyew v. United Parcel Service, 49 Cal.App.2d 516, 518, 519, 122 P.2d 73; Hoffart v. Honig, 41 Cal.App.2d 271, 274, 106 P.2d 630; Cunha v. Lewis, 31 Cal.App.2d 1, 76 P.2d 1198; Reilley v. McIntire, 29 Cal.App.2d 559, 562, 563, 85 P.2d 169; Hoffman v. Lane, 11 Cal. App.2d 655, 658, 54 P.2d 477; Peri v. Culley, 119 Cal.App. 117, 119, 121, 6 P.2d 86. We must conclude that the trial judge in reweighing the evidence on the motions for new trial decided that the jury correctly determined from the evidence that appellants were liable and the respondent entitled to damages against them for the injuries incurred, that the amount of the verdict was not the result of a compromise reached by some of the jurors surrendering their convictions that appellants were entitled to a verdict in exchange for a reduction of the amount of damages, but that the amount awarded was none the less inadequate to compensate the plaintiff for the injuries actually received. There is ample evidence in the record, if believed by the trial judge, to support all of these conclusions.

Appellants, in an attempt to prove the award of over $5,000 for general damages so palpably inadequate as to demonstrate that it must be the result of some of the jurors compromising their views of nonliability, suggest that the $5,000 plus must have been awarded either to cover the cost of a further operation on the injured scapula or the loss of respondent's earnings from the time of injury to the date of trial or both. In making this argument appellants enter the field of pure speculation. The only physician to testify concerning the possibility of a further operation on the scapula expressed the opinion that it was too late for such an operation to improve the function of the arm and shoulder and that he would only advise its being performed if it developed that it should become necessary at some time in the future for the relief of pain. No evidence was produced as to the cost of such operation if performed. Respondent was the owner of a dairy which had occupied his full time in its operation and no amount of earnings lost was either proved or prayed for, nor was the jury given any instruction upon that subject.

The trial court gave the following instruction at the request of the respondent: "The amount of care required of the defendant Wade as the driver of a motor vehicle along a public highway was far greater than the amount of care exacted from Miller McNear as a pedestrian. The driver of a motor vehicle is in charge of a dangerous instrumentality capable of inflicting serious and often fatal injuries, and for that reason he is charged by law with a greater amount of care than the pedestrian."

[8] Both the driver and the pedestrian are bound to use the same degree of care. Each is bound to the duty of using the care of a person of ordinary prudence acting under the same or similar circumstances, but it is well settled that the amount or quantum of care necessary to reach the standard or degree of ordinary care is greater in the case of the operator of a motor vehicle than in the case of a pedestrian (De Greek v. Freeman, 108 Cal.App. 645, 291 P. 854; 2 Cal.Jur. 10 Yr.Supp., 366, 367) and it has been held to be reversible error for the trial court to refuse to so instruct the jury. Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002; Brown v. Blair, 26 Cal.App.2d 613, 80 P. 2d 95.

[9] Appellants, while conceding this rule, attack the instruction on two grounds: (1) That it was prejudicial error to instruct the jury that the amount of care required of the driver of the motor vehicle was far greater than the amount of care

exacted of the pedestrian; and (2) that it was prejudicial error to characterize a motor vehicle as a dangerous instrumentality. An instruction that the amount of care required of the driver is far greater than the amount of care required of a pedestrian has been approved more than once by the appellate courts of this state (Weihe v. Rathjen Mercantile Co., 34 Cal. App. 302, 305, 167 P. 287; Morgan v. Los Angeles R. & G. Corp., 105 Cal.App. 224, 231, 232, 287 P. 152; Pinello v. Taylor, 128 Cal.App. 508, 514, 17 P.2d 1039) and the same language has been used to describe the amount of care required of the operator of a motor vehicle in other cases. Raymond v. Hill, 168 Cal. 473, 483, 143 P. 743; De Greek v. Freeman; Dawson v. Lalanne, supra. The characterization of an automobile in similar instructions as "a dangerous instrumentality capable of inflicting serious and often fatal injuries," "serious injuries and death" or "severe injuries" has been held not to constitute reversible error in Martin v. Vierra, 34 Cal. App.2d 86, 93, 93 P.2d 261, 94 P.2d 567; Del Carlo v. Oberti, 2 Cal.App.2d 304, 306, 307, 37 P.2d 1050, and De Greek v. Freeman, supra, and our courts not infrequently have used the words "dangerous instrumentality" in reference to motor vehicles. People v. Chatham, 43 Cal.App.2d 298, 301, 110 P.2d 704; Dawson v. Lalanne, supra; Anderson v. Walters, 135 Cal.App. 380, 384, 27 P.2d 100; Vedder v. Bireley, 92 Cal.App. 52, 59, 267 P. 724.

The use of the words "dangerous instrumentality" to characterize an automobile was criticized by the court in passing on the refusal to give an instruction containing those words in Warnke v. Griffith Co., 133 Cal.App. 481, 497, 498, 24 P.2d 583, 590, but the court in that case conceded that "Similar instructions have been by different * * * courts approved as not constituting error" and that "such a charge might not be erroneous if given in connection with proper instructions as to the degree of care necessary for each to use to avoid being negligent."

It is true that it has been generally held that a motor vehicle is not a "dangerous instrumentality" in the sense that dynamite, gunpowder, ferocious animals and the like have been held to be dangerous instrumentalities so as to make those responsible for them answerable for injuries to others beyond the ordinary rules of negligence and respondeat superior. 5 Am.Jur. 522, 523; 42 Corpus Juris, 614, 615; Whicker v. Crescent Auto Co., 20 Cal.App.2d 240, 244, 66 P.2d 749. Our Supreme Court said in Buelke v. Levenstadt, 190 Cal. 684, 688, 214 P. 42, 43: "While an automobile is not, in and of itself, a dangerous machine, it may become such in the hands of a careless and indiscreet person."

While recognizing that a motor vehicle is not a dangerous instrumentality in the sense of imposing unusual liability on its owner or operator, "in a number of cases the courts have referred to the automobile as a dangerous instrumentality in the sense that a high degree (sic) of care must be exercised by the person operating it." 5 Am.Jur. 524; 16 A.L.R. 272.

[10-12] In the case before us the jury was properly instructed on what constitutes negligence and ordinary care; that the driver of the bus was not required to use extraordinary care but only ordinary care; that the driver of the bus was not required to use any greater degree of care than the plaintiff; and that the law forbids comparing negligence. Taken as a whole, the jury could not well have misunderstood the instructions. In describing a motor vehicle as "a dangerous instrumentality, capable of inflicting serious and often fatal injuries," the trial court was only expressing a fact undoubtedly already within the knowledge of every juror, acquired from his own observations on the streets and highways of the state and from reading in the newspapers the almost daily accounts of traffic accidents and deaths. It is a truism founded upon common experience that a motor vehicle is an instrumentality capable of inflicting serious and often fatal injuries. It was proper so to instruct the jury. The use of the adjective "dangerous" in the descriptive phrase added no new or different idea to that otherwise expressed by the words "capable of inflicting serious and often fatal injuries." Considered with the other instructions the criticized instruction did no more than point up for the jury the accepted rule that in reaching the degree of ordinary care "the care to be exercised in the use of any instrumentality is proportionate to the possibilities arising from its careless use." Whicker v. Crescent Auto Co., supra, 20 Cal.App.2d page 244, 66 P.2d 749; 19 Cal.Jur., 579-581.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

63 Cal.App.2d 54

GREENSPOT DESERT INNS, Inc., v. ROY et al.

Civ. No. 3265.

District Court of Appeal, Fourth District, California.

Feb. 25, 1944.

1. Appeal and error ⇐539

Where record contained stipulation that all evidence received in another action should be deemed received as part of record in instant action, and it was stipulated that reporter's transcripts could be used on both appeals, appellate court could consider record in appeal in the other action.

2. Appeal and error ⇐158(1, 2)

Generally, a voluntary satisfaction of judgment by a party estops him from prosecuting an appeal therefrom, but where satisfaction is involuntary mere circumstance that judgment has been satisfied does not deprive party aggrieved of his right to appeal therefrom.

3. Appeal and error ⇐162(3)

An exception to general rule that a party may not accept fruits of judgment and at same time appeal is recognized where appellant is conceded to be entitled to the thing which he has accepted and where appeal only relates to additional claim on his part.

4. Appeal and error ⇐801(1)

It is the policy of the District Court of Appeal to hear appeals on their merits rather than to dismiss them on motion when that result could be reached without violation of clear rules of law.

5. Evidence ⇐20(1)

Court could take judicial notice of stimulation of business caused in certain localities by war conditions.

6. Appeal and error ⇐162(3)

In suit by lessee's assignee for specific performance of option to purchase property, lessors' acceptance of benefits of judgment did not preclude them from appealing where they also accepted payments under threat of serious loss and they only accepted money which assignee admitted owing them, whereas lessors claimed a much larger amount was due them. Code Civ.Proc. § 944.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Greenspot Desert Inns, Inc., against John H. Roy and another to enforce specific performance of an option to purchase property. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal.

Motion denied.

Fred A. Wilson and Duckworth, Mussell & King, all of San Bernardino, and Norman S. Sterry and Gibson, Dunn & Crutcher, all of Los Angeles, for appellants.

John L. Mace, of Los Angeles, and Surr & Hellyer, of San Bernardino, for respondent.

MARKS, Justice.

This is a motion to dismiss this appeal on the ground that defendants have accepted the benefits of the judgment and, therefore, cannot prosecute it.

[1] Both parties have filed affidavits, arguments and extensive briefs. In their affidavits and briefs appellants have made frequent reference to the case of Roy v. Greenspot Desert Inns, Inc., now pending here on appeal. Respondent argues that no notice can be taken of the record in that case because it is a separate appeal pending in a case separate and distinct from the instant case. In the record before us we find a stipulation reciting that in the trial of the instant case it was stipulated "that all of the evidence oral and documentary received in the first above entitled action (Roy v. Greenspot Desert Inns, Inc.) should be deemed to be received as a part of the record in" the instant action and that all documentary evidence was included in the clerk's transcript in the other action. It was stipulated that the two reporter's transcripts be considered as one and used on both appeals and that the clerk's transcripts in either may be used in the other. An appropriate order was made in conformance with the stipulation. Therefore we consider it proper to consider both records in this proceeding where it may be necessary to do so.

On May 1, 1941, appellants were the owners of the Greenspot Cafe and Annex in Victorville, in San Bernardino County. On that day they leased it to D. H. Peery for a term of five years. There were modifications of the lease and an assignment to respondent. The lessors, appellants here,

were given the option of receiving 8% of the gross monthly income from the business in lieu of the monthly rental of $550. Respondent was given an option to purchase the property for $63,000, payable $5,000 in cash, a note for $10,000, payable in instalments within two years secured by a chattel mortgage, and $48,000 payable in instalments over a ten-year period. In the option it was provided that upon its exercise appellants would execute a conditional sales contract of the property.

Peery entered into possession of the property about May 1, 1941, and subsequently assigned the lease and option to respondent. Appellants elected to take the 8% of the gross receipts of the business in lieu of the monthly rental reserved in the lease. The rentals thus computed averaged in excess of $2,000 per month. To a considerable extent these high returns were due to war conditions and military activities on the California desert.

Respondent sought to exercise its option to purchase, and on April 10, 1942, deposited $5,000 in escrow with the San Bernardino Branch of the Bank of America, together with escrow instructions. By agreement the time of the exercise of the option was extended six months from that date to October 10, 1942. We are informed by affidavits that much of the six months was used in negotiations over the terms of a sale which included discussions of the sale and purchase of stock in respondent corporation. About November 23, 1942, respondent gave appellants notice of its intention to proceed to exercise its option. At that time no rent had been paid for the months of October or November.

Respondent prepared a promissory note for $10,000, a chattel mortgage securing it, and a form of a conditional sales contract it desired to have executed and placed these documents in escrow. Appellants prepared a conditional sales contract in the form they desired. Neither of the parties approved the form of contract prepared by the other and neither contract was executed. No rent was paid during this period and appellants commenced an action in unlawful detainer to recover possession of the property. Respondent filed an action to enforce specific performance of its option to purchase the property. It was successful in both actions and this appeal followed.

The judgment set forth copies of the promissory note and chattel mortgage to be executed by respondent and a copy of the conditional sales contract to be executed by both. The judgment contained the following:

"That the defendants, John H. Roy and H. E. Roy, and each of them, within ten days from the date of service upon them or their attorneys, of notice of entry of this Judgment, execute, acknowledge before a Notary Public and deliver to the plaintiff, Greenspot Desert Inns, Inc., a corporation, a conditional sales contract in the words, terms and figures set forth in Exhibit 'A' hereunto annexed and by this reference made a part hereof for all purposes."

The judgment further provided that in the event defendants failed to so execute the contract that the clerk of the court carry the judgment into effect and "procure, execute, acknowledge and deliver the documents".

The situation existing at the time of the entry of judgment seems to be this: Appellants claimed to be entitled to immediate possession of the property because of alleged breaches in the conditions of the lease, together with 8% of the gross receipts of the business as rental amounting to something over $28,000, being a little more than $2,000 per month, with a judgment against them in these issues. They were required by the judgment to accept $13,200.55, being $5,000, less a cash deposit of advance rentals paid when the lease was executed, and accrued instalments of principal and interest on the $10,000 promissory note and the conditional sales contract, accept the promissory note and chattel mortgage and execute and deliver the conditional sales contract or have the county clerk act for them. The total payments accruing to them under the decree would amount to something over $1,000 a month while they claimed they were entitled to rentals of over $2,000 a month as long as respondent held possession of the property. Under any view of the case appellants received under the judgment only that which was admittedly due them and less than half of what they claimed was due them and what they might be able to recover should the judgment be reversed and should they prevail on a retrial of the case.

Appellants tendered a conditional sales contract to respondent under conditions respondent refused to accept. Finally appellants accepted the $13,200.55 due them, the promissory note and chattel mortgage

and delivered the conditional sales contract to respondent. Appellants also accepted money representing a proration of taxes and insurance paid by them. The aggregate of these amounts is small. Respondent on its own motion satisfied the judgment except the portion awarding it costs.

Respondent has moved to dismiss this appeal on the ground that appellants, having accepted the fruits of the judgment, cannot attack it on appeal. Appellants are resisting the motion on several grounds among which are: (1) That they acted under compulsion and so are not prohibited from urging a reversal of the judgment, and (2) that they only accepted that which was actually and admittedly due them under any theory of the case while claiming a considerably larger sum which furnishes one important exception to the general rule to the effect that a party accepting the fruits of a judgment may not attack it.

The general rule just stated is thoroughly established in California. See, Preluzsky v. Pacific Co-operative C. Co., 195 Cal. 290, 232 P. 970; Graham v. Alchian, 51 Cal. App. 263, 197 P. 134; Mt. Shasta Power Corp. v. Dennis, 66 Cal.App. 186, 225 P. 877; Guho v. City of San Diego, 124 Cal. App. 680, 13 P.2d 387; Paul v. Walburn, 135 Cal.App. 364, 26 P.2d 1002.

[2, 3] There are two equally well settled exceptions to this rule. The first is thus stated in Preluzsky v. Pacific Co-operative C. Co., supra [195 Cal. 290, 232 P. 971]:

"It is the general rule that a voluntary satisfaction of a judgment by a party estops him to prosecute an appeal therefrom, but where such satisfaction is involuntary and enforced by process, the mere circumstance that the judgment has been so satisfied does not of itself alone deprive a party aggrieved of his right to appeal therefrom. Knight v. Marks, 183 Cal. 354, 191 P. 531; Sunset Lumber Co. v. Bachelder, 167 Cal. [512], 513, 140 P. 353, Ann.Cas.1916B, 664; Warner Bros. Co. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am.St.Rep. 400."

The second exception is stated in Guho v. City of San Diego, supra [124 Cal.App. 680, 13 P.2d 388], as follows:

"As a general rule, a party may not accept the fruits of a judgment and at the same time appeal from the same. Estate of Ayers, 175 Cal. 187, 165 P. 528, and cases there cited. An exception to this rule is recognized where the appellant is conceded to be entitled to the thing which he has accepted and where the appeal only relates to an additional claim on his part. San Bernardino County v. Riverside County, 135 Cal. 618, 67 P. 1047; Walnut Irr. Dist. v. Burke, 158 Cal. 165, 110 P. 517, 518."

[4] We have here the question of whether or not the case of appellants comes within either or both of the exceptions to the general rule. In approaching that question it might not be out of place to state that it has been the consistent policy of this court to hear appeals on their merits rather than to dismiss them on motion when that result could be reached without violation of clear rules of law. In following this policy we may have gone further than some of the other courts of this State, although we have dismissed appeals when required to do so.

Appellants first argue that their acts were done under compulsion of the mandatory order in the judgment already quoted. We can find little merit in this argument because that portion of the judgment could have been stayed by the deposit with the county clerk of the conditional sales contract pending the determination of the appeal. Sec. 944, C.C.P.

[5] It is next argued in this connection that as appellants admittedly had considerable sums of money due and payable to them each month they acted under the compulsion of facing serious financial loss unless they accepted part of what they demanded and believed due them. This argument gains substance when we take judicial notice of what is known to all residents of San Bernardino County, of the stimulation that war conditions have given business there. During the past twelve years courts have frequently taken judicial notice of business conditions caused by the depression so we can see no reason why we cannot take judicial notice of the stimulation of business caused in certain localities by war conditions. Much of the increase in business values and revenues is due to war conditions and to trade caused by the presence of large numbers of the armed forces and will disappear when the men in those forces return to their homes. Thus depreciation in revenues and values which are now inflated in those localities is not an improbable result. The probability of loss to appellants through delay is not merely fanciful should they forego all revenues from their property during the pendency of

this litigation which would have happened had they merely stayed the judgment on appeal.

In Warner Bros. v. Freud, 131 Cal. 639, 63 P. 1017, 82 Am.St.Rep. 400, the possibility of financial loss to defendant in the sum of $12,790.33 in property values was held sufficient compulsion to excuse the payment of $12,209.67 adjudged to be due in an action foreclosing a mortgage and to furnish sufficient reason to deny a motion to dismiss an appeal involving the validity of that judgment.

The case of Alamitos Land Co. v. Shell Oil Co., 217 Cal. 213, 17 P.2d 998, is to the same effect. The defendant was lessee of oil lands belonging to the plaintiff which recovered judgment against it in the sum of $522,895.11 on an accounting. The effect of the judgment was to terminate the oil lease unless the money was paid before a fixed date. The money was paid and the defendant appealed. The motion to dismiss the appeal was denied on the ground that the payment was made under the compulsion of the threatened serious financial loss. Hartke v. Abbott, 106 Cal.App. 388, 289 P. 206; Everts v. Matteson, 46 Cal.App.2d 14, 115 P.2d 207, and Hallett v. Slaughter, Cal. Sup., 140 P.2d 3, are to the same effect.

In discussing the second exception to the general rule in Walnut Irrigation District v. Burke, 158 Cal. 165, 110 P. 517, 518, it was said:

"This suggests that there may be exceptions. As to these the court, in San Bernardino County v. Riverside County, 135 Cal. [618], 620, 67 P. [1047], 1048, says: 'A limitation to this rule exists where a reversal of the judgment or order cannot affect the right of the party to the benefit which he has secured thereby; as, for example, where there is no controversy as to his right for the amount for which the judgment was given, but he claims that he was entitled to a greater amount. In such a case he is not precluded from an appeal, even though he has received the amount awarded to him.' In 2 Cyc. 653, one of the exceptions is thus stated: 'So an appellant, by the collection of a judgment in his favor, will not be estopped from appealing for the purpose of modifying the judgment so as to increase the amount of his recovery —as where the judgment allows a counterclaim, makes a deduction for usurious interest, for the value of improvements, or disallows certain items of account,'."

[6] Here appellants only accepted the money which the respondent admitted owing them while they claimed a much larger amount was due and payable to them. They also accepted the payments under threat of serious loss. Therefore we conclude that both exceptions to the general rule are applicable here and that the appeal need not be dismissed.

The motion to dismiss the appeal is denied.

BARNARD, P. J., and GRIFFIN, J., concur.



63 Cal.App.2d 38

In re GOSNELL'S ESTATE.

GOSNELL et al. v. GOSNELL et al.

Civ. 14279.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1944.

Rehearing Denied March 14, 1944.

Hearing Denied April 24, 1944.

1. Executors and administrators ⇐189

A widow loses her right to a family allowance upon her remarriage.

2. Marriage ⇐3

A marriage contracted in the state of Nevada which is valid under the laws of that state is valid in the state of California, and the right to a decree of nullity is governed by the law which determines the validity of the marriage. Civ.Code, §§ 63, 82.

3. Evidence ⇐35

The courts of California will take judicial notice of the Nevada law.

4. Marriage ⇐54

Under the laws of Nevada a marriage can be declared void only from the date of the entry of the decree of a court of competent authority adjudging the nullity. Comp.Laws Nev. § 4067.

5. Appeal and error ⇐837(10)
Evidence ⇐43(4)

The complaint and answer in a Nevada action could not be considered by the

District Court of Appeal when not introduced in evidence in the court below, since judicial notice could not be taken of pleadings filed in other courts.

6. Appeal and error ⇐910

It will be presumed that an action for annulment of a Nevada marriage was based upon one of the grounds covered by the Nevada statute. Comp.Laws Nev. § 4067; Civ.Code, § 82.

7. Marriage ⇐54

Where under Nevada statute a marriage could only be declared a nullity from the time of entry of the decree, a California court was not authorized to declare a Nevada marriage void from the beginning. Comp.Laws Nev. § 4067; Civ.Code, §§ 82, 86.

8. Executors and administrators ⇐189

A widow whose marriage in Nevada was annulled by California decree was not entitled to the continuance of family allowance as widow of previous husband on ground that California decree annulled her subsequent marriage "from the beginning", since under Nevada law the annulment was only effective from date of entry of decree, and her rights as widow were lost by her remarriage. Comp.Laws Nev. § 4067; Civ.Code, §§ 82, 86.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Ira Gosnell, deceased, wherein Thomas Selby Gosnell and others, children of deceased, and Bertie Gosnell objected to the granting of a family allowance to Evalou Gosnell, as surviving spouse. From an order granting the family allowance, Thomas Selby Gosnell and others, children of deceased, appeal.

Order reversed.

William T. Selby, of Ventura, for appellants.

Phillip Barnett and Robert L. Dreyfus, both of San Francisco, for respondent.

W. J. WOOD, Justice.

The appellants, children of Ira Gosnell, who died on July 28, 1942, have appealed from an order granting a family allowance in the sum of $250 per month to Evalou Gosnell, respondent who married Ira Gosnell on July 5, 1941.

Respondent married Wade E. Willey at Las Vegas, Nevada, on November 6, 1942. At the hearing in the probate court respondent offered and the court received in evidence a decree of the superior court in and for the county of San Francisco, dated March 25, 1943, in which it was adjudged "that the purported ceremony of marriage between Evalou Gosnell Willey and Wade Willey be, and the same is hereby, annulled and declared void and without any force or effect whatsoever from the beginning." It appears from the decree of the San Francisco court that notice of the time and place of the trial and findings of fact were waived by the defendant Willey and consequently the court made no findings.

[1] A widow loses her right to a family allowance upon her remarriage. Estate of Still, 117 Cal. 509, 49 P. 463. There was a period of approximately six months following November 6, 1942, in which respondent was the wife of Willey by virtue of the marriage at Las Vegas, a marriage that was valid for all purposes until annulled by a court having jurisdiction. If Willey had died during that period she would have been entitled to a widow's allowance from his estate. Estate of Harrington, 140 Cal. 244, 247, 73 P. 1000, 98 Am.St.Rep. 51. The wife of Willey would not be entitled to a family allowance claiming to be the widow of Gosnell. The argument that by the decree of the San Francisco court, apparently entered with the consent of Willey, she again became the widow of Gosnell is not persuasive.

[2-4] A marriage contracted in the state of Nevada which is valid under the laws of that state is valid in the state of California. Civil Code, sec. 63. The right to a decree of nullity is governed by the law which determines the validity of the marriage. McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163, 104 A.L.R. 1290. The rule is stated in section 136 of the Restatement of the Law of Conflicts of Law, approved in the McDonald case: "The law governing the right to a decree of nullity is the law which determines the validity of the marriage with respect to the matter on account of which the marriage is alleged to be null". In the comments of the Restatement in connection with section 115 it is stated: "Therefore, in determining whether such a decree (of nullity) will be rendered, the court at the forum will be governed by the principles of the marriage law of the state which under the appropri-

ate Conflict of Laws rule, determines the validity of the marriage in question." In deciding whether decrees nullifying marriages celebrated in Nevada should be granted the California courts must be governed by the marriage laws of Nevada. McDonald v. McDonald, supra. Turning to the Nevada law, of which we take judicial notice, we find that section 4067, Nevada Compiled Laws of 1929, provides: "When either of the parties to a marriage, for want of age or understanding, shall be incapable of asserting thereto, or when fraud shall have been proved, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from the time its nullity shall be declared by a court of competent authority." It thus appears from the express provision of the marriage laws of Nevada that the marriage of respondent and Willey at Las Vegas could be declared void only from the date of the entry of the decree of a court of competent authority adjudging the nullity.

[5-7] The judgment roll of the action in the San Francisco court was not admitted in evidence and appellants now contend that it was error for the trial court to receive the decree without the judgment roll, by which it could be shown that the Nevada marriage was voidable and not void. They have printed in the appendix to their brief the complaint and answer in the San Francisco action, showing that the Las Vegas marriage ceremony was performed while respondent and Willey were both intoxicated and that respondent was induced to go through with the ceremony because of the intimidations of Willey. Respondent properly contends that the complaint and answer should not now be considered by this court, for they were not introduced in evidence and we may not take judicial notice of the pleadings of actions filed in other courts. Plum v. Indian Valley Bank, 118 Cal.App. 13, 17, 4 P.2d 543. However, the failure to introduce the pleadings of the San Francisco action is not vital to appellant's contention. The Nevada statute appears to be substantially the same as section 82 of the Civil Code of California. It will be presumed that the action for annulment was based upon one of the grounds covered by the Nevada statute above quoted. MacCormack, v. MacCormack, 175 Cal. 292, 165 P. 930. As we have seen, it is expressly provided by the Nevada law that a marriage annulled on one of such grounds could be rendered void only from the time that its nullity is declared by a court decree. It follows that the San Francisco court was not authorized to declare the Las Vegas marriage void "from the beginning".

[8] The decree nullifying the Las Vegas marriage was not conclusive as to appellants, who were not parties to the action and had no notice thereof. Section 86 of the Civil Code reads: "A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them." In Price v. Price, 24 Cal.App.2d 462, 75 P.2d 655 the parties made a property settlement agreement in which it was provided that the husband should pay to the wife $150 per month. But it was also provided that in the event of a divorce and remarriage of the wife the obligations of the husband would cease. The parties were divorced and the wife entered into a marriage ceremony in Mexico. The Mexican marriage was thereafter annulled by a California court. The reviewing court held that under section 86 of the Civil Code, the decree of the California court nullifying the Mexican marriage was not binding upon the husband and did not have the effect of obligating him to carry out the terms of the property settlement agreement.

The order is reversed, appellants to recover costs on appeal from respondent.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

63 Cal.App.2d 46

ROWE v. HOLMES et ux.

Civ. 3244.

District Court of Appeal, Fourth District, California.

Feb. 25, 1944.

Hearing Denied April 24, 1944.

1. Contracts ⇐229(1)

Where landowners employed plaintiff as hydraulic engineer, in action to condemn lands, at $75 per day to be paid "when we shall have recovered * * * the money or damages for our land", and landowners recovered judgment in such condemnation action for about $475,000, and pending appeal a stipulated judgment for landowners for over $533,000, was entered and money paid into court, plaintiff was entitled to interest on amount of his fee from entry of original judgment; words "recovery of damages" meaning a recovery of judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Recovery of Damages".

2. Contracts ⇐169, 170(1)

Where contract is ambiguous, resort may be had to circumstances surrounding transaction and subsequent conduct of parties for purpose of discovering meaning intended.

3. Contracts ⇐65(1)

The "consideration" for landowners' contract employing plaintiff as hydraulic engineer in condemnation action at $75 per day to be paid "when we shall have recovered * * * the money or damages for our land" applied to landowners' subsequent written agreement to pay 7 per cent. on amount due plaintiff from date of original judgment for landowners in the condemnation action, and existence of the prior indebtedness for plaintiff's services was sufficient "consideration" for the subsequent agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

4. Judgment ⇐841

Landowners' assignment of a proportional interest in judgment recovered in condemnation action as security for payment of plaintiff's services in the condemnation action was an "executed contract" requiring no consideration.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed Contract".

5. Judgment ⇐844

Landowners' assignment of proportional interest in judgment recovered in condemnation action as security for payment of plaintiff's fee for services in such action, providing for interest from entry of judgment at same rate finally awarded landowners on their judgment, was not conditioned on receipt of interest by landowners.

6. Eminent domain ⇐148

Where landowners were obligated to pay plaintiff for his services in condemnation action on entry of judgment therein, judgment recovered by landowners in the condemnation action became "final" after their assignment of proportional interest in the judgment as security for payment of plaintiff's fee for such services, insofar as allowance of interest from time of taking possession of property to date of entry of judgment was concerned.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

7. Eminent domain ⇐247(2)

Landowners who recovered judgment in eminent domain action would eventually have been entitled to interest at 7 per cent. on some amount from date of such judgment.

8. Judgment ⇐844

Landowners who recovered judgment for large amount in eminent domain action, from which appeal was pending for several years, could not, by settling case and stipulating to amount of final judgment, defeat plaintiff's right under landowners' assignment of proportional interest in the judgment as security for payment of plaintiff's fee for services in the condemnation action

9. Appeal and error ⇐909(1)

Where landowners recovered judgment for $475,000 in condemnation action, and pending appeal settled case several years later as result of which a stipulated judgment was entered for landowners for over $533,000, appellate court could not determine that landowners did not collect 7 per cent on amount they received for their land under the judgment, so as to defeat plaintiff's right to interest on fee for services

in condemnation action to be paid with same rate of interest as landowners should finally recover on their judgment.

Appeal from Superior Court, Riverside County; G. R. Greeman, Judge.

Action by W. P. Rowe against Lawrence Holmes and wife to recover interest on fee for professional services rendered to defendants. Judgment for plaintiff, and defendants appeal.

Affirmed.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellants.

Sarau & Thompson and Roy W. Colegate, both of Riverside, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment awarding the plaintiff interest on a fee for professional services rendered to the defendants.

The defendants owned certain lands which were condemned and taken for use as a reservoir site in an action filed by the Metropolitan Water District. In 1935, the defendants employed the plaintiff, by a written contract, too render services as a hydraulic engineer in connection with that action. While the plaintiff's compensation was not contingent upon the outcome of that case, under the terms of the contract, whether it was payable upon the entry of a judgment in that action or at the time any such judgment was paid, is the only matter in controversy here. The services were completed and the trial of that action ended on or about September 1, 1937. In that action these defendants recovered a judgment against the Metropolitan Water District for some $475,000. The water district took an appeal which was pending for several years. In February, 1942, and before that appeal was finally decided, the parties thereto effected a compromise as a result of which a stipulated judgment was entered in February, 1942, giving these defendants $533,390.39 and that amount was paid into court. The plaintiff was paid the amount of his fee, this amount not being disputed, but the defendants refused to pay interest thereon from the date the original judgment was entered. By some arrangement, the court retained $7500, from the amount paid in, to abide a determination of this plaintiff's claim for interest.

In this action which followed, certain written instruments were introduced in evidence and the plaintiff testified. The defendant Lawrence Holmes did not take the stand and the testimony of Mrs. Holmes is not material on this appeal. The defendants' contention was and is that no interest was due to the plaintiff under the terms of the contract of employment, and that there was no consideration for any of the later instruments. The court found in all respects in favor of the plaintiff and entered judgment accordingly, and the defendants have appealed.

[1] The contract of employment dated August 1, 1935, was drawn by one of the attorneys representing these appellants in the condemnation action and was signed by these appellants and by the respondent. So far as material here, it provides that the respondent was to receive $75 a day for his services in the case of the Metropolitan Water District v. Adams et al. "to be paid when we shall have recovered from the plaintiff in the case the money or damages for our land or dam sites, either in the law suit or by stipulation out of court." The appellants argue that it clearly appears from the language thus used that the compensation was not to be paid until the money for the lands involved was actually received by them. It is argued that the court erroneously interpreted this language as calling for payment of the compensation when judgment was entered. The use of the language "when we shall have recovered * * * the money or damages for our land" suggests that some alternative was in the minds of the parties. The recovery of money is one thing, but the recovery of damages may be different and is ordinarily interpreted as meaning the recovery of a judgment. Westinghouse Electric & Mfg. Co. v. Chambers, 169 Cal. 131, 145 P. 1025; Cordes v. Harding, 27 Cal.App. 474, 150 P. 650; Ferris v. Independence Indemnity Co., 124 Cal.App. 154, 12 P.2d 148. The fact that both of these expressions were used in the contract rather clearly indicates an intention that something other than the payment of the money for the land might determine the date when the compensation to the respondent was to be paid. The language thus used is coupled with the further words "either in the law suit or by stipulation out of court." This shows that the parties had in mind the possibility that the case might be settled out of court before a judgment

was entered. This may account for the use of the expression "money or damages for our land", since the appellants would naturally recover "money" in the event the case was settled by stipulation before judgment, and would recover "damages," within the usual meaning of that word, if the case was not settled and a judgment was entered. This seems to be a reasonable interpretation of the contract, if not the most reasonable one, and the court was, therefore, free to adopt it.

[2] The least that can be said is that the language of the contract is ambiguous and uncertain and, under such circumstances, under well settled rules, resort may be had to the circumstances surrounding the transaction and the subsequent conduct of the parties for the purpose of discovering the meaning which was intended. In this case these factors, to an unusual degree, support the conclusion that it was intended that the respondent's compensation should become due when a judgment was entered. The appellants owned valuable lands which were being taken by the water district and it was certain that a judgment in a large amount would be recovered by them. That judgment would draw interest from the time it was entered and if the respondent were required to wait for his pay, pending an appeal, it would be normal and natural for the parties to provide for the payment of interest to him since the appellants would normally receive interest on an equivalent amount represented in the judgment.

In view of this general situation the acts of the parties here are peculiarly suggestive. On August 6, 1937, shortly before the respondent's work was completed, the attorney who drew the contract wrote a letter to the respondent expressing pleasure with the results of his work and stating: "After having examined your figures, I am perfectly willing to approve them in the amount that there is due to you now, to wit: $16,900.00 under the contract with Mr. Holmes * * *." The respondent had borrowed some money from a bank in Riverside in August, 1937. On December 15, 1937, this same attorney addressed a letter to the president of this bank, in which he said:

"Some time ago I wrote to you giving you the approximate amount due Mr. W. P. Rowe from Mr. Lawrence Holmes for his services in connection with the case of Metropolitan Water District vs. Adams et al., and inasmuch as the trial of that case is now ended, I wish to state that the amount due Mr. Rowe from Mr. Holmes at the conclusion of that case on or about September 1, 1937, was "17,737.50. This amount will bear interest at the rate of 7% from the date of the judgment until it is paid."

This attorney handed this letter to the respondent who took it to Mr. Holmes and asked him to approve it. Mr. Holmes wrote "O.K." on it and signed his name.

About December 1, 1939, the respondent presented to the appellants a form of partial assignment of the judgment that had been obtained against the water district assigning to him an interest in that judgment to the extent of his fee with interest at the rate of 7%. Mrs. Holmes objected to the assignment, saying she did not know what interest would be allowed them by the court on that judgment and that she wanted to discuss the matter with their other attorney, Mr. Clark. Shortly thereafter, a conversation was held between the respondent, Mr. Holmes and the president of the bank who had loaned money to the respondent. Mr. Holmes then said he was willing to give an assignment but did not want to sign one that mentioned 7% interest because he did not know whether that was the rate of interest, or whether interest was to be paid between the date of taking the property and the date of judgment; that he did not know whether he was going to get any interest or not; that this was now a matter of litigation before the courts; and that he wanted to discuss the matter with Mr. Clark. The matter was then taken up with Mr. Clark by both parties, and on January 25, 1940, Mr. Clark wrote a letter to the respondent, in which he said:

"The form of assignment enclosed is entirely satisfactory. I approved it to Mr. Holmes in person last Monday and I think you will have no difficulty in procuring its execution, as it only conforms to your understanding and it is just and proper that you should have it and I do not believe that Mr. and Mrs. Holmes would withhold from you anything which it is just and proper you should have.

"As to interest, there can be no question as to the right to interest from and after the date of judgment. That question has been settled by the courts of this state. The only controversy is as to the right to interest for the period preceding the judg-

ment during which the condemning party had possession of the property. I also believe that that question will be answered in the affirmative. * * *

"I enclose copy for Mr. and Mrs. Holmes."

The respondent took this letter to the appellants on February 2, 1940, and they stated that they were willing to sign the assignment as they had discussed it with Mr. Clark. The appellants then signed the assignment, which reads:

"For value received, we the undersigned, Lawrence Holmes and Gertrude E. Holmes, his wife, hereby assign, transfer and set over unto W. P. Rowe of San Bernardino, California, as security for the payment to him of Seventeen Thousand Eleven Hundred Thirty-seven and 51/100 Dollars ($17,737.50), together with interest thereon at the same rate which the court finally awards assignors on their judgments from the date of entry of judgment, same to be computed from the date of entry of judgment in Action 27011 which was on or about September 1, 1937, an undivided interest equal to said total sum due him in the Judgments heretofore rendered in Actions Nos. 26462 and 27011 in the Superior Court of Riverside County, California, and do hereby authorize and direct payment of said sum to the order of said W. P. Rowe as and when payment of said Judgments shall be made."

The respondent recorded the original of this assignment in the office of the County Recorder of Riverside County, sent a photostatic copy thereof to the Metropolitan Water District, and filed a photostatic copy in the condemnation proceedings in the Superior Court. The matters above recited support the interpretation placed upon this contract by the trial court and support the conclusion that the intention of these parties was that the compensation should be paid to the respondent when a judgment was entered in the other action, unless the case was settled before judgment in which event payment would have been due when the money for the land was received.

[3] Another consideration is that the appellant Lawrence Holmes, on December 15, 1937, signed what amounts to a direct written agreement to pay interest at 7% on the amount due from the date of the original judgment in the other action. While the appellants have at no time denied that they agreed to pay this interest, they now contend that this written promise of December 15, 1937, is void for lack of any consideration and because it was not signed by Mrs. Holmes. This writing clarified the uncertainty in the original contract and reaffirmed that contract by stating the precise amount due. Not only did the consideration for the original agreement relate and apply to this instrument, but the existence of the prior indebtedness was a sufficient consideration. The land involved in the condemnation proceeding was community property of the appellants and, in any event, the amount now held in court to cover the judgment in the present action is much less than the interest of Mr. Holmes in the proceeds of the judgment in the other action.

[4-9] A further consideration is that the assignment of a proportional interest in the judgment in the condemnation action was an executed contract and required no consideration. The appellants argue that this assignment was conditional, with respect to interest, in that they were to pay interest only in the event they should receive interest from the water district, and that they never received any interest on their judgment since the case was settled and final judgment was entered for a stipulated amount. The assignment was not conditioned on the receipt of interest by these appellants, but merely provided for interest which should be at the same rate which was finally awarded the assignors on their judgment. The judgment obtained by appellants became final, after the assignment was made, insofar as an allowance of interest at 7% from the time of taking possession of the property to the date of entry of the judgment is concerned. Metropolitan Water Dist. v. Adams et al., 16 Cal.2d 676, 107 P.2d 618. This would have covered the interim had there been a new trial. That they would eventually have been entitled to interest at 7% on some amount from the date of the original judgment, under our law, if they had not settled the case, cannot be questioned, and 7% would have been the "rate which the Court finally awards assignors." The court found that the compromise in the other action was made without the consent of this respondent. The appellants could not by thus settling the case, and stipulating to the amount of the final judgment, defeat the rights thus given the respondent by the assignment. Moreover, it does not certainly appear that the appellants did not collect 7% on the

amount they received for their lands. While the original award was about $475,000, they settled for and received about $533,000. For all that here appears the settlement agreement may have been based upon an award of some $410,000, with interest at 7% from the date of the original judgment, making the total amount thus received.

Under the views above expressed certain other points raised require no consideration. There can be no doubt that the appellants intended to and agreed to pay this interest to the respondent, and the evidence and findings amply support the judgment.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CARTER, J., dissenting.



MITCHELL et al. v. CEAZAN TIRES, Limited.*

Civ. 14119.

District Court of Appeal, Second District, Division 3, California.

Feb. 25, 1944.

Rehearing Denied March 21, 1944.

Hearing Granted April 24, 1944.

1. Landlord and tenant ⇐93

Where lease does not restrict use of leased premises to a single purpose, lease is not invalidated by subsequent enactment prohibiting use for less than all of the several purposes specified.

2. Landlord and tenant ⇐199½

A change in the law, during term of a lease, which merely restricts and does not wholly prohibit conduct of business carried on, does not release tenant from his obligation to pay rent.

3. Landlord and tenant ⇐199½
War ⇐4

Where lease did not restrict use of leased premises to a single purpose of automobile tire business and thereafter lease for which tenant intended to use property was restricted by federal rationing, proof by tenant that his only purpose in obtaining lease was to use property in tire business would not relieve tenant of his obligations under the lease, especially where tenant had right to sublet.

4. Landlord and tenant ⇐93

Tenant with right to sublet cannot claim that he has been deprived of fruits of his lease because the use he wished to make of it is no longer possible.

5. Landlord and tenant ⇐93
War ⇐4

Where lease of store provided that premises were to be used for conduct of automobile tire business and other related business such as automobile supplies, and in no event used for a business which would increase fire hazard or insurance rates, act of federal government in imposing restriction upon sale of new tires did not release tenant from its obligations under the lease.

Appeal from Superior Court, of Los Angeles County; John Gee Clark, Judge.

Action by Alfred D. Mitchell and another against Ceazan Tires, Limited, for a declaration that a lease which had been entered into between the parties was still a binding obligation upon defendants. From a judgment for defendants, the plaintiffs appeal.

Reversed.

L. D. Uhlman, of Long Beach, for appellants.

Charles J. Katz, Alfred Gitelson, and Mose Katzev, all of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Because of the tire rationing program which followed closely upon December 7, 1941, the defendant, a wholesaler of new tires, took the position that it was relieved from all obligations under a lease it had with the plaintiffs for a building in which to carry on a branch of its business in the city of Long Beach. We have reached the conclusion that the defendant was not released from its lease by the restrictions placed upon its business.

The lease between the parties was entered into in March, 1940, and was to run to July 24, 1943. Its fourth paragraph read:

"The Lessee shall have the full control and occupancy of the buildings upon said premises and may sublet or sublease any part or portion thereof to any acceptable and responsible person, but the Lessee is

* Subsequent opinion 153 P.2d 53.

to be and remain liable for the rentals herein reserved and for the performance of all the conditions of this lease imposed upon the Lessee.

"The premises hereby leased are to be used for the conduct of an automobile tire business and other related business such as automobile supplies, and in no event used for a business that would increase the fire hazard or insurance rates."

This 1940 lease was a renewal of one entered into in 1937, with like terms except that the rental under the renewal lease was $125, instead of $150, per month. The use the defendant had been making of the premises covered by the two leases had been entirely that of selling tires and tubes; no "related" business had been engaged in. With the successive restrictions imposed by the O.P.A. upon the sale of tires, beginning with the freezing order of December 11, 1941, the defendant found its business materially affected and on February 23 served a notice of rescission upon the plaintiffs, giving warning that on February 25 it would quit plaintiffs' premises and pay no more rent after that date. On February 25 the defendant did vacate the leased property. Plaintiffs promptly brought this suit, seeking a judgment that the lease was still a binding obligation upon the defendant. From a judgment declaring that the defendant was under no further obligation for rent on the leased premises, the plaintiffs appealed.

Plaintiffs' position is that the provisions of the lease respecting the use to which the defendant might put the premises, were permissive, not restrictive; that the defendant could make any use of the property, so far as the lease was concerned, except as limited by the provision, general in its application to all businesses, that the use should not increase the fire hazard or the insurance rates. The defendant advanced two theories, which found favor with the trial court: First, it contended, the lease by its terms restricted the use of the premises to the automobile tire business and to other related businesses, such as the business of automobile supplies, and that the restrictions placed by the government upon the tire business so destroyed the usefulness of the premises to it (the lessee) that it was released from the payment of further rent. Second, it argued, its right to be relieved of the burdens of the lease, because of the severe restrictions on the sale of new tires, is to be measured by its known purpose in leasing plaintiffs' property, for the sale of new tires only, whatever interpretation be placed on the lease. In this connection it points to the fact that it made no use of the leased buildings other than for the wholesaling of tires as proof that that was its primary purpose in securing the lease, and that any other "related" business that it was authorized to engage in was to be in conjunction with the primary business, and was frustrated with it.

With respect to the interpretation to be placed upon the lease itself, it does not matter, in the end, whether it is held to be permissive or restrictive. If permissive, the defendant beyond doubt would remain liable for the rent, as will be seen from the cases soon to be cited. But if the lease is regarded as restrictive, even so the defendant remained under obligation to fulfill its provisions. Looking to the uses which the lease authorized the defendant to make of the demised premises, we find them to be: "for the conduct of an automobile tire business and other related business such as automobile supplies." One might engage in many phases of the automobile tire business itself without violating any of the regulations which caused the defendant to rescind. The first orders prohibited entirely the sale of new tires and tubes, but left unaffected the sale of second hand tires and tubes. Later, sales of new tires and tubes were permitted, although in a greatly restricted market, and the sale of used and reconditioned tires was placed under a rationing program. From early in January, 1942, there were restrictions, not prohibitions, upon the sale of tires. At all times the business of repairing and changing tires and tubes continued to be lawful. The defendant may not have cared to engage in the branches of the tire business which remained open to it, but it could lawfully have done so in the premises it had leased.

So, too, could it without restrictions have conducted numerous "related" businesses, of which "automobile supplies" was named in the lease, plainly as an illustration, not a definition. There are those who find a livelihood in selling, renting, repairing and charging batteries. We suggest this as a possible "related" business which, so far as we are aware, remained lawful. The furnishing of automobile supplies has been the business of a well known

chain of stores, and many stores carry large stocks. The defendant had the undoubted right to use its leased premises for this business.

[1, 2] One principle that we find to be applicable to the situation thus presented is thoroughly established. It was expressed in these words in an annotation published in 1920 (7 A.L.R. 836): "The decided weight of authority is to the effect that where the contract does not restrict the use of the leased premises to a single purpose, it is not invalidated by a subsequent enactment prohibiting the use for less than all of the several purposes specified." Since the publication of the annotation from which we have just quoted, these cases recognizing the principle have been decided: Jacobs v. Mingle, 1923, 278 Pa. 250, 122 A. 285, 286; Girard Trust Co. v. Tremblay Motor Co., 1928, 291 Pa. 507, 140 A. 506, 511; Grace v. Croninger, 1936, 12 Cal.App.2d 603, 55 P.2d 940; 61-69 Pierrepont St. v. Feist, 1940, 124 N.J.L. 412, 11 A.2d 727; Byrnes v. Balcom, 1942, 265 App.Div. 268, 38 N.Y.S.2d 801, affirmed, 1943, 290 N.Y. 730, 49 N.E.2d 1004; Davidson v. Goldstein, 1943, 58 Cal.App.2d Supp. 909, 911, 136 P.2d 665. Another principle, also applicable to the situation in which the defendant found itself, was stated in Byrnes v. Balcom, one of the cases just cited, as follows (page 803, of 265 App.Div., page 803 of 38 N.Y.S.2d): "A change in the law during the term of the lease, however, which merely restricts but does not wholly prohibit the conduct of the business carried on, does not release the tenant from his obligation to pay rent." Other cases to the same point are: Grace v. Croninger, supra; Davidson v. Goldstein, supra; Colonial Operating Corporation v. Hannan Sales & Service, Inc., 1943, 265 App.Div. 411, 39 N.Y.S.2d 217; Robitzek Investing Co. v. Colonial Beacon Oil Co., 1943, 265 App.Div. 749, 40 N.Y.S. 2d 819, 822; Deibler v. Bernard Bros., 1943, 319 Ill.App. 504, 48 N.E.2d 422.

Of these several cases cited we shall make further reference only to one, the case of Grace v. Croninger. That action was by the lessor upon a guaranty for the payment of the rent under a lease which gave the lessee the right to use the premises as a saloon and also for bootblack and cigar store purposes. It is quite obvious that the primary purpose of such a lease would be the running of the saloon; the other two purposes would be incidental to the major operation. After the lease was entered into the War-Time Prohibition Act, 27 U.S.C.A. § 1 et seq., outlawed the sale of intoxicating liquor. "The main question presented by these appeals," the court stated (page 605, of 12 Cal.App.2d, page 941 of 55 P.2d), "is whether the liability of the guarantor for the subsequently accruing rents ceased upon the enactment of the War-Time Prohibition Act." It was determined that the liability did not cease, for three reasons: First, because there were two uses authorized by the lease which were unaffected by the statute, viz. the use of the premises for bootblacking and for a cigar store. Second, the conduct of the saloon business was not prohibited but only restricted, for soft drinks could still be sold. Third, the lessee continued in possession of the premises. In our case the third reason does not exist, but each of the others does, and as they would singly, so they do jointly, support the conclusion that the defendant had not been released from its obligation to pay rent under the terms of its lease.

[3-5] We have seen that a lessee is not released from the obligations of a lease which permits or authorizes him to use the property for two purposes by a police regulation which stifles one use only. A lessee cannot escape the effect of this rule by proving that it never was his intention to use the property in the way that remains lawful, that his only purpose in obtaining the lease was to use the property in the business he is no longer permitted to carry on. The lessee's obligations, under the lease, are to be measured by his rights, not his desires. Davidson v. Goldstein, supra, 58 Cal.App.2d Supp. 909, 910, 136 P.2d 665; Robbins v. McCabe, 1921, 239 Mass. 275, 131 N.E. 799; Colonial Operating Corp. v. Hannan Sales & Service, Inc., 1943, 265 App.Div. 411, 39 N.Y.S.2d 217. Especially is this true where his right under the lease is not limited to his own use of the premises but includes the right to take such reward as may be obtained from a subletting. A lessee with the right to sublet, and that describes the defendant in the present case, is in no position to claim that he has been deprived of the fruit of his lease just because the use he wished to make of it is no longer possible.

Upon the return of this case to the trial court the cause of action that will remain will no longer be one in equity for declaratory relief, but one at law for rent

which has become past due. This may necessitate some amended or supplemental pleading which the plaintiff should be permitted to make.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.



NICHOLSON et ux. v. HENDERSON. HENDERSON v. NICHOLSON et al.*
Civ. 14304.

District Court of Appeal, Second District, Division 2, California.

Feb. 25, 1944.

Hearing Granted April 24, 1944.

1. Appeal and error ⇐78(4)

An order granting motion of defendant who filed a cross-complaint for nonsuit on the complaint was a "final order" and appealable.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

2. Appeal and error ⇐870(3)

An appeal from judgment on the merits does not authorize appellate court to review any other decision from which an appeal might have been taken. Code Civ.Proc. § 956.

3. Appeal and error ⇐870(3)

In action to impress a trust and to quiet title to land wherein defendant filed cross-complaint to quiet title to same land, on plaintiffs' appeal from judgment on the cross-complaint, appellate court could not review alleged errors in granting defendant's motion for nonsuit on the complaint. Code Civ.Proc. § 956.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by William M. Nicholson and his wife against Mabel Scott Henderson, as administratrix of the estate of Armour Ray Henderson, deceased, and Mabel Scott Henderson, individually, to impress a trust and to quiet title to a parcel of land, wherein defendant filed a cross-complaint to have her title quieted to the parcel of land described in the complaint. The defendant's motion for nonsuit on the complaint was granted and, from a judgment for defendant on the cross-complaint, the plaintiffs appeal.

Affirmed.

Earl Oakley and George R. Wickham, both of Los Angeles, for appellants.

William H. Haupt, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal, after trial before the court without a jury, from a judgment on a cross-complaint quieting respondent's title to a parcel of land.

The essential facts are these:

[1] Appellants filed a complaint seeking to impress a trust and to quiet title to a parcel of land. Respondent filed an answer to the complaint, and also sought by cross-complaint to have her title quieted to the parcel of land described in the complaint. At the time of the trial the court granted respondent's motion for a nonsuit on the complaint, which order was entered in the clerk's minutes March 12, 1943.[1] This was a final and appealable order from which no appeal has been taken. McColgan v. Jones, Hubbard & Donnell Inc., 11 Cal.2d 243, 247, 78 P.2d 1010; Spinner v. L. A. Ry. Corp., 52 Cal.App.2d 679, 685, 126 P.2d 940; Nulsen v. Nulsen, 3 Cal.App.2d 407, 408, 39 P.2d 509. Because the time for appeal has elapsed this order is final.

After the granting of respondent's motion for a nonsuit the cause proceeded to trial on the cross-complaint and answer thereto. When the trial was completed judgment was entered upon the cross-complaint in favor of respondent.[2] The present ap-

[1] The minute order read in part as follows:

"Defendant's Motion for a nonsuit on the Complaint is granted on the grounds of insufficiency of the evidence. * * *"

[2] Omitting the title of the court and cause, the judgment read as follows:

"Judgment

"(On Cross-complaint)

"The above-entitled cross-complaint, and the action thereon, duly and regularly came on for trial before the above entitled court, in Department 30 thereof, before the Honorable Edward R. Brand, judge presiding,

* Subsequent opinion 153 P.2d 945.

peal[3] is from this judgment only.

Appellants' entire argument is directed to alleged errors of the trial court in granting respondent's motion for a nonsuit on the complaint. They do not present any authority or argument showing error in the entry of the judgment in favor of respondent on the cross-complaint.

This is the sole question necessary for us to determine:

On appeal from a judgment on a cross-complaint may this court review alleged errors in the granting of a motion for a nonsuit on the complaint?

This question must be answered in the negative.

[2] The rule is established in California that an appeal from a judgment on the merits does not authorize the appellate court to review any other decision or order from which an appeal might have been taken. Sec. 956 Code of Civil Proc.; Wells Fargo Bank & U. T. Co. v. Broad, 3 Cal.App. 2d 45, 48, 39 P.2d 241; Ratliff v. Ratliff, 116 Cal.App. 39, 41, 2 P.2d 222. See also, Bohn v. Bohn, 164 Cal. 532, 539, 129 P. 981; Chard v. O'Connell, 48 Cal.App.2d 475, 476, 120 P.2d 125; Estate of Gurnsey's Estate, 61 Cal.App. 178, 180, 214 P. 487; Gellert v. Bank of Calif., Nat. Ass'n, 107 Or. 162, 214 P. 377, 386.

[3] Applying the foregoing rule to the facts of the present case, it is clear that the alleged errors of the trial court in granting respondent's motion for a nonsuit cannot be considered by us upon the present appeal from the judgment in favor of respondent on the cross-complaint.

Since appellants do not urge, nor do we find, any error in the granting of the judg-

without a jury, on the 10th day of March, 1943, William H. Haupt, Esq., appearing for the cross-complainant, and Messrs. Earl Oakley, Esq., and George R. Wickham, Esq., appearing for the cross-defendants, and evidence having been adduced, and the court having heard and considered such evidence and the arguments of counsel thereon, and the cause having been submitted for decision, and the court having duly made and caused to be filed herein its written findings of fact and conclusions of law:

"Now, therefore, by reason of the law and the findings of fact and conclusions of law aforesaid,

"It is ordered, adjudged and decreed that the title of the cross-complainant Mabel Scott Henderson as Administratrix of the Estate of Armour Ray Henderson, deceased, and of the said Estate of Armour Ray Henderson, deceased, in and to the following described property, situated in the County of Los Angeles, State of California, be, and it hereby is, forever quieted as against the cross-defendants William M. Nicholson and Sephia B. Nicholson, and each of them; said real property being bounded and described as follows, to-wit:

"The Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) and the Southeast Quarter (SE¼) of the Southwest Quarter (SW¼) of Section Ten (10), in Township Fourth (4) North, of Range Seventeen (17) West, of the San Bernardino Base and Meridian, containing eighty (80) acres, according to the Official Plat of the Survey of the said land returned to the General Land Office by the Surveyor-General.

"It is further ordered, adjudged and decreed that the cross-complainant Mabel Scott Henderson, as Administratrix of the Estate of Armour Ray Henderson, deceased, have and recover from the cross-defendants William M. Nicholson and Sephia B. Nicholson her costs and disbursements incurred in the above entitled action, amounting to the sum of $63.25.

"Dated at Los Angeles, California, this 22 day of March, 1943.

"Brand
"Judge of the Superior Court."

[3] Omitting the title of the court and cause, the notice of appeal read thus:

"Notice of Appeal

"To the Cross-Complainant, Mabel Scott Henderson, as Administratrix of the Estate of Armour Ray Henderson, deceased; and, to William H. Haupt, Esq., Her Attorney:

"You, and each of you, will please take Notice that the cross-defendants in the above entitled action, William M. Nicholson and Sephia B. Nicholson, his wife, hereby appeal to the Supreme Court of the State of California from that certain judgment herein made and entered in the Superior Court of the State of California, in and for the County of Los Angeles, in favor of said cross-complainant above named and against said cross-defendants above named, and which judgment was entered on the 23rd day of March, 1943, in Book 1322, Page 325 of the Book of Judgments in the office of the Clerk of the above entitled Superior Court.

"Dated this 19th day of May, 1943.

"Earl Oakley and George R. Wickham,
"By Earl Oakley
"Attorneys for cross-defendants.

ment from which the appeal is taken, the judgment is affirmed.

It is so ordered.

MOORE, P. J., concurs.

W. J. WOOD, Justice (dissenting).

I dissent. Respondent is the holder of the record title to the real estate in question. Appellants, basing their action on claims of possession and of a written promise to convey, ask that respondent be adjudged to hold the property in trust for them and that a conveyance to them be ordered by the court. The trial court found that the claims of appellants are barred by laches and by sections 318, 337, 339 and 343 of the Code of Civil Procedure. In my opinion the evidence received in support of appellants' complaint is so involved with the evidence upon which the findings are based that all of the rulings of the court of which complaint is made should be reviewed on this appeal.



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KLING et ux. v. CROWN FINANCE CORPORATION et al.

Civ. No. 14240.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1944.

Hearing Denied April 20, 1944.

1. Appeal and error ⇐1060(1)

Refusal to permit defendants' counsel to argue to jury in reply to closing argument of plaintiffs' counsel who had waived right to make opening argument was not prejudicial error.

2. Trial ⇐108

Waiver of right to make opening argument, as distinguished from right to open and close the argument, by party entitled thereto does not preclude him from making closing argument in reply to adversary's argument.

3. Trial ⇐108

Plaintiff having waived right to make opening argument may be foreclosed from making any argument to jury without permission from court should defendant waive his right to argue case.

4. Appeal and error ⇐207

Defendant waived any errors in closing argument of plaintiffs' counsel by not objecting thereto or requesting instruction that jury disregard improper argument.

5. Damages ⇐132(3)

Award of $7,500 to husband and wife for injuries suffered by 39 year old wife as a result of which she suffered headaches, dizziness, symptoms of nausea, partial loss of memory, inability to concentrate, and nervousness, husband lost her services at home and as secretary in his law office, and they were required to expend more than $1,200 for medical services and office help, was not excessive.

6. Appeal and error ⇐930(1), 1001(1)

Appellate courts do not weigh the evidence but view it in the light most favorable to respondent indulging all intendments sustaining the finding of trier of facts, and will not disturb such finding if supported by substantial evidence.

7. Appeal and error ⇐1004(1)

A verdict must be so outrageously excessive as to suggest passion, prejudice or corruption to warrant setting it aside on appeal as excessive.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by D. G. Kling and Belle Kling, his wife, against Crown Finance Corporation and Sydney Martin Finegold to recover damages resulting from an automobile accident. Verdict and judgment for plaintiffs, and defendants appeal.

Judgment affirmed.

Parker & Stanbury and Harry D. Parker, all of Los Angeles, for appellants.

Joseph L. Fainer, Thomas Connell, and D. G. Kling, all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before a jury in an action to recover damages resulting from an automobile accident, defendants appeal.

The evidence being viewed in the light most favorable to plaintiffs, (respondents) the essential facts are:

On March 14, 1940, about 3:55 p.m., plaintiff Belle Kling, the wife of plaintiff D. G. Kling, was struck by the left front fender of an automobile driven by defendant Finegold, and owned by defendant Crown Finance Corporation.

When the action was called for trial defendants specifically admitted liability for the accident, but denied that plaintiffs suffered any damages as a result thereof. Thereafter evidence was introduced before the jury on the sole question of the extent of damages, if any, sustained by plaintiffs. After both sides had introduced evidence and rested, plaintiffs' counsel waived the right to make an opening argument,[1] whereupon defendants' counsel presented an argument to the jury followed by plaintiffs' counsel making a closing argument. Thereafter defendants' counsel asked the trial judge to permit him to answer the argument of plaintiffs' counsel.[2] This request was denied. After the cause had been submitted to it, the jury returned a verdict in favor of plaintiffs in the sum of $7,500.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim.

[1] First: *Did the trial judge commit prejudicial error in refusing to permit defendants' counsel to make an argument in reply to the closing argument of plaintiffs' counsel?*

This question must be answered in the negative.

[2] A waiver merely of the right to make the opening argument, as distinguished from the right to open and close the argument, by the party entitled thereto, does not preclude him from making the closing argument in reply to the argument of his adversary. (Trask v. People, 151 Ill. 523, 38 N.E. 248, 250; Pennsylvania Co. v. Greso, 79 Ill.App. 127, 133; Hickman v. Layne, 47 Neb. 177, 66 N.W. 298, 300. See also Purington Paving Brick Co. v. Metropolitan Paving Co., 8 Cir., 4 F.2d 676, 682.)

[3] This rule of procedure operates fairly for both parties. When plaintiffs waived their right to an opening argument they took the chance that defendants would waive their right to argue the case also,

[1] At the close of the evidence the following occurred:

"Mr. Fainer: [plaintiffs' attorney] We have finished with our case.

"Mr. Parker: [defendants' attorney] We rest, Your Honor.

"Mr. Fainer: We rest, too.

"The Court: Any rebuttal?

"Mr. Fainer: No rebuttal.

"At this time plaintiff waives opening argument, reserving the right to close the argument if the defendant's attorney argues.

"Mr. Parker: If the court please, I object to plaintiffs' counsel waiving his opening argument. There is only one issue in this case, and that is the issue of the amount of damages, if any, and I feel that defendants' counsel should have an opportunity to reply to that one issue, one and only issue, and I submit that the plaintiffs' counsel should say what he has to say, if anything, with regard to the issue of damages, in order that the defendants may be afforded an opportunity to answer that argument.

"The Court: Well, counsel, I can't make this man make an opening argument. I think he is at liberty to waive it.

"Mr. Fainer: I can say this, if there were more than one issue, if there was the question of liability and the question of damage I would argue it, but I do not see the necessity of haranguing the jury twice.

"The court: Well, counsel, I don't think I can force Mr. Fainer to make an argument."

[2] After defendants' counsel had concluded his argument, plaintiffs' counsel made an argument to the jury after which the following ensued:

"Mr. Parker: If the court please, I desire to answer the argument at this time, which Mr. Fainer made.

"The Court: Answer what?

"Mr. Parker: I would like to answer the speech now made by Mr. Fainer, and the only opportunity I have had to answer his argument.

"Mr. Fainer: I certainly will resist that.

* * * * *

"The Court: As I understand it, the plaintiff can always waive his opening argument and reserve his right to close.

"Mr. Fainer: That is right.

* * * * *

"The Court: Well, counsel, the best I can do under the circumstances in the absence of some authority to support your contention is to deny your motion."

in which event, in the absence of permission from the court, plaintiffs would have been foreclosed from making any argument to the jury. As far as defendants are concerned, they had the right to and did argue their cause to the jury.

[4] If any improper argument was advanced by plaintiffs' counsel in his closing argument to the jury, defendant, by objection and request to the trial judge for an instruction to the jury upon the subject, could have restricted plaintiffs' counsel to proper argument upon the issues before the jury. In the absence of objection and a request to the court to properly admonish the jury, defendants waived any error in plaintiffs' closing argument. (Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 787, 117 P.2d 850; Balkwill v. City of Stockton, 50 Cal.App.2d 661, 673, 123 P.2d 596; Woebbe v. Sperry, 48 Cal. App.2d 340, 344, 119 P.2d 743; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 607, 111 P.2d 346.

Potapoff v. Mattes, 130 Cal.App. 421, 426, 19 P.2d 1016, relied on by defendants does not announce a rule contrary to that stated above but merely holds that, under the provisions of section 607 of the Code of Civil Procedure, the trial court in the absence of an abuse of discretion may grant defendants' permission to answer plaintiffs' closing argument in a case where plaintiffs have waived the opening argument.

Since defendants did not request the trial judge to instruct the jury to disregard alleged improper argument of plaintiffs' counsel, such error, if any, was waived by defendants under the authorities above cited.

[5] Second: *Was the verdict in favor of plaintiffs in the sum of $7,500 excessive?* This question must also be answered in the negative and is governed by these rules:

[6] (1) It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (California Employment Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 350, 128 P.2d 874; People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558.)

[7] (2) A jury's verdict will not be set aside on appeal on the ground that damages are excessive, unless the verdict is so outrageously excessive as to suggest, at first blush, passion, prejudice, or corruption. (Junge v. Midland Counties, etc., Corp., 38 Cal.App.2d 154, 160, 100 P.2d 1073.)

The evidence being viewed in the light of the principles set forth under rule 1 supra discloses that plaintiff Belle Kling, at the time of the accident was 39 years of age and prior to the accident had been in perfect health; that she had studied law; that she had acted as her husband's secretary in his law office for more than twenty years; and that her memory was good.

The accident resulted in Mrs. Kling's receiving a brain concussion; a puncture wound into the muscle of the abdomen; lacerations of her elbows and ankles; and contusions of her back. She also suffered pains, headaches, dizziness, and symptons of nausea. In addition she sustained a certain amount of loss of memory, a lack of ability to concentrate and was quite nervous. After the accident she was unable to perform her prior secretarial duties.

Plaintiffs paid the sum of $1,260.29 for doctors' bills, X-rays, and office help as a result of the accident.

In view of the foregoing facts and the fact that plaintiff D. G. Kling lost the services of his wife, both at home and in his law office, the verdict in the instant case does not fall within the purview of rule 2 supra, and we are of the opinion that the verdict is not excessive.

Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987; Hodges v. Gonzales, 5 Cal.App.2d 86, 42 P.2d 359; Pozzobon v. O'Donnell, 1 Cal.App.2d 151, 36 P.2d 236; Davis v. Renton, 99 Cal.App. 264, 278 P. 442; and Herr v. Johnson, 58 Cal.App. 306, 208 P. 338, are each factually distinguishable from the instant case and therefore are inapplicable to the facts now before us.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, Justice (concurring).

I concur in the judgment. The judge has a wide discretion in the conduct of the trial and for this reason I see no justification for a reversal. But in my opinion the

procedure followed is subject to criticism rather than commendation. By the exercise of the right to open and close the argument the plaintiff has a decided advantage. That advantage is unduly enhanced when he is permitted to address the jury after the defendant has presented his argument and no opportunity is given the defendant to reply. Of course, submission of the issue to the jury by stipulation without argument would be fair to both parties but if the case is to be argued the party making the opening argument, whether it be the plaintiff or the defendant, should be given the right to close.



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LOWRY v. STANDARD OIL CO. OF CALIFORNIA.

Civ. 14253.

District Court of Appeal, Second District, Division 2, California.

Feb. 23, 1944.

Rehearing Denied March 14, 1944.

Hearing Denied April 20, 1944.

1. Assault and battery ⚖43(6)

In action to recover damages for alleged assault, instructions impliedly informing jury that negligence or lack thereof was an issue for their determination were erroneous, where evidence showed without conflict an assault, and question for determination was whether it was justified.

2. Appeal and error ⚖1064(1)

Error in giving instructions on negligence or lack thereof in action to recover for assault was emphasized and made more prejudicial where court in response to jury's request for further instructions in effect told jury that they must decide against plaintiff if they found plaintiff had not acted as ordinarily prudent person.

3. Assault and battery ⚖43(6)

Instruction that mere pointing of unloaded weapon at another without attempt to use weapon does not constitute assault was error, where evidence established without conflict that defendant's employee not only pointed weapon at plaintiff, but ran after plaintiff clicking the weapon, and placing plaintiff in fear of his life.

4. Assault and battery ⚖2

A civil action for assault is based upon an invasion of right of person to live without being put in fear of personal harm. Civ.Code, § 43.

5. Assault and battery ⚖4

Pointing of a gun at another in threatening manner is sufficient to cause fear of personal injury and constitute an assault, unless it is known by person at whom weapon is pointed that the gun is in fact unloaded. Civ.Code, § 43.

6. Assault and battery ⚖26

Instruction in action to recover damages for assault requiring plaintiff to show by preponderance of evidence that conduct of defendant's employee in pointing a pistol at plaintiff was willful and unlawful erroneously placed upon plaintiff obligation to establish that conduct was unlawful, and plea that conduct was lawful would be an affirmative defense.

7. Assault and battery ⚖35

When plaintiff suing for damages for assault presented evidence showing that defendant's employee chased him, pointed a gun at him and clicked it, he established a prima facie case of assault.

8. Assault and battery ⚖35

Defendant in action to recover damages for assault, claiming that assault was justified presented an affirmative defense, which defendant was required to establish by preponderance of the evidence.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by John E. Lowry against Standard Oil Company of California to recover damages for alleged assault. Judgment for defendant, and plaintiff appeals.

Reversed.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action plaintiff claims that he was assaulted by defendant's service sta-

tion manager, who chased him from the station with a revolver in the belief that plaintiff was the accomplice of a bandit who was robbing the station. In running away from the station plaintiff stumbled and received serious injuries for which he seeks to recover damages. At the first trial of the action a jury returned a verdict in plaintiff's favor in the sum of $10,572 but on appeal the judgment was reversed because of errors in the instructions to the jury on the question whether defendant's employee was justified in his conduct. Lowry v. Standard Oil Co., 54 Cal.App.2d 782, 130 P.2d 1. At the second trial the jury returned a verdict in favor of defendant and plaintiff appeals from the resulting judgment.

Defendant operated a gasoline service station at the southwest corner of Beverly and Rampart Boulevards in Los Angeles. At about ten o'clock in the evening of August 8, 1939, a bandit attempted to rob the manager of the station, G. M. Greenlee, who resisted the bandit, wrestled with him, threw him to the floor and took the bandit's revolver from him.

Plaintiff testified that as he was walking on the sidewalk on the south side of Beverly Boulevard he noticed as he approached the service station that two men were scuffling inside the station building and that one of them had the other down on the floor and was kicking him. Plaintiff stopped and said, "Hey, you fellows are going to hurt one another there," and one of them said "Come on in here". He further testified that he walked away and when he had gone about ten feet Greenlee came running out of the station and ran after him with an automatic firearm, pointing the weapon at plaintiff and clicking it. Plaintiff began to run as fast as he could when he saw Greenlee come out of the station and in trying to escape he fell and received the injuries for which he seeks damages. Plaintiff was on the sidewalk at all times as he passed the service station. Greenlee gave no outcry or any warning to plaintiff to halt before he chased him with the weapon. When plaintiff fell Greenlee returned to the station. It is not disputed that Greenlee's actions were within the scope of his employment.

Greenlee testified that after the bandit had hit him on the head several times with a gun, he wrestled with the bandit and knocked the gun from his hand; that he was dazed by the blows on his head; that he heard someone calling from the opposite side of the pump, "Dont hurt him, dont hurt him"; that, thinking that the man calling was a partner of the hold-up man, he took the gun and went out the door of the station and saw plaintiff running; that he ran after plaintiff for 18 or 20 feet, when plaintiff fell; that the bandit had arisen from the floor and he returned to the station; that when he heard the man on the opposite side of the pump say, "Dont hurt him" he did not reply, "Come on in".

There is not a great deal of difference between the statements of the two main witnesses. Plaintiff's testimony differs from that of Greenlee as to the point at which plaintiff spoke to the two men scuffling within the station. Plaintiff testified that he was on the sidewalk and Greenlee testified that he heard the man calling from the opposite side of the pumps, which were located approximately 10 feet south of the sidewalk and approximately 10 feet from the station building. He testified that he could see nothing except the head of the man who had spoken. There is a further discrepancy between the statements of the two principal witnesses as to the point where plaintiff stumbled but this discrepancy is of no importance in this discussion.

At defendant's request the court gave to the jury the following instruction: "A person who is suddenly confronted with unexpected and imminent danger, either to himself or to others, is not expected, nor required, to use the same judgment and prudence that is required of him, in the exercise of ordinary care, in calmer and more deliberate moments. His duty is to exercise only the care that an ordinarily prudent person would exercise if confronted with the same unexpected danger, under the same circumstances. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, he does all the law requires of him, although, in the light of after-events, it should appear that a different course would have been better and safer."

The court also instructed the jury: "If from a preponderance of all the evidence

in this case you find that Greenlee committed an assault upon the person of plaintiff Lowry; and you further find that plaintiff Lowry sustained injuries by reason of the acts of Greenlee; and you further find that said Greenlee did not act as a reasonably prudent person would have acted under like circumstances then your verdicts should be in favor of plaintiff Lowry and against the defendant Standard Oil Co. If, however, you find from a preponderance of all the evidence that Greenlee acted as a reasonably prudent person would have acted under like circumstances, then your verdict should be in favor of the defendant, Standard Oil Company."

After the jury had deliberated for several hours they returned to the court room for further instructions. The foreman stated: "The question is this: Was the action of Mr. Lowry in intruding into the property enough to justify Mr. Greenlee's actions?" The judge thereupon stated: "That is a question that the jury themselves will have to determine under the rule I have given you, as to whether an ordinary prudent person under like circumstances would have done what Mr. Lowry did do, and would a reasonably prudent person have done exactly as Mr. Greenlee did under the circumstances. That is the only answer I can give you that I know of. If counsel have any suggestions in regard to the matter, you may approach the bench". Counsel approached the bench and plaintiff's counsel asked the court to instruct the jury fully on the rules applicable in case of the eviction of an intruder or trespasser. Counsel also called the court's attention to his contention that contributory negligence was not an issue in the case. The court declined to grant the request of plaintiff's counsel.

[1, 2] The evidence shows without conflict that Greenlee assaulted plaintiff and the question for the determination of the court was whether the actions of Greenlee were justified. Certain principles applicable to the defense of justification are stated in the opinion on the former appeal in this action. It is there stated: "A question in this case, therefore, was whether a reasonable man, situated as the employee was, would be justified in acting as the employee did." The court referred with approval to the opinion in People v. Albori, 97 Cal.App. 537, 275 P. 1017, 1020, wherein it is stated that if a person acts on apprehension that he is in imminent danger and believes his apprehension is based on sufficient ground "he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only, did the person acting on appearances himself believe that he was in * * * peril * * * but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?" In running after plaintiff and pointing and clicking the firearm Greenlee unquestionably acted intentionally. Negligence is not charged in the pleadings and it is not an issue in the case. Nevertheless the trial court in the instructions above quoted impliedly informed the jury that negligence or lack of negligence on the part of Greenlee was an issue for their determination, for the court told them that "his duty is to exercise only the care that an ordinarily prudent person would exercise * * * and (if) you further find that said Greenlee did not act as a reasonably prudent person would have acted under the circumstances then your verdict should be in favor of plaintiff. * * * If, however, you find from a preponderance of all the evidence that Greenlee acted as a reasonably prudent person would have acted under like circumstances, then your verdict should be in favor of the defendant, Standard Oil Company." These instructions would be appropriate in an action based upon negligence and are generally given in such actions. But they have no place in an action based upon a charge of assault. Lambrecht v. Schreyer, 129 Minn. 271, 273, 152 N.W. 645, L.R.A.1915 E, 812; Hawks v. Slusher, 55 Or. 1, 4, 104 P. 883. The error of the court in giving these instructions was emphasized and made more prejudicial to plaintiff when the jury returned to the court for further instructions and asked the court if the action of plaintiff in "intruding" upon defendant's property was a justification for Greenlee's actions. Instead of enlightening the jury upon the rules applicable to trespass, the court told them that in passing upon the question they should determine "whether an ordinary prudent person under like circumstances would have done what Mr. Lowry did do, and would a rea-

sonably prudent person have done exactly as Mr. Greenlee did under the circumstances". By thus instructing the jury the court in effect told them that they must decide against the plaintiff if they should find that plaintiff had not acted as an ordinarily prudent person. It injected into the case an issue very similar to the defense of contributory negligence presented in accident cases. It permitted the jury to render a verdict in favor of defendant without regard to any conclusions they might reach as to misconduct on the part of Greenlee.

[3-5] The court erroneously instructed the jury: "The mere pointing of an unloaded weapon at another, without any attempt to use such weapon does not constitute an assault." There was no factual basis for this instruction. The evidence established without conflict that Greenlee did not merely point the weapon at plaintiff without attempting to use it, but on the contrary he ran after plaintiff, clicking the weapon and placing plaintiff in fear of his life. From this instruction the jury could have reasonably inferred that the court intended to instruct them that Greenlee's conduct could not form the basis of a judgment against defendant. Moreover, the instruction does not accurately state the rule applicable to the present action. "Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present". Am. Juris. Vol. 4, p. 124, Sec. 2. A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm. Every person has "the right of protection from bodily restraint or harm." Sec. 43, Civil Code. It is clear that a person's right to live in society free from being put in fear of personal harm is invaded if he believes that an unloaded firearm being pointed at him is loaded. The pointing of a gun at another in a threatening manner is sufficient to cause fear of personal injury unless it is known by the person at whom the weapon is pointed that the gun is in fact unloaded. 4 Amer. Juris. p. 134, Sec. 13; Chapman v. State, 78 Ala. 463, 464, 56 Am. Rep. 42.

[6-8] The court instructed the jury: "It is alleged in plaintiff's complaint that G. M. Greenlee did wilfully and unlawfully, at the time and place in question, assault and injure the plaintiff. In that connection you are further instructed that in determining the question of whether or not the plaintiff has proven this charge by a preponderance of the evidence, it is not sufficient for plaintiff merely to show that he was chased by the defendant Greenlee, and that plaintiff was injured, as a result thereof, plaintiff must go further and show as alleged in his complaint that such conduct was wilful and unlawful". By this instruction the court erroneously placed upon plaintiff the obligation to establish that Greenlee's conduct was unlawful. Clearly, Greenlee's conduct was wilful but the question whether it was unlawful depends upon the view to be taken of the circumstances shown in evidence. When plaintiff presented evidence showing that Greenlee chased him, pointed a gun at him and clicked it, he established a prima facie case of assault. In claiming that the assault was justified defendant presented an affirmative defense and it was incumbent upon defendant to establish this defense by a preponderance of the evidence. Marriott v. Williams, 152 Cal. 705, 711, 93 P. 875, 125 Am.St.Rep. 87.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

WESTERN PIPE & STEEL CO. OF CALIFORNIA et al. v. TUOLUMNE GOLD DREDGING CORPORATION et al.

Civ. No. 12553.

District Court of Appeal, First District, Division 2, California.

Feb. 24, 1944.

Rehearing Denied March 25, 1944.

Hearing Denied April 20, 1944.

1. Trial ⇐158

A ruling preventing defendant from presenting evidence for affirmative recovery under its cross-complaint because of the pendency of another action was not a ruling that defendant's cause of action for affirmative relief was barred, but only that the cause of action was abated. Code Civ. Proc. §§ 430, 433, 597.

2. Appeal and error ⇐204(1)

The appellate court would not rule upon admissibility of evidence which was received without objection in trial court.

3. Appeal and error ⇐1152
Judgment ⇐571

A judgment sustaining a plea of another action pending should not be construed as barring the cause of action for all time, but would be amended so as to make judgment interlocutory and enable the court to hear the issue after termination of pending proceeding. Code Civ.Proc. §§ 430, 433, 597.

4. Trial ⇐45(3)

An offer of proof of affirmative matters set up in defendant's cross-complaint which did not state the evidence whereby the facts in issue were to be proved and did not set forth the names of any witnesses was insufficient.

5. Pleading ⇐212

In action to foreclose lien for work and material furnished under construction contract, property owner's general demurrer to contractor's cross-complaint for extra work, which demurrer attempted to set up misjoinder of causes of action, was waived when parties stipulated that trial should proceed upon pleadings then filed.

6. Pleading ⇐205(1)

Where the statute specifies specific grounds of special demurrer, such grounds cannot be raised by general demurrer.

7. Abatement and revival ⇐9

The plea of another action pending need not be confined to those cases where plaintiffs and defendants are same parties, but may apply between cross-complainants and cross-defendants. Code Civ.Proc. §§ 430, 433, 597.

8. Abatement and revival ⇐8(2), 9

A requisite for the plea of "another action pending" is that the causes of action and issues in the two suits be substantially the same, and it must appear that it is between the same parties, and that they stand in the same relative position as plaintiff and defendant. Code Civ.Proc. §§ 430, 433, 597.

See Words and Phrases, Permanent Edition, for all other definitions of "Another Action Pending".

9. Abatement and revival ⇐9

Where property owner's action against contractor for breach of construction contract was pending in federal court at time property owner filed cross-complaint for breach of contract in mechanics' lien foreclosure action, brought against property owner and contractor, contractor's plea of another action pending was available against cross-complaint, although property owner and contractor were both defendants in foreclosure action. Code Civ.Proc. §§ 430, 433, 597.

10. Principal and surety ⇐149

Where contractor's performance bond provided for a 90-day trial period to discover defects in construction, and stipulated that any action against surety to recover on bond should be commenced within six months from completion of work, and the difficulties which arose after trial period were due either to faulty plans or to owner's lack of proper knowledge of methods of operation and repair, owner's action against surety on the bond which was not brought within six months after expiration of trial period was barred.

11. Principal and surety ⇐149

The filing of complaints by lien claimants did not toll the running of the time within which property owner might sue to enforce surety's liability on contractor's performance bond, since the foreclosure actions and action for contractor's breach of performance were in no way related.

12. Limitation of actions ⇐129

The rule that where right of action pleaded in cross-complaint existed at time original complaint was filed running of statute of limitations is suspended by filing original complaint only applies where cross-complainant is seeking either affirmative relief or a set-off against the party plaintiff.

13. Limitation of actions ⇐41
Pleading ⇐140

The statute relative to procedure for filing of cross-complaints contains nothing which tends to suspend any statute of limitations or other time limits within which the cause of action pleaded in cross-complaint may be sued upon. Code Civ.Proc. § 442.

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Action by Western Pipe & Steel Company of California and others against Tuolumne Gold Dredging Corporation and others to enforce individual liens against the defendant named as owner of certain gold-bearing lands, and to recover on a faithful performance bond executed by contractor for the construction of gold dredge, wherein the defendant named filed cross-complaint against Walter W. Johnson Company, contractor, and the Fidelity & Deposit Company of Maryland, surety, and the contractor filed cross-complaint against the defendant named. From adverse judgments on the cross-complaints, the defendant named appeals.

Judgment amended, and affirmed as amended.

George K. Ford and Zimdars & Warren, both of San Francisco, and Thomas C. Boone, of Modesto, for appellant.

DeLancey C. Smith and Thomas R. White, both of San Francisco, and Hawkins, Hawkins & Cardozo, of Modesto, for respondent Walter W. Johnson Co.

Thomas E. Davis, of San Francisco, and Hawkins, Hawkins & Cardozo, of Modesto, for respondent Fidelity & Deposit Co. of Maryland.

NOURSE, Presiding Justice.

Three actions to enforce individual liens were filed in the superior court against Tuolumne Gold Dredging Corporation, the owner of certain gold bearing lands, the Johnson Company, the holder of a contract with the Tuolumne Company for the construction of a gold dredge, and the Fidelity and Deposit Company, the surety on a faithful performance bond covering that contract. The lien claimants were all subcontractors of the Johnson Company and they performed practically all the work and furnished the materials for the construction of the gold dredge. The three actions were consolidated for trial, judgments were duly entered in favor of the three lien claimants, and against the surety. During the course of the trial the claims of these lienholders, and the unsecured claim of Moore Machinery Company, which is not involved in the appeal, were established without any material contest, but the main issues involved, and with which this appeal relates, were tried on the respective cross-complaints of the Tuolumne Company and the Johnson Company. A judgment favorable to the Johnson Company and the Fidelity and Deposit Company was entered against the Tuolumne Company, from which the latter has appealed naming all other parties respondents. After the appeal was perfected a stipulation was filed herein reciting that the lien claimants had been joined as nominal respondents only, that no relief was sought affecting the judgments in relation to their liens, and that they need not appear or file briefs herein. The issues on the appeal are thus narrowed to the controversy between the owner of the premises and the original contractor concerning the performance of the contract. There is also the issue of the liability of the surety on the original contract.

The Johnson Company filed a cross-complaint against the co-defendant, the Tuolumne Company, claiming a certain amount due under the terms of the original contract. The Tuolumne Company filed a cross-complaint against the Johnson Company and its surety claiming damages for failure to perform the conditions of the contract. Prior thereto the Tuolumne Company had filed in the same superior court an independent action against the same parties pleading the same matters and seeking the same relief. That action had been removed upon motion of Johnson Company to the United States District Court where it was still pending at all the time during these proceedings. After all the evidence was in the Johnson Company was permitted to amend to plead the pendency of the action in the federal

court. This plea having been sustained the Tuolumne Company made an offer to prove the facts alleged in its answer and cross-complaint and this offer was rejected. These rulings present two of the grounds urged here by appellant. Upon the trial of the issues raised by the cross-complaint of the Johnson Company it offered evidence tending to prove the satisfactory completion of its contract with the Tuolumne Company, the full acceptance and taking possession of the dredge, the payments made on account thereof, and the balance alleged to be due. The Tuolumne Company introduced no substantial evidence to controvert this and the findings of the trial court on that issue are not subject to attack. No explanation is made of the failure of the Tuolumne Company to controvert this evidence, but, when it came to the issues raised in its cross-complaint and answer to the cross-complaint of the Johnson Company it made a qualified tender of proof that after full acceptance and complete possession for several months it discovered certain minor defects in its plans and specifications which made the dredge unworkable under certain conditions, and the form of the offer presents one of the questions for decision.

Preliminarily it should be stated that the objection to the offer of proof of the affirmative allegations of the cross-complaint of the Tuolumne Company was sustained upon the ground that another action was pending in the federal court for the same relief. The objection to the offer of proof of the allegations of its answer to the cross-complaint of the Johnson Company, and of the defensive matters pleaded in its own cross-complaint, was sustained upon the ground that it was too general and insufficient in law to constitute a valid offer of proof.

[1] In this portion of the opinion we will refer to the Tuolumne Company as appellant and to the Johnson Company as respondent. The basis of the attack upon the ruling on the question of the pendency of another action is that it led to the finding and conclusion of the trial court that appellant was "barred" from presenting evidence under its cross-complaint "for affirmative recovery thereon" whereas, the appellant argues, if the plea were good the action should have been abated and not barred.

The circumstances under which the question arises are these—while a witness called by appellant was testifying the respondent requested leave of the court to amend its answer to appellant's cross-complaint to plead the pendency of another action. Appellant stipulated that the amendment could be filed at that time, but reserved objection that it did not plead a valid defense. From that time forward the plea was treated as one coming under sections 430 and 433 of the Code of Civil Procedure—"another action pending between the same parties for the same cause." At no time was it treated as a "bar" to the cause of action, and, though the word was used in the findings, it is followed immediately by the expression "from presenting evidence * * * for affirmative recovery * * * because of the pendency of another action * * *." It is apparent that there was no intention to bar the appellant from prosecuting its cause at the proper time and in the proper tribunal, but that the true meaning of the finding was in accord with the intention of the parties—that appellant's cause of action for "affirmative" relief was abated under the terms of the Code section.

It was made equally clear by the trial court, and by the statements of respective counsel at the time, that the ruling upon appellant's offer of proof was made separately; that, as to the affirmative matter pleaded in appellant's cross-complaint, the objection was sustained upon the ground that another action was pending for the same relief; that, as to any defensive matter to the cause of action pleaded in respondent's cross-complaint, the offer of proof was too general. Appellant does not contend that it was error to suspend proceedings upon the cross-complaint for the reasons stated. Cases cited by appellant support the ruling. Conner v. Bank of Bakersfield, 174 Cal. 400, 404, 163 P. 353; Hilton v. Reed, 46 Cal.App.2d 449, 454, 116 P.2d 98; National Auto Ins. Co. v. Winter, 58 Cal.App.2d 11, 15, 136 P.2d 22; 1 Cal.Jur. p. 23.

[2] But it is contended that the ruling was inequitable because the respondent was permitted to proceed to trial on its cross-complaint though some of the issues involved therein were the same as those involved in the "other action." The respondent replies that the appellant did not make the plea either by demurrer or answer, that it was fully warned by the same plea made by the defendant Fidelity & Deposit Company of Maryland in its answer filed prior

to the trial, and that the question was not raised in the trial court. All the evidence offered by the respondent in support of its cross-complaint against appellant was received without objection on this ground and hence the trial court was not called upon to rule upon the admissibility of such defense if it had been interposed. This being so the appellate court will not rule upon the admissibility of evidence which was received without objection in the trial court. 2 Cal.Jur. p. 248.

[3] In its reply brief the appellant suggests that the judgment as entered is error and that the trial court should have followed the procedure outlined in section 597 of the Code of Civil Procedure and entered an interlocutory judgment pending determination of the proceeding in the federal court. The point was not raised before the trial court and is raised here for the first time in appellant's reply brief. But it is one of easy solution. The Code section provides that when the answer pleads that another action is pending upon the same cause "the court may, upon the motion of either party, proceed to the trial of such special defense * * * and where the defense of another action pending is sustained * * * an interlocutory judgment shall be entered in favor of the defendant pleading the same * * *." If the judgment as entered should be interpreted as barring this appellant for all time from prosecuting its cross-complaint for affirmative relief there would be merit in the argument. But we are satisfied that the judgment should not be so interpreted. However, in order that the matter may be clear for further proceedings between the parties it is proper that the judgment in this respect be amended so as to comply with the Code section and enable the court to hear the issue after the termination of the proceedings in the federal court.

The next question relates to the ruling of the trial court upon appellant's offer of proof. This question appears more complicated than necessary because of appellant's insistence that the trial court refused to permit appellant to offer any evidence in defense of the respondent's cross-complaint as well as in support of the affirmative allegations of appellant's cross-complaint. On frequent occasions the trial court informed appellant that its ruling on the defense of another action pending related solely to the proof of the "affirmative" matter pleaded in appellant's cross-complaint, and that the ruling relative to the defensive matters only was based upon the insufficiency of the offer of proof. The form of this offer, as well as respondent's objection, is set forth in the bill of exceptions, where we find: "Thereupon (except as appears from this bill of exceptions and supplement) Tuolumne Gold Dredging Corporation stated in general terms that it offered to prove all of the allegations of its answer and of its cross-complaint as a portion of said answer as a matter of defense to the cross-complaint of Walter W. Johnson Company. In making such offer Tuolumne Gold Dredging Corporation did not set forth or state to the court the name or names of any witnesses, the nature of any testimony which might be given by any witnesses, the contents of any written evidence which it might produce, or the nature and character of such evidence it might submit. It confined its offer solely to the statement that it would prove the allegations contained in its answer to the cross-complaint of Walter W. Johnson Company, including the allegations of its cross-complaint as a portion of such answer, and also that it would prove the allegation of its cross-complaint. To this offer the respondent made several objections, but emphasized that the offer "was insufficient as an offer of proof." From the supplemental bill of exceptions it appears that this offer was repeated in substantially the same form. Similar objections were made and, in response to the request of appellant's counsel that the situation be made more clear, the trial court announced that its ruling upon the offer of proof should be treated separately as to the affirmative and defensive matters pleaded in appellant's cross-complaint and answer stating: "Defensively, for the other reason (i. e. insufficiency of offer) but as far as the cross-complaint itself is concerned, it is for the reason of another action pending." It should be noted that in its answer to the cross-complaint appellant pleaded five separate and distinct defenses, that partial proof was made in support of such defenses, and that further proof was not denied by any of the rulings complained of.

[4] From the record it is clear that the trial court denied the appellant's offer to prove the affirmative allegations on the ground that another action for the same cause was then pending. This would cover

all those allegations which coincided with the cause of action pleaded by appellant in the proceeding then pending in the federal court and which would support appellant's plea for affirmative relief. It did not, therefore, include the defensive matters pleaded in appellant's cross-complaint and answer, because such matters were not made an issue in the other action. Appellant refers to an isolated portion of the record where counsel for respondent is quoted as stating that he understood the ruling to be that no evidence could be offered "in connection with our cross-complaint." The discussion related entirely to the plea of the affirmative matters in appellant's cross-complaint, and the use of the word "our" was clearly a slip of the tongue requiring no further comment. The ruling that, in so far as the offer related to the proof of the defensive matters pleaded in this cross-complaint and answer it was insufficient finds ample support in the authorities. Some of these are cited in Douillard v. Woodd, 20 Cal.2d 665, 670, 128 P.2d 6, 9, where the court said: "A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal." For these reasons we find no error in the ruling complained of.

[5, 6] Appellant attacks the portion of the judgment relating to the second cause of action pleaded in respondent's cross-complaint. This is a pleading for the recovery of the reasonable value of work and labor furnished appellant in excess of the original contract. The appellant filed a general demurrer which was submitted without argument, and overruled, and appellant answered. If the general demurrer could be deemed sufficient to present the ground now advanced by the appellant—misjoinder of causes of action—the objection was waived when the parties stipulated that the trial should proceed upon the pleadings then filed. But it seems apparent that when the statute specifies specific grounds of special demurrer those grounds cannot be raised by general demurrer. 21 Cal.Jur. p. 108.

[7-9] We are not impressed with the appellant's argument that the plea of another action pending cannot apply between cross-complainants and cross-defendants, but must be confined to those cases where the plaintiffs and defendants are the same parties. Some of the language used in Hamm v. San Joaquin, etc., Canal Co., 44 Cal.App.2d 47, 111 P.2d 940, might lend strength to the argument, but the rule is fully stated in National Auto Ins. Co. v. Winter, 58 Cal.App.2d 11, 16, 136 P.2d 22, 25, where the court said: "Another requisite for the plea of another action pending is that the causes of action and the issues in the two suits be substantially the same; and it must also appear that it is between the same parties as the later action and that these parties stand in the same relative position as plaintiff and defendant." In 1 Cal.Jur., p. 32, similar language is used—that the parties "stand in the same relative position as plaintiff and defendant"—not that they be named as plaintiff and defendant in both actions. Here the cross-complaint of the Tuolumne Company pleads the same cause of action and in the same way as the complaint pending in the federal court. Hence the parties "stand in the same relative position."

Then it is argued that the issues raised by "the pleadings" were such that they could not be tried on the cross-complaint of the Johnson Company alone. Appellant cites various items of its pleading found in its cross-complaint and in its answer. All these matters which were defensive matters to the Johnson Company cross-complaint were in fact tried under the ruling of the trial court which denied appellant the right to try affirmative matters only. It is incorrect to say that these defensive matters were not tried. Appellant called two witnesses and presented a considerable amount of evidence before the objection was made to the proof of matters in support of affirmative relief. We cannot agree with appellant that it was denied the right to contest respondent's claim or that the ruling denying proof of the affirmative matters could be so construed. During the frequent discussions between court and counsel some words were used inadvertently which lend color to the argument, but the trial court took extreme care to advise counsel of the full purport and extent of the ruling. It is not conceivable that this distinction was not clear to counsel at the time of the trial, or that, if a proper and sufficient offer of proof had been made of the "defensive" matters, the appellant would have been denied the right

to contest and controvert the evidence of respondent on the latter's cross-complaint.

[10] In its answer to the cross-complaint of Tuolumne Company the bonding company pleaded the pendency of the other action in the federal court, and also that the cause of action was barred because not commenced within six months after the completion of the dredger. Both pleas were sustained. If the first plea alone had been sustained the judgment should have suspended proceedings on the cross-complaint until the termination of the other proceeding. But if the second plea is sound, final judgment was properly entered for the respondent bonding company.

The trial court found that the Tuolumne Company took possession of the dredge on June 25, 1938, though the evidence and the admission of counsel would have supported a finding that the possession dated from June 15, 1938. The cross-complaint was filed on June 9, 1939. The bond stipulated that any action to recover under it should be commenced within six months from the completion of the work provided for in the contract. By the terms of this contract the owner was permitted a ninety day trial period of operation of the dredge to discover any defects in its construction. Upon the completion in June, 1938, the owner took full and exclusive possession of the dredge; the operation of the dredge for the ninety day period was conducted by the owner, several defects were noted, and these were corrected by the contractor. The basis of the cross-complaint of the Tuolumne Company is that other defects were discovered after the trial period and it sued for damages for failure to "complete" the terms of the contract.

So far as the liability of the bonding company is concerned it was obligated to insure the faithful performance of the contract, and such obligation terminated when the work was accepted by the owner, subject to the curing of these defects which were discovered and asserted within the ninety day trial period. It is the contention of the bonding company, and this is supported by a mass of evidence in which there is no substantial conflict, that the difficulties which the Tuolumne Company found in the construction and operation of the dredge were due either to faulty plans or to lack of proper knowledge of methods of operation and repair. Since the bond expressly relieved the bonding company of liability of that character it is contended that the judgment should favor the bonding company on the merits.

But the trial court concluded that the cross-complaint of the Tuolumne Company was barred because not filed within six months of the completion of the contract, and this conclusion is so sound that there is no purpose in extending the opinion in the discussion of other matters.

[11, 12] The cross-complaint filed by the Tuolumne Company set up against the bonding company an entirely new cause of action and had no relation to, or bearing upon, the causes of action pleaded by the various lien claimants, other than that the latter sought recovery from the bonding company on its obligation to insure payment of claims under the construction contract. Hence the filing of the complaints by these lien claimants cannot be deemed to have tolled the running of the time within which the Tuolumne Company might sue to enforce the liability upon the bond arising from an asserted breach of the construction contract. The bonding company had filed no complaint or cross-complaint against the Tuolumne Company which might bring into operation the rule of Whittier v. Visscher, 189 Cal. 450, 209 P. 23, and similar cases holding that if a right of action pleaded in a cross-complaint existed at the time the original complaint was filed the running of the statute of limitations is suspended by the filing of the original complaint. This rule applies to those cases where the cross-complainant is seeking either affirmative relief or a set-off against the party plaintiff. Here the controversy arises between two parties who were both named defendants in the complaints by the lien claimants. It was by stipulation confined to the cross-complainant and cross-defendant and the claims of the original plaintiffs were conceded. There was nothing in the original complaints that put in issue the controversy over the obligation of the bonding company to reimburse the Tuolumne Company for damages caused by the contractor under the original contract.

The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded. But, where the controversy is limited to cross-defendants none of whom

has done any act in the nature of a waiver the reason for the rule does not exist.

[13] The appellant's argument that time to sue was suspended by the filing of the original complaints because section 438 of the Code of Civil Procedure permits the filing of a counterclaim for any cause "existing at the commencement of the action" is based upon a misunderstanding of the existing law. The early section contained the language referred to and noted in Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 P. 118, but since that decision the section was amended and the quoted language omitted. The procedure for the filing of a cross-complaint is found in section 442 of the same Code, and there is nothing contained therein which tends to suspend any statute of limitations, or other time limit, within which the cause of action pleaded in the cross-complaint may be sued upon.

From what we have said in reference to the plea of the Johnson Company of another action pending it follows that the same plea made by the bonding company was good. If a plea of abatement only had been made the judgment in favor of the bonding company should have been interlocutory. But the plea that the action was barred by the terms of the contract compels a judgment against the Tuolumne Company on that ground alone. It is argued that the action now pending in the federal court, in which the bonding company was joined as a defendant with the Johnson Company, was filed within the six months' period, and that that action was sufficient to stay the running of the limitation. If such action were filed within time the parties are free to litigate the issues upon the merits as nothing which we have said herein determines any issue relating to appellant and the bonding company except that, in this action, the cross-complaint was filed too late.

Paragraph 12 of the judgment is amended to read: "That Tuolumne Gold Dredging Corporation take nothing by its cross-complaint against Fidelity and Deposit Company of Maryland, and that, until the final determination of the proceeding in the federal court, all proceedings under said cross-complaint against Walter W. Johnson Company, as cross-respondent to said cross-complaint be suspended." In other respects the judgment is affirmed as to all respondents. The respondent Johnson Company shall bear its own costs on the appeal; other respondents shall have their costs.

STURTEVANT, J., concurs.



63 Cal.App.2d Supp. 841

BUMGARNER v. ORTON et ux.

Civ. A 5696.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 18, 1944.

1. Landlord and tenant ⇐278½
War ⇐4

Under O.P.A. Rent Regulation, the test of landlord's right to recover possession of housing accommodations for his own immediate use and occupancy is good faith rather than necessity. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

2. Landlord and tenant ⇐278½
War ⇐4

The phrase "in good faith", as used in O.P.A. Rent Regulation authorizing landlord to recover housing accommodations from tenant when landlord seeks in good faith to recover possession for himself, is borrowed from equity jurisprudence and simply means honestly; without fraud, collusion, or deceit; really; actually; without pretense. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Faith".

3. Landlord and tenant ⇐278½
War ⇐4

On issue of good faith in landlord's action to recover housing accommodations for himself, court may consider circumstances which landlord appears to have regarded as important in forming desire to occupy premises, and landlord's necessity, while relevant, is only one circumstance to be considered. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

4. Landlord and tenant ⇐278½
War ⇐4

The absence from O.P.A. Rent Regulation of any provision making landlord's necessity test in determining right to recover housing accommodations indicates absence of such intention on part of those who drafted the regulation. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

5. Landlord and tenant ⇐278½
War ⇐4

In landlord's action to recover housing accommodations, finding that landlord was not acting in good faith and therefore not entitled to recover solely because there was no necessity for landlord to occupy premises was error. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

6. Landlord and tenant ⇐278½
War ⇐4

In landlord's action to recover housing accommodations, complaint must allege that landlord either owned or acquired an enforceable right to buy or right to possession prior to effective date of Rent Regulation, or, if he thereafter acquired property, that he secured from administrator a certificate authorizing eviction of tenant. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

7. Landlord and tenant ⇐278½
War ⇐4

Where landlord's complaint in action to recover housing accommodations failed to allege when landlord acquired property, or that landlord had certificate from administrator for eviction of tenant, but landlord testified without objection that she owned property prior to effective date of Rent Regulation, and trial court so found, tenant could not complain on appeal that such issue was not properly presented. Emergency Price Control Act of 1942, § 201, 50 U.S.C.A.Appendix, § 921.

8. Appeal and error ⇐171(3)

Where cause is tried as though pleadings raised a particular issue, evidence is received thereon and trial court makes a finding thereon, without objection, neither litigant may for first time on appeal assert that there was no such issue.

9. Appeal and error ⇐1201(1)

Where defendant had waived objection to failure of complaint to contain a requisite allegation, upon a retrial plaintiff was entitled to amend complaint to insert such allegation.

Appeal from Municipal Court of Los Angeles; Ida May Adams, Judge.

Action by Kate M. Bumgarner against William K. Orton and wife to recover from defendant, for plaintiff's own immediate occupancy of a dwelling, certain premises held by tenant on a month to month tenancy. Judgment for defendants, and plaintiff appeals.

Reversed and remanded for a new trial.

George H. Pratt, of Los Angeles, for appellant.

William K. Orton and Mrs. William K. Orton, in pro. per., for respondents.

Stanley Howell, Chief Rent Atty., and Edwin D. Hamlin, Rent Atty., both of Los Angeles, amici curiae for Office of Price Administration.

FOX, Judge.

Plaintiff seeks to recover from the defendants, for her own immediate occupancy as a dwelling, the possession of certain described premises in the city of Los Angeles. Defendants have been occupying said premises on a month to month tenancy since March 21, 1942. On August 20, 1943, plaintiff served defendants with a written notice terminating their tenancy on September 22, 1943, and, within twenty-four hours thereafter, served a copy of said notice upon the Office of Price Administration, Rent Control Division, Los Angeles office, as required by O.P.A. Rent Regulation for Housing. 8 Federal Register 7322, issued pursuant to the Emergency Price Control Act of 1942, Pub.L. No. 421, 77th Cong., 2d Sess., c. 26, 56 Stat. 29, 50 U.S.C.A.Appendix, § 921.

Plaintiff testified that she was then living in an upper flat of a four-family flat building; that her family consisted of herself and an adult niece; that she had formerly lived in a large house with her husband, but that after his death in August, 1942, "she could not bear to live there any longer and moved out to the flat where she now lived"; and that she still owned the house where she formerly lived, which was larger than the house occupied by the defendants, and rented for $15 per month more. Plaintiff also testified that

she had been employed at a defense plant, working the "graveyard" shift and attempting to sleep during the daytime, but that she had not been able to sleep well in her flat, due to the noise caused by several small children, who lived in the building, running up and down the halls. She further testified that she had been ill and unable to work for some time and that "one of the reasons why she wanted to live in her own home was to use the sun deck which it had," and that "she sought in good faith to secure possession of the premises as a permanent dwelling for herself." No testimony was offered by or on behalf of the defendants, and plaintiff's testimony was not otherwise challenged.

On the issue of plaintiff's good faith, the trial court made the following finding: "The Court finds no necessity for plaintiff to occupy said premises, and for this reason only, finds that plaintiff's desire to recover possession for her immediate use and occupancy is not in good faith. The Court finds that plaintiff's desire to recover possession of said premises for her immediate use and occupancy as a dwelling for herself is not in good faith because the Court finds no necessity for plaintiff to occupy said premises." Based on this finding, judgment was rendered for the defendants.

[1, 2] The trial court was clearly in error in holding that plaintiff was not entitled to prevail because she failed to establish that it was necessary for her to have possession of the housing accommodations in question for her immediate use and occupancy. The test of the owner's right to recover possession of housing accommodations for his own immediate use and occupancy is not his necessity but his good faith. The O.P.A. Rent Regulation covers this precise point. Section 6(a) of said Regulation provides that "no tenant shall be removed from any housing accommodations * * * unless; * * * (6) The landlord * * * seeks *in good faith* to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself." (Emphasis added.) The phrase "in good faith" is borrowed from equity jurisprudence and must be interpreted accordingly. 28 Corpus Juris 715; 35 C.J.S., Faith, page 488. It simply means "honestly, without fraud, collusion, or deceit; really, actually, without pretense." Docter v. Furch, 1895, 91 Wis. 464, 65 N.W. 161, 164; Heney v. Sutro & Co., 1915, 28 Cal.App. 698, 702, 153 P. 972; Peden Iron & Steel Co. v. Jenkins, Tex. Civ.App.1918, 203 S.W. 180, 188; Waugh v. Prince, 1921, 121 Me. 67, 115 A. 612, 614.

[3] On the issue of good faith, it is proper for the court to consider all the facts and circumstances which the owner appears to have regarded as important in forming his desire to occupy the housing accommodations himself. Thus his necessity may be relevant on that issue, but it is only one of the factors to be considered. The criterion still remains as the owner's good faith.

[4] If it had been the intention to make the owner's necessity the test in determining his right to recover possession of housing accommodations, it would have been very simple to have so provided. The absence of such a provision indicates the absence of any such intention on the part of those who drafted the regulation.

[5] Here the evidence discloses a reasonable basis for plaintiff's desire to occupy the premises in question. There is no evidence presented and no basis for an inference that she was not acting in good faith.

[6-9] Defendants argue that, in any event, the complaint fails to state a cause of action. They base this contention on the provisions of the said Rent Regulation, to the effect that a tenant shall not be removed from housing accommodations in order that a landlord may occupy them unless the landlord can establish that he either owned or acquired an enforceable right to buy or the right to the possession of such housing accommodations prior to the effective date of the Regulation, which was November 1, 1942, for this Defense-Rental Area (Section 6(a) (6), or if he has acquired the property since that date, that he has secured from the Administrator of the O.P.A. a certificate authorizing the eviction of the tenant. (Section 6(b) (1). In order for an owner to prevail in such a case, he must bring himself within one or the other of these provisions, and his complaint should contain appropriate allegations to that end. The complaint here fails to allege when plaintiff acquired the property or that she has a certificate from the Administrator for the eviction of the defendants. This defect in the complaint would not be fatal to the judgment, were it otherwise correct, because plaintiff testified without objection that she owned

the property prior to November 1, 1942, and the court made an express finding to that effect. It thus appears that the issue was litigated and determined by the court without objection, as though the complaint sufficiently stated a cause of action. "The rule applicable to the above situation is clearly stated in 2 California Jurisprudence, p. 242, § 71, as follows: 'Where the trial proceeds in all respects as though the complaint sufficiently states a cause of action, and the defendant goes to trial upon the theory that there is a material issue, and allows evidence to be received upon such issue without objection in any way, and the court makes a finding upon such evidence upon the theory that the proper issue is made by the pleadings, with no objection from either party, the parties will not, nor will either of them, be allowed on appeal to say, for the first time, there was no such issue.'" Asnon v. Foley, 1930, 105 Cal.App. 624, 629, 288 P. 792, 794. However, upon a retrial, plaintiff should be permitted to amend her complaint.

The judgment is reversed, and the cause is remanded to the Municipal Court for a new trial, appellant to recover her costs of appeal.

SHAW, P. J., and KINCAID, J., concur.

PEOPLE v. DE LA ROI.

Cr. 4466.

Supreme Court of California.

Feb. 24, 1944.

Rehearing Denied March 23, 1944.

1. Criminal law ⇐1134(2)

In prosecution of life prisoner for malicious assault with deadly weapon on fellow convict, points urged on appeal were required to be considered in light of unwillingness of certain convicts to testify, conditions affecting safety of convicts giving information, treatment of others by prison officials, interest of other witnesses in testifying and significant silence of record on certain matters. Pen.Code, §§ 1239(b), 4500.

2. Convicts ⇐5

An information alleging that the defendant on a specified date in the county of Sacramento in the state of California being then and there a person undergoing a life sentence in the state prison at Folsom wilfully, unlawfully and feloniously and with malice aforethought committed an assault upon a named person with a deadly weapon or instrument and by means of force likely to produce great bodily injury was sufficient. Pen.Code §§ 952, 4500.

3. Convicts ⇐5

Evidence sustained conviction of life prisoner of malicious assault with deadly weapon on fellow convict. Pen.Code, § 4500.

4. Criminal law ⇐564(1)

In prosecution of life prisoner for malicious assault with deadly weapon on fellow convict, evidence that acts referred to in testimony of some witnesses occurred at Folsom Prison and stipulation by counsel for defendant that Folsom Prison was situated within the county of Sacramento, state of California, established venue in County of Sacramento. Pen.Code, § 4500.

5. Criminal law ⇐304(5)

Court would take judicial notice of the fact that Folsom Prison is situated within the county of Sacramento. Code Civ.Proc. § 1875, subd. 2.

6. Criminal law ⇐852, 1186(4)

Instruction that jury would receive no visitors from any source whatever, neither would they send out any communications nor would any one be sent to jury room, and that jury had all there was to be said in the case by the respective parties and by the court, was error, but not prejudicial. Pen.Code, § 1138; Const. art. 6, § 4½.

In Bank.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Wilson De La Roi was convicted of committing an assault upon the person of another with a deadly weapon while undergoing a life sentence in the state prison, and he appeals.

Judgment affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

In the year 1939 the defendant Wilson De La Roi was found guilty of murder in the first degree and was sentenced to imprisonment for life. In the pending action it has been found that such defendant, while serving his term of imprisonment at Folsom State Penitentiary, committed an assault with a deadly weapon (and with deadly effect) and with malice aforethought upon a fellow convict. The penalty for the latter offense is death (Pen. Code, § 4500), and from the judgment imposing that penalty this appeal comes to us automatically by the provisions of section 1239(b) of the Penal Code.

The defendant urges five grounds for reversal which he states as follows:

"I. His first contention is that the information does not state a public offense, and that the Court had no jurisdiction over the subject of the information. * * * II. The evidence is insufficient in point of law to warrant the State of California in putting this appellant to death. III. The venue was never established in this case and consequently appellant is entitled to a new trial. IV. The Court erred in stating to the jury at the conclusion of his instructions that they could not exercise their right to send out or to receive any communication. V. The Court erred in failing to instruct the jury that a verdict of guilty condemned the defendant to die."

Factual Background

The evidence, both direct and circumstantial, amply supports the verdict of guilty, but it discloses also certain circumstances pertaining to the investigation of the affair by prison officials and the treat-

ment of prisoners who were known or believed to possess information relative to the occurrence, which have caused us to scan every word of testimony and every incident of procedure with most scrupulous care, not only to test the assignments of error made by the defendant but to lend independently our critical scrutiny to that of his able counsel in a search for any prejudice which could indicate a miscarriage of justice. The nature of such circumstances and treatment of prospective witnesses is such that any error whatsoever in the trial proceedings, which could reasonably have prejudiced the defendant, would require a reversal. After such scanning of the record and consideration of the defendant's arguments, we are satisfied, however, that only one of the points urged by the defendant—point IV above stated—shows error in any respect, and we are further satisfied that the error on that point could not, in the light of the other instructions, have prejudiced the defendant but must rather have tended to favor him.

William Deal was the victim of defendant's assault. On the 15th day of July, 1942, in broad daylight (between the hours of 1 and 2 p.m.), in the laundry building at Folsom prison, in the immediate or near presence of at least forty-five persons, including a trusty-guard and a prison official (the laundry superintendent), Deal was stabbed three times with a six-inch dagger, once in the right forearm, once in the left chest, and once in the left back near the waist. The wound in the right forearm was relatively superficial, as was that in the left chest. The one in the back made a deep penetration, severed a large vein, and caused death within a few minutes through abdominal hemorrhage. The wound in the left chest was not fatal because, although apparently directed at the heart, its force was somewhat spent and it was deflected by striking and penetrating a tin can which was in the left breast pocket of the shirt which Deal was wearing. Further importance of the fact that Deal was wearing a shirt will appear later in this opinion.

When Deal was stabbed he screamed. According to the laundry superintendent (one of the few witnesses who was not a convict), it was "a very loud scream, or holler, such as a very unusual scream, it sounded as if someone was being actually murdered over and above the sound of the laundry. * * *" Deal not only screamed, he ran, endeavoring to escape, the defendant pursuing and "stabbing at" him. The laundry superintendent came to the door of his office (a room within the laundry building), someone called to the defendant to "beat it," and someone suggested to Deal that he sit down. The defendant walked out; Deal, having in his flight run into a dryer and fallen down, got up, walked to a table, sat down on it, and soon collapsed.

As previously mentioned, there was a convict-guard, or trusty, stationed at the door of the laundry building, whose duty it was to permit no unauthorized person to pass through the door. The killer of Deal, with his weapon, apparently was permitted to leave the building unmolested and unrestrained. The guard at the door was not produced as a witness. Whether he was interrogated by prison officials does not appear. Even the identity of the guard is not revealed. Whether there was a record as to who was on duty at the time is not stated. The laundry superintendent testified, "Just as I came through the door [from his office into the main room of the laundry] * * * running toward the table where Deal, near where he had fallen, I observed this man because I was wondering why he had left the door open; it was open at the time and the fellows were coming and going. * * *" It does not appear that any order to close the door was given. Seemingly no witness who presumably knew the identity of the convict guard was willing to reveal it. Illustrative of the apparent attitude of all of the witnesses who were interrogated on that subject is the testimony of James Allen, one of the leading witnesses for the prosecution.

"Q. Isn't there usually a convict guard at that door? A. Yes, there is, but Mr. Roosevelt [the laundry superintendent] was in his office at the time that happened, and that time the door was open.

"Q. Isn't there usually a prisoner who acts as guard at that door? A. That is one thing I wouldn't say, because I was attending to my business.

"Q. You wouldn't say then there is or there is not a prisoner who stands guard at that particular door and lets people in and out? A. Yes, there is, yes, but I never seen him at that time. I couldn't say.

"Q. Your recollection now is that you don't remember whether there was a prisoner guard there or not, that is, a con-

vict guard? A. I wouldn't say that, because I didn't see any—I wouldn't say that.

"Q. Do you know who the convict guard was at that door in the forenoon? A. No, I don't. I don't remember that."

It appears that clothing issued to prisoners was stamped with a number identifying it as belonging to the prisoner to whom it was issued. Whether this was required to be done as an incident of issue or only upon its being sent to the laundry does not appear. It is significant here because the dagger identified as the lethal weapon was found in a trash can on the prison grounds wrapped in a pair of trousers. The dagger was not examined for fingerprints and, so far as appears, the trousers were not examined for an identification mark. It does not appear whether any effort was made to ascertain the identity of the owner of the trousers or whether the trousers were marked with an identifying number. The record is also silent as to the source of manufacture of the dagger and as to how it came into the possession of an inmate of the prison. During the appreciable period of time which elapsed between the stabbing of Deal and his lapse into unconsciousness through loss of blood, no one appears to have asked him the name of his assailant.

[1] Coupled to the above related circumstances are the added facts that all of the witnesses who identify defendant as the perpetrator of the crime are themselves recidivists and in the furnishing of information or the giving of testimony they were faced with a problem which involved personal interest. It appears that conditions in the prison were such that it was unsafe for any prisoner who had testified or given information to the prison officials against a fellow convict to be left in the main yard of the prison. Accordingly it was the practice to protect such prisoners by giving them more favorable working or living quarters outside the main yard. This practice was followed as to the principal prosecution witnesses. Also having a bearing upon the interest of witnesses, it appears that those prisoners who were deemed by the prison officials to have been concerned in the commission, or in protecting the perpetrator, of the crime here involved, were placed in solitary confinement shortly after the assault upon Deal and were kept there until the time of trial. This treatment was applied to several defense witnesses. Fairness to the defendant demands that we consider the points urged by him in the light of the circumstances related, and accordingly we so consider them, and in the order presented by defendant.

The Law Points Presented

[2] 1. *The Information States a Public Offense.* Defendant contends that the information upon which he is prosecuted fails to state a public offense in that it does not describe the deadly weapon used and hence it cannot be ascertained "by what means of force the assault charged was committed." The information alleges that "the said Wilson De La Roi on the 15th day of July, A.D. 1942, in the said County of Sacramento, in the said State of California, * * * being then and there a person undergoing a life sentence in * * * the State Prison at Folsom, did then and there willfully, unlawfully and feloniously and with malice aforethought commit an assault upon the person of William Deal with a deadly weapon or instrument and by means of force likely to produce great bodily injury. * * *" Defendant relies upon statements in People v. Perales (1904), 141 Cal. 581, 75 P. 170. That case was decided in 1904, long prior to the amendments of 1927 and 1929 of section 952 of the Penal Code, and no longer states the applicable rule of pleading in this state. (People v. Mitchell (1940), 40 Cal.App.2d 204, 209, 104 P.2d 545.) The section as amended expressly provides that an offense may be charged "in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused." The information fully meets the requirements of the present statute.

[3] 2. *The Evidence Supports the Verdict.* Medical testimony establishes that William Deal, one of defendant's fellow inmates of Folsom State Penitentiary, died on July 15, 1942, from abdominal hemorrhage resulting from the severance of a large vein below the heart occasioned by a stab wound inflicted on the victim's back. The assault occurred in the prison laundry which occupies a building 92.5 feet long by 48.5 feet wide situated within the prison grounds. Three eyewitnesses testified to seeing defendant with a knife in his hand actually engaged in stabbing or "stabbing at" or "cutting" the decedent. Other witnesses testified to seeing the defendant

enter or leave the laundry at about the time of the assault. Two witnesses testified that after defendant came out of the laundry he placed something in a trash can on the outer grounds. Later, a dagger having a blade approximately six inches long and a pair of trousers in which it had been concealed, were recovered from the trash can. Another witness asserted that on the day preceding the assault he overheard defendant telling Deal that "he wanted his stuff [tobacco, which was used as a medium of exchange] and he didn't want no if or and about it." This witness added that a few hours before his death Deal had arranged to borrow from him (the witness) seventy sacks of "weed" with which to pay his debt to defendant. Weak and seemingly illogical as is this evidence of motive—the death of the debtor would surely in this case obviate any chance for collection of the debt—it may, nevertheless, reveal a basis sufficient to have roused the unbridled emotions of this defendant.

Defendant took the stand in his own defense and denied making the assault. He stated that he and the deceased were the best of friends (that they had been seen together often is corroborated by several witnesses) and that no debt existed between them. By his testimony defendant placed himself out in the yard at "the back gate," about 435 feet—the most remote point in the main yard—from the laundry, at the time of the assault. Certain inmates, called as witnesses by the defense, corroborated to some extent defendant's narration of events. Three of them agreed on one point: that at the time of the commission of the assault the defendant was at or near "the back gate." But their stories do not withstand careful analysis. One defense witness, Calvin Hanson, who admitted convictions for first degree robbery and for first degree burglary, testified that he saw Allen, a prosecution witness, follow Deal into the shower room, that he heard Deal yell, and that Allen then reappeared holding a knife and with "blood on his hands * * * dripping down," and that Deal did not reappear. This latter testimony not only was not corroborated by any other witness, but is thoroughly discredited by certain circumstances and other testimony. The witness insisted that *Deal was not wearing any shirt,* "he was stripped to the waist," whereas it is well nigh indisputably established by other evidence that Deal was wearing a shirt and that a tin can in the left breast pocket of the shirt, through which one knife thrust passed, contributed to prevent that blow from being fatal. Further discrediting circumstances are the facts that this witness had never told this story to anyone—not even to counsel for the defense—prior to telling it on the witness stand, and that his story left the fatally wounded Deal out of sight in the shower bath, whereas every other witness to the scene of the actual stabbing, including the laundry superintendent, placed Deal in plain sight in the main laundry room. It is difficult to conceive how a witness could be more completely discredited than was this one.

Other witnesses, besides the defendant, who testified for the defense, include Eddie Walker, the defendant's cellmate, who admitted convictions for kidnaping, robbery, burglary, and escape from custody of an officer; John De La Roi (brother of defendant), who admitted convictions for burglary, first degree, burglary, second degree, and grand theft, and James Morgan, who admitted convictions for burglary, robbery of the first degree, and another robbery and kidnaping.

Eddie Walker, as previously mentioned, was defendant's cellmate at the time the offense was committed. His testimony, much more closely than that of any other witness, comports with that given by defendant. It is to be noted that the evidence for the prosecution tends to an appreciable extent to connect Walker with the defendant in the commission of the offense charged. Walker's testimony was to the effect that Deal, the defendant, and Walker, were the "best of friends," that no debt could exist among them, and that at the time of the assault the defendant was "down to the back gate"—that farthermost point in the main yard from the laundry building—talking with a trusty. The trusty, called as a witness, did not corroborate this testimony.

John De La Roi, defendant's brother, testified in substance that the defendant had played a game of handball with him "early in the afternoon" on July 15th, and, like Walker, said that at the time of the assault the defendant was "down at the back gate" talking to a trusty. He also said that shortly before the stabbing he, the witness, *"got through playing handball"* and, being thirsty, went to a point near the laundry to get a drink from a hydrant, where, through a window, he observed someone whom he did not recognize stabbing the

decedent. The witness Morgan testified that he and the witness John De La Roi played handball on the day of the assault, with the defendant Wilson De La Roi keeping tally, but he differed materially from his co-witness John De La Roi in that according to Morgan the handball game "was probably half over, when I heard someone scream. * * * We stopped the game and walked over to see what was happening, Johnny De La Roi and I. * * *" Obviously if Morgan was telling the truth then John De La Roi was not near a window of the laundry looking in, when the assault occurred. About the only thing in which he agreed with John De La Roi was in placing the defendant *near the back gate* at the crucial time. He also said that the defendant engaged in playing handball with his brother that afternoon, but the defendant himself denied that he played handball on the day Deal was killed. Morgan likewise differed with the defendant in that Morgan testified that the defendant returned to the handball game and resumed keeping tally after the stabbing, while the defendant positively denied that he returned to the handball court after the assault.

While each of the witnesses for the prosecution who was at the scene of the crime, other than the laundry superintendent, stands convicted of multiple felonies, analysis and comparison of their several testimonies fail to reveal any fundamental or wholly irreconcilable inconsistencies. The evidence not only legally supports the verdict but in comparison with that offered by the defendant it appears overwhelming in persuasiveness.

[4, 5] 3. *Venue in the County of Sacramento Is Established by Proof that the Offense Was Committed within Folsom State Prison.* In his third contention defendant asserts that the venue of the offense was never established in that none of the witnesses testified that any of the events related by him occurred in the county of Sacramento. The transcript discloses, however, that some of the witnesses testified that the acts referred to in their testimony occurred at Folsom prison, and defense counsel stipulated "that Folsom Prison is situated within the County of Sacramento, State of California." Moreover, as stated by the trial court, it could take judicial notice of the fact that Folsom prison is situated within the county of Sacramento. Code Civ.Proc. § 1875, subd. 2; People v. Wright (1926), 79 Cal.App. 523, 525, 250 P. 204; People v. Bastio (1942), 55 Cal.App.2d 615, 617, 131 P.2d 614.

[6] 4. *It Was Error to Instruct the Jury Contrary to the Provisions of Section 1138 of the Penal Code, but It Appears that No Prejudice Therefrom Was Suffered by Defendant.* Defendant's fourth contention—the only one which has semblance of merit—is based on the last paragraph of the charge of the court. In closing his instructions to the jury the trial judge stated, "I wish to say that from this time on, you will receive no visitors from any source whatever; *neither will you send out any communications nor will any be sent to your room. You have now all that is to be said in this case, by the respective parties and by the Court.* The case now remains with you." (Italics supplied.) Section 1138 of the Penal Code provides that "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

Obviously it was improper to admonish the jury, "neither will you send out any communications. * * * You have now all that is to be said in this case, by the respective parties and by the Court." The jury had the right to send out a communication to the court at any time it saw fit and it had the right to have testimony read or further instructions given. But the fact that it had these rights does not show that it had any occasion, in this case, to use them; nor, even if we assume that it may have wished to exercise such rights and felt precluded therefrom, does prejudice to the defendant appear possible.

The instructions given in this case, other than the single one under discussion, comprise a charge which is generally a model of excellence. The charge as a whole is clear, complete, concise; the language is plain; the rules stated are simple. There is no point of law as to which, in reason, the jury could have *needed* further information. The trial was not protracted: the jury was empaneled on Monday, September 21, 1942; the verdict was returned

on Thursday, September 24th. The deliberations were not prolonged: the jurors retired at 2:58 p.m. and returned into court one hour and fifty minutes later, at 4:48 p.m., with their verdict. They were polled and each declared the verdict to be his.

By the instructions which were given, the jurors were advised as to every element entering into the crime charged; they were not only given the statutory rule and definition as to burden of proof and reasonable doubt, but they were also told that "The defendant is presumed to be innocent, and this presumption attaches at the beginning of the trial and remains throughout all stages of the trial," that the plea of the defendant "puts in issue every material allegation of the information and charge, and it devolves upon the prosecution to establish beyond a reasonable doubt that he, the said defendant, is guilty of the crime charged against him in the information," and that "Each of the parties in this case is entitled to the *independent judgment of each juror.*" (Italics supplied.) In the light of these proper instructions as to the law governing their consideration of the case, it seems clear to us that the concluding instruction which purported to preclude the jury from asking for further information, if it prejudiced either party, must have tended to prejudice the plaintiff and favor the defendant, rather than vice versa. Under the instructions quoted, *if there was any material disagreement among the jurors as to the evidence* which, in the absence of the improper instruction, would have caused their asking to be brought into court for further information, such disagreement must certainly have tended to impede or prevent rather than to facilitate or cause arrival at a verdict of guilty. If any juror entertained a view of the evidence inconsistent with guilt beyond a reasonable doubt, he was told, it was his duty to vote for a verdict of not guilty. If this situation of disagreement had arisen and the jurors had felt precluded from asking to be brought into court and given further information, the verdict which was returned herein could never have been reached. With the jury instructed that each party was "entitled to the independent judgment of each juror," that the burden of proof was on the prosecution, and that the defendant was entitled to the benefit of any reasonable doubt, it seems apparent that any disagreement among the jurors as to either facts or law, as to which they might have wanted, but felt prohibited from asking, further information, would have tended to prevent, rather than to cause, a verdict of guilty.

We are satisfied, after an examination of the entire cause, including the evidence, that the error in the instruction noted has not prejudiced the defendant or resulted in a miscarriage of justice. Cal. Const. art. VI, § 4½.

5. *The Record Shows that the Jury Was Informed that the Penalty for the Crime Charged Was Death.* Defendant's final contention—that the "Court erred in failing to instruct the jury that a verdict of guilty condemned the defendant to die"—is not supported in its factual base. The court read to the jury section 4500 of the Penal Code which provides that "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, *is punishable with death.*" (Italics supplied.)

For the reasons hereinabove stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

Rehearing denied; EDMONDS, J., dissenting.



23 Cal.2d 877

The PENNSYLVANIA RAILROAD COMPANY, Plaintiff and Respondent, v. MID-STATE HORTICULTURAL COMPANY, Inc., Defendant and Appellant.

L. A. 18001.

Supreme Court of California.

Feb. 21, 1944.

In Bank. Mandate, 64 S.Ct. 128, conformed to.

Prior opinion 131 P.2d 544.

PER CURIAM.

Pursuant to the mandate of the Supreme Court of the United States filed herein on the 27th day of December, 1943,

It is hereby ordered that the judgment of this court given, made and entered in said action on the 27th day of November, 1942,

affirming the judgment entered in said action by the Superior Court of the State of California, in and for the County of Fresno, on the 14th day of May, 1941, be and the same is hereby vacated and set aside and the remittitur of this Court, heretofore filed with the Clerk of said Superior Court upon said affirmance of said judgment, is hereby recalled and annulled, and

It is further ordered, adjudged and decreed that the judgment of said Superior Court given, made and entered on said 14th day of May, 1941, in said action in favor of the plaintiff therein, Pennsylvania Railroad Company, and against said defendant, Midstate Horticultural Company, Inc., be and the same is hereby reversed, and said action is hereby remanded to said Superior Court, and the said Superior Court is hereby ordered and directed to enter judgment in said action in favor of defendant and appellant, Midstate Horticultural Company, Inc., upon each and all of the causes of action set forth in the amended complaint on file in said action, defendant and appellant herein to recover its costs on appeal and in said Superior Court.

Let the remittitur of this Court issue forthwith.



23 Cal.2d 708

PEOPLE v. SHAW.

Cr. 4518.

Supreme Court of California.

Feb. 24, 1944.

1. Homicide ⇐253(3)

Evidence that admitted killing of accused's wife was willful, deliberate, premeditated, and with malice aforethought sustained accused's conviction of first-degree murder. Pen.Code, §§ 187–189.

2. Criminal law ⇐1182

Where record disclosed no prejudicial error, proceedings appeared regular and fair in all respects, and the evidence supported beyond any reasonable doubt the verdict, conviction of first-degree murder must be affirmed. Pen.Code, §§ 187–189, 1239(b).

In Bank.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

William Shaw was convicted of murder in the first degree and sentenced to death, and from the judgment an appeal is automatically taken under Penal Code, § 1239 (b).

Judgment affirmed.

Martin C. Casey and Theodore C. Krumm, both of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

SCHAUER, Justice.

In an information filed by the District Attorney of San Bernardino County, defendant was charged with the murder of Pecola Shaw. The defendant entered pleas of not guilty and not guilty by reason of insanity; he subsequently withdrew the latter plea. A jury found him guilty of murder of the first degree and made no recommendation as to penalty. Upon such verdict the defendant was sentenced to death. This is an automatic appeal from the judgment as provided by subdivision (b) of section 1239 of the Penal Code. No brief has been filed and no appearance made on behalf of defendant herein. It has therefore been necessary for us independently to examine the record of the proceedings. From such examination it appears that the judgment must be affirmed.

From the testimony the following facts appear: In 1941 the defendant left San Bernardino, where he and his wife Pecola had resided, and went to Oakland. Although the defendant provided a home for her in Oakland, his wife would not leave San Bernardino, where she resided in a rooming house owned or maintained by the witness Garland Hardage, known in his local community as King George. She stayed at the Hardage house intermittently over a period of about two years, receiving money regularly from the defendant and visiting him occasionally in Oakland. In May, 1943, the defendant returned to San Bernardino and moved her from Hardage's house. About a week before June 4, 1943, the date when she was killed, Mrs. Shaw left the defendant and went back to the Hardage house. The defendant testified

that about five days before the killing, after an unsatisfactory conversation with his wife and Hardage, "A voice spoke to me and said to be sure and kill her." The next day he saw her on the street intoxicated and supported by two Negro soldiers, and he decided then that he "would rather she be dead than in the condition she was living."

About midnight on June 3d, Shaw broke into the Hardage residence. Hardage, wakened by the noise, got his shotgun and fired one shot downward through the door into the hall. He heard the intruder leave the house, and he and Pecola went "to call the law." As they returned, they saw the defendant across the street. Shaw waited near by until the police who answered the call and Hardage left the house to look for him. He then broke into the house again, with a pocket knife open in his pocket. Pecola picked up the shotgun, the defendant stabbed her once, and she dropped it. He continued to cut her as she, struggling and "hollering," went out the door, across the porch, and fell in the yard. She was stabbed more than fifty times.

The defendant proceeded down the street and two neighbors who had been interested spectators called an ambulance. There is testimony that while the deceased lay in the yard she said that she was bleeding to death and that her husband, William Shaw, had cut her.

The defendant caught a freight train to Victorville that night, and was arrested after his return to San Bernardino the following night. The officers testified to statements of the defendant made shortly after his apprehension, in which he confessed and recounted the circumstances of the homicide. Defendant testified to the same effect at the preliminary examination, and this evidence was introduced at the trial. Also, defendant took the stand and confirmed his previous statements and the testimony of other witnesses.

[1, 2] The record discloses no prejudicial error and the proceedings appear to have been regular and legally fair in all respects. The evidence supports beyond any reasonable doubt the verdict with its implied findings that the killing was with malice aforethought (Pen.Code, § 187), that there was manifest on the part of defendant a deliberate intention unlawfully to take the life of deceased (Pen.Code, § 188), and that the murder was willful, deliberate, and premeditated (Pen.Code, § 189). It does not appear that the defendant was insane at the time either of the homicide or of trial. The defendant apparently believed that he had reasons for committing the homicide which, in his opinion, justified his act. He voluntarily returned from Victorville to San Bernardino and offered no resistance to arrest. He testified that on being arrested he told the officers, "I didn't want to run off, that I wanted to do to them as they would do to me, I had killed her and I am willing to be killed."

Under the law which denies to individuals, even though they be sorely aggrieved, any right to be judge and executioner in such cases, the judgment must be, and is, affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



23 Cal.2d 711

LISSNER v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 18722.

Supreme Court of California.

Feb. 25, 1944.

Rehearing Denied March 23, 1944.

1. Mandamus ⇐31

Mandamus would not lie to compel probate court to effectuate disposition of petition for ratable distribution in a pending estate if probate court's order was a denial of the application and not a refusal to exercise jurisdiction in the premises. Probate Code, § 1010.

2. Mandamus ⇐28

Mandamus will issue to compel court to act, but not to act in a particular manner unless situation presented is one wherein court can exercise its discretion in but one way.

3. Divorce ⇐207

An order in divorce action appointing receiver to take possession of community property of spouses and separate property of husband, including possessory right of husband as legatee, was not subject to collateral attack in probate proceeding by receiver for ratable distribution of estate. Probate Code, § 1010.

4. Divorce ⇐207

An order in divorce action appointing receiver to take possession of community property of spouses and separate property of husband, including possessory right of husband as legatee, made on proper showing and duly confirmed, and which was unchallenged by husband for over three years, was entitled to same conclusiveness as any other judicial act of an authorized court. Probate Code, § 1010.

5. Courts ⇐472(4)

Where order was made in divorce action appointing receiver to take possession of community property of spouses and separate property of husband, including possessory right of husband as legatee, husband's opposition, as individual, to receiver's application for distribution of estate did not create an unadjudicated "controversy" sufficient to oust probate court of jurisdiction to determine matter. Probate Code, § 1010.

See Words and Phrases, Permanent Edition, for all other definitions of "Controversy".

6. Courts ⇐207(4)

Probate court's refusal to pass on application for distribution of estate made by receiver appointed to take possession of community property of spouses and separate property of husband, as required by Supreme Court's decision in proceeding by receiver in the matter of a decedent's estate in which husband, as executor, had opposed application established proper factual base, jurisdictionally, for issuance of mandamus by Supreme Court, though opposition in mandamus proceeding was by husband individually. Probate Code, § 1010; Code Civ.Proc. § 1085.

7. Executors and administrators ⇐314(12)

The reversal of probate court's order denying petition for ratable distribution of estate, with direction "to proceed with these matters in a manner consistent with the views herein expressed", was not tantamount to reversal with directions for entry of a particular order, but left trial court free to permit filing of additional pleadings and to dispose of matter on merits. Probate Code. § 1010.

8. Mandamus ⇐4(3)

A ruling of superior court, sitting in probate, sustaining objections to its power to hear application for distribution of estate, neither granted nor denied the motion, but refused to consider question at all, and was therefore not appealable; as the "refusing to make any order heretofore mentioned in this section", within statute including, among others, an order "distributing property", and mandamus would lie to compel court to pass on matter for lack of adequate remedy in ordinary course of law. Code Civ.Proc. § 1086; Probate Code, §§ 1010, 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Refusing to Make Any Order Heretofore Mentioned".

9. Appeal and error ⇐1
Mandamus ⇐26

A "writ of mandamus" is means regularly employed to compel performance of judicial duty, whereas "appeal" generally contemplates correction of error in disposition of a cause, consequent of trial court's exercise of jurisdiction in the case. Code.Civ.Proc. § 1086; Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appeal" and "Writ of Mandamus".

In Bank.

Original mandamus proceeding by Louis M. Lissner, as receiver of the community property of Baldwin M. Baldwin and wife and the separate property of Baldwin M. Baldwin, to compel the Superior Court of Los Angeles County and Carl A. Stutsman, Judge thereof, to effectuate the disposition of a petition for ratable distribution in a pending estate.

Writ granted.

Louis M. Lissner, in pro. per., Loeb & Loeb, and Laurence M. Weinberg, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, Meserve, Mumper & Hughes, and Roy L. Herndon, all of Los Angeles, Thatcher & Woodburn, of Reno, Nev., and Frank P. Doherty and William R. Gallagher, both of Los Angeles, for respondents.

CURTIS, Justice.

This is an original proceeding in mandamus to effectuate the disposition of a petition for ratable distribution in a pending estate.

In pursuance of appropriate allegations and the consequent prayer of the complaint

filed in a divorce action instituted by Rowena Schneider Baldwin against Baldwin M. Baldwin, the petitioner herein, Louis M. Lissner, was by an ex parte order dated December 15, 1939, appointed the receiver to take into possession the community property of the spouses and the separate property of the defendant husband. At that time the matter was made returnable on an order to show cause and on December 28, 1939, following the submission of additional sworn evidence at the hearing in open court, an order was made confirming said receiver's appointment. Located as an asset of Baldwin within this state was his claim to an allowance of $1,500 a month from the estate of his mother, Anita M. Baldwin, deceased, pending administration, as bequeathed under the terms of her will. Upon petitioning the court in the divorce action for instructions, the receiver on May 20, 1940, was ordered to take all necessary steps in the estate matter to reduce this claim of Baldwin to possession, and to hold such sums as he might thus recover in accordance with the order appointing him as receiver. To this end, and pursuant to the provisions of section 1010 of the Probate Code, the receiver filed in the estate proceeding a petition for ratable distribution of Baldwin's aforesaid legacy. Baldwin and his sister, Dextra Baldwin Derx, as executor and executrix, respectively, of their mother's will, resisted the receiver's application and also presented their own application for partial distribution. After hearing, the probate court denied the receiver's petition for ratable distribution and granted the petition of the executor and executrix for partial distribution. The receiver appealed from both orders as they adversely affected his position in the estate proceeding, and this court based its judgment of reversal on these grounds: (1) That the order appointing Louis M. Lissner as receiver in the Baldwin divorce action was valid on its face and therefore was not subject to collateral attack in the probate proceeding; (2) That such receiver as the "successor in interest" of the possessory right of Baldwin to the payment of $1,500 per month from the estate of his deceased mother, Anita M. Baldwin, pending administration, was entitled, under authority of section 1010 of the Probate Code, to seek ratable distribution of such legacy; and (3) That the objections to the receiver's petition as urged by Baldwin and his sister in their respective *representative* capacities did not present such a dispute as would oust the probate court of jurisdiction to try and determine the claim, for the controversy in the estate proceeding as to the proposed distribution of the decedent's property otherwise than in conformity with the terms of her will did not involve opposition by the *real party in interest*—Baldwin as legatee. In re Estate of Baldwin, 21 Cal.2d 586, 134 P.2d 259. Accordingly, the decision of this court was as follows: "The order denying the petition of appellant [the receiver] for ratable distribution is reversed; the order granting the petition of respondents [Baldwin and his sister, Dextra Baldwin Derx, the executor and executrix] for partial distribution is reversed as to the legacy of Baldwin M. Baldwin; and the probate court is directed to proceed with these matters in a manner consistent with the views herein expressed."

After the filing of the remittitur the receiver presented in the probate court his motion for an order granting his petition for ratable distribution, and notice of hearing was served upon counsel of record for Baldwin as executor and his sister, Dextra Baldwin Derx, as executrix. The latter filed written objections to the motion and so did Baldwin, but in this instance he appeared "in his individual capacity, and not otherwise." After hearing of argument in the matter, the probate court refused to grant the order sought. Thereupon the receiver made application to this court for a writ of mandamus and an alternative writ was issued.

The principal question involved in this matter is whether or not under the prescribed rules of probate procedure the respondent court was empowered to hear and determine the petitioner's application when contested by Baldwin as an individual. In these circumstances the opposing views as to judicial duty stem primarily from the conflicting interpretation of the decision of this court rendered on the appeal in the estate proceeding heretofore cited. Following a discussion of the merits of these points of difference, the additional question of the availability of an appeal from the order of the respondent court in refusal of the petitioner's application will be considered.

[1, 2] As the parties have framed the issues to test the propriety of this proceeding, the first matter in dispute is whether the respondent court in the exercise of its jurisdiction has acted upon and denied the

petitioner's application for ratable distribution or whether it has refused to exercise its jurisdiction in the premises. If the former be the fact, then mandamus will not lie, for a court may act as efficiently by denying as by granting a motion or request. On the other hand, should it be determined that the respondent court has refused to act in a matter properly brought before it, mandamus will, and should, issue to put it in motion, but not, of course, to compel it to act in a particular manner unless the situation presented is one in which the court can exercise its discretion in but one way. 16 Cal.Jur. 809; Hilmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 175. That the respondent court refused to entertain the petitioner's motion on the ground of lack of jurisdiction is apparent from pertinent portions of the record herein.

In the course of the hearing of argument in the matter the presiding judge expressed his views as to the power of the court in these words: "The motion of the receiver for the granting of the petition of the receiver for ratable distribution is such that, in my judgment, I am without jurisdiction, and this department of the court, sitting exclusively in probate, declines to assume any jurisdiction in that behalf. In my opinion, that matter must be determined by the judge who tries the divorce case; and it presents conflicts as to title which can only be determined by this court sitting either at law or in equity, and not in probate."

Thereupon the following colloquy occurred:

"Mr. Lissner [the petitioner]: * * * I understand the court declined to pass on the petition for ratable distribution, on the ground it did not assume jurisdiction.

"The Court: That is the idea.

"Mr. Lissner: It didn't grant it or deny it; it just declined to assume jurisdiction over the matter?

"The Court: Yes.

"Mr. Weinberg [attorney for petitioner]: You mean, the motion on the matter of ratable distribution?

"The Court: No, I didn't pass on it at all; I didn't either approve or deny the issue; I simply declined to assume jurisdiction."

Accordingly, the respondent court included this principle of ruling in its formal order, which, so far as here material, reads as follows: "It further appears to the court, from the records and files herein and particularly from the petition of said receiver for ratable distribution and the written objections thereto filed herein by Baldwin M. Baldwin, individually, and by Dextra Baldwin Derx, as executrix of the will of said decedent, that a controversy is hereby presented between the said receiver and the said Baldwin M. Baldwin, individually and as legatee, involving issues of law and disputed issues of fact which are not matters of probate and which are without and beyond the jurisdiction of this court sitting in probate.

"It is therefore ordered that by reason thereof, issues of law and disputed issues of fact are now involved which are not issues of probate and which are without and beyond the jurisdiction of this court sitting in probate, of which issues this court sitting in probate declines to assume jurisdiction."

[3-5] From this unequivocal declaration of the basis of the respondent court's nonadjudication of the petitioner's application emerges the main question in controversy in this mandamus proceeding—whether under the prevailing circumstances the petition for ratable distribution was a matter properly before said court for disposition, for the petitioner is entitled only to such writ as will operate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office * * *." Code Civ.Proc. sec. 1085. The legal principles governing this point were stated in this court's prior opinion in the matter of In re Estate of Baldwin, supra, and carried to their logical conclusion, they establish the respondent court's retention of the requisite jurisdiction despite the interposition of the legatee Baldwin as a resisting party litigant. By reason of said decision the respondents do not now dispute the petitioner's right to seek ratable distribution in the probate proceeding nor the ineffectiveness of Baldwin's objections in his limited *representative capacity* to preclude the settlement of the contested issues therein, but they maintain that his present opposition *as an individual—the real party in interest*—so alters the factual situation as to divest the respondent court of its previous jurisdiction in the matter. Again, as on the occasion of the prior appeal to this court, reliance is placed "upon a line of decision holding that the probate court is without jurisdiction to try and determine disputes concern-

ing the *existence or validity of the right asserted* as the basis for distribution of the decedent's property otherwise than in conformity with the terms of the will or the laws of succession, as the case may be" (italics added), and again it must be said that "the rule [so] established * * * has no application." Estate of Baldwin, supra, 21 Cal.2d at pages 592, 593, 134 P.2d at page 264. As was then observed by this court, the "existence or validity of the right asserted" by the petitioner rests upon his judicial appointment as receiver in the Baldwin divorce action, an order valid on its face and not subject to collateral attack in the probate proceeding. Such order, made upon a proper showing and duly confirmed, and which Baldwin has allowed to stand unchallenged for more than three years, is entitled to the same conclusiveness as any other judicial act of an authorized court. The petitioner's status has heretofore been resolved by appropriate judicial rulings "in an independent proceeding"—the divorce action—(cf. McGee v. Allen, 7 Cal.2d 468, 471, 60 P.2d 1026) and it would be incompatible with the finality of decision which necessarily attaches to such appointment to sustain the argument made in derogation of the respondent court's power to determine the petition for ratable distribution, that Baldwin's opposition as an individual creates an unadjudicated controversy between the real parties in interest as contesting claimants. The premise of the petitioner's position in the probate proceeding is no longer classifiable as a "dispute" affecting the respondent court's power to pass upon the matter here involved, and no more in his individual than in his representative capacity may Baldwin prevail upon this jurisdictional ground of attack.

[6, 7] In the light of these considerations the failure of the respondent court to pass upon the petitioner's application for ratable distribution—a matter properly before it for disposition—as required by the import of the decision in Re Estate of Baldwin, supra, establishes here a proper factual base, jurisdictionally, for the intervention of mandamus.

However, there is no force in the petitioner's added contention that upon the filing of the remittitur after reversal of the orders subject of the prior appeal, as above noted, the respondent court was bound to rule favorably upon his petition. Under well-defined principles of law, such formal remand with the general specification that further proceedings be taken consistent with the views theretofore expressed is not tantamount to a reversal with directions for entry of a particular order, but it simply leaves the trial court free to permit the filing of additional pleadings and to so dispose of the matter upon the merits as its discretion shall dictate. 2 Cal.Jur. pp. 996, 1053-1054; Pillsbury v. Superior Court, 8 Cal.2d 469, 472, 66 P.2d 149; Atchison, T. & S. F. R. Co. v. Superior Court, 12 Cal.2d 549, 554, 555, 86 P.2d 85.

[8, 9] The final point to be considered in relation to the propriety of the issuance of the writ herein is whether the petitioner has in the premises "a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ.Proc. sec. 1086. In this connection it is contended that under section 1240 of the Probate Code the order made by the respondent court at the conclusion of argument on the petitioner's motion may be characterized as appealable because in effect, it was "an order refusing to make an order distributing property." Such claim comports neither with the significance of the order herein involved nor with a reasonable construction of the mentioned code provision in its strict limitation of the orders in probate from which an appeal will lie. The respondent court's ruling, as above quoted, merely sustained the objections raised as to its power to proceed with the hearing of the petitioner's application, which was then left pending because of a failure to exercise jurisdiction. In so declining to act, said court *neither granted nor denied* the motion before it, but in reality refused to consider the question of the distribution of the estate property at all. Since a writ of mandamus is the means regularly employed to compel the performance of judicial duty while the remedy of appeal generally contemplates the correction of error in the disposition of a cause *consequent of* the trial court's *exercise of jurisdiction* in the case, it logically follows that the Legislature, consistent with the narrow scope of section 1240 of the Probate Code in its precise enumeration of appealable orders, did not intend, by including in such list an order "refusing to make any order heretofore mentioned in this section"—referring, among others, to one "distributing property"—to invade thereby the field of law normally occupied by mandamus proceedings. Rather it would seem that in the orderly administra-

tion of justice such quoted language was intended to comprehend only such orders of refusal as evidenced a denial of the relief sought after the probate court had entertained the matter and made disposition thereof upon the merits. Cf. Johnson v. Superior Court, 102 Cal.App. 178, 191, 283 P. 331. Accordingly, the order of the respondent court divesting itself of jurisdiction of a matter properly before it for decision would not come within the purview of section 1240 of the Probate Code, and the writ herein sought is the only remedy open to the petitioner.

It is therefore ordered that a peremptory writ of mandamus be issued to the respondents, requiring the court and the judge thereof to hear and determine the issues raised by the pleadings filed in connection with the petitioner's application for ratable distribution in the estate of Anita M. Baldwin, deceased, and to render such judgment or order thereon as it may be advised.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.



63 Cal.App.2d 169

DOLINAR et al. v. PEDONE et al.

Civ. 6808.

District Court of Appeal, Third District, California.

March 2, 1944.

Hearing Denied April 27, 1944.

1. Automobiles ⇐245(40)

Where evidence was in conflict as to speed of defendant's automobile which struck a wrecked automobile parked on highway resulting in injuries to plaintiffs, question of defendant's negligence was for jury.

2. Appeal and error ⇐989

Where a judgment is attacked as being unsupported, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

3. Appeal and error ⇐996

When two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court, or, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a judgment, appellate courts should resolve that doubt in favor of the judgment.

4. Master and servant ⇐302(1)

To hold master liable for acts of the servant, the act must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed.

5. Automobiles ⇐245(31)

Where salesman parked his automobile on wrong side of highway at night to assist third persons in distress, court could not hold as a matter of law that because the act of mercy itself was not within scope of his employment the act of parking was also outside the employment, and question whether in so parking automobile and assisting third persons salesman was acting within his employment, so as to make employer liable for injuries resulting when salesman's automobile was struck, was for jury.

6. Master and servant ⇐302(1)

Employee's deviation from a strict course of duty does not release the master from liability unless the deviation is shown substantially to amount to an entire departure.

7. Automobiles ⇐245(30)

The act of salesman in parking his automobile along highway was not such an act as would take him outside of his employment as a matter of law, nor is it such an act as might not have been reasonably expected of a traveling salesman driving long distances on his employer's business and to which therefore the master's assent may be fairly assumed.

8. Master and servant ⇐332(2)

Whether employee's deviation from course of duty is so material or substantial as to constitute complete departure is usually a question of fact.

9. Evidence ⇐208(2, 3)

Generally, a pleading containing an admission is admissible against the pleader in a subsequent proceeding, and is admis-

sible even on behalf of a stranger to the former action.

10. Evidence ⇐208(2)

When a pleading is verified by counsel and the client allows it to remain as a pleading in the case so that it contains a solemn admission of record, it should be presumed that the allegations contained therein were inserted by his authority, and hence admissible against him in other actions.

11. Evidence ⇐208(2), 263(4), 265(8)

Where a pleading in another action is offered in evidence as an admission of the pleader, it is competent for party against whom pleading is offered to show that statements therein were inadvertently made or not authorized by him or made under a mistake of fact, and whether such explanation weakens or destroys the force of the statement is for the court or jury, but it only affects the weight not the admissibility of such statement.

12. Evidence ⇐208(2)

There is no distinction with reference to the admissibility of pleadings as admissions of the pleader, whether pleadings were filed by attorneys for an individual or for a corporation.

13. Evidence ⇐208(3)

In action against corporation and others for injuries arising out of automobile accident, admitting corporation's answer, filed in another action, which admitted that at time of accident driver of automobile involved was corporation's agent, was not error although answer was not verified by an officer of the corporation but by corporation's attorney.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Mildred Dolinar and others against Fred Pedone and others for injuries arising out of an automobile accident. Verdict and judgment for plaintiffs, motions for new trial were overruled, and defendants appeal.

Affirmed.

Gerald M. Desmond, of Sacramento, for defendants and appellants Fred and Jos. Pedone.

Butler, Van Dyke & Harris and Van Dyke & Harris, all of Sacramento, and Redman, Alexander & Bacon, of San Francisco, for defendants and appellants A. W. Bowman and Universal Film Exchange.

Leo M. Fitzwilliam and Henry & Bedeau, all of Sacramento, for plaintiffs and respondents.

PEEK, Justice.

This is an appeal by the defendants from a judgment based upon a verdict of the jury in favor of plaintiffs in a personal injury action arising out of an automobile accident.

The accident occurred shortly after six o'clock on the evening of December 7, 1940, at a point approximately 28 miles west of the City of Placerville on U. S. highway 50. The defendant Bowman was an employee of the defendant Universal Film Exchange, Inc., and was driving his own car on his employer's business from Placerville to Carson City, Nevada. His testimony shows that he had stopped his car to assist two young women whose car had gone over the embankment, and being fearful of his car likewise going off the road if he parked on the right side of the highway, he drove to the left side and parked his car against the embankment, leaving the headlights burning on the low beam. He so parked his car that approximately one-half of its width extended on to the paved portion of the highway. The highway at the designated point was of concrete construction with a white line extending along the center and with shoulders of decomposed granite. While he was assisting one of the women out of the car, an automobile owned and operated by one Coleman skidded on the icy pavement and crashed into his parked car. The Coleman car came to rest immediately in front of the Bowman auto and at right angles to the highway so that the car extended across the northerly half thereof with the rear end a short distance over the center white line. While Bowman was conversing with the plaintiff Frank Dolinar, an occupant of the Coleman car, they noticed defendant Pedone's car approaching at what was testified to have been between 300 to 700 feet away. Bowman and Dolinar ran toward the oncoming Pedone car, signaling and shouting in an unsuccessful attempt to stop it. They testified that Pedone apparently did not see them and passed at a speed which they estimated to have been 55 or 60 miles an hour. The Pedone car collided with the Coleman car, causing injuries to the plaintiff Mil-

dred Dolinar and her infant son, Norman Dolinar, whom she was holding in her arms, and fatally injuring Coleman.

At the conclusion of the trial the jury returned a verdict against all of the defendants. A stipulation limited the judgment against the defendant Fred Pedone in accordance with the provisions of Section 402 of the Vehicle Code, St.1937, p. 2353, and judgment was entered accordingly. Motions for judgment notwithstanding the verdict on behalf of the Universal Film, Exchange, Inc. and motions for a new trial by all of the defendants were denied by the trial court.

[1] The sole contention of the defendants Fred Pedone and Joseph Pedone is that the judgment should be reversed as to them in that the evidence of negligence on the part of defendant Joseph Pedone, the driver of the car, is insufficient as a matter of law to support the verdict and judgment against them. In support of said contention they maintain that the testimony of plaintiff Frank Dolinar and defendant Bowman as to the speed of their car, which was denied by the five occupants of their car, was insufficient to support the finding of negligence; that the accident was unavoidable as there were no visible lights; that when they first saw the wreck at a distance of from 40 to 100 feet the brakes were applied in an effort to avoid the accident but that the car skidded and crashed into the Coleman car, and that skidding of itself does not constitute negligence.

The effect of the contentions made by the defendants Pedone would be to have this court reject completely the testimony of Bowman and Dolinar as regards the speed of the Pedone car or hold, as a matter of law, that such speed did not constitute negligence under the circumstances in that it was not apparent that the highway at the point where the accident occurred was icy and slippery.

In each of the cases cited by them (Comstock v. Morse, 107 Cal.App. 71, 290 P. 108, 109, and Fernholtz v. Bisbee, 42 Cal.App. 2d 579, 109 P.2d 371) the reviewing court adhered to the well established rule of affirming the judgment of the trial court where there was a conflict in the evidence. In the Comstock case, an automobile overturned on a slippery highway injuring a guest. Complaint was made on appeal of certain instructions and of insufficiency of the evidence. In affirming judgment for the defendant the court stated: "* * * the facts and circumstances surrounding the accident are such that reasonable minds might differ as to whether or not respondent was guilty of negligence, and in such a case a reviewing court is not permitted to substitute its deductions for those of the jury and the trial court." In the second case [42 Cal.App.2d 579, 109 P.2d 374], which factually is somewhat similar to the present one, an accident occurred when one car skidded on an icy pavement and crashed into another. There was no evidence of excessive speed of either automobile but there was a conflict as to the lane of the highway where the accident occurred. The court remarked: "It seems only reasonable to conclude that the jury found from the evidence, as it was warranted in doing, that the accident was unavoidable and happened without any negligence on the part of either plaintiff * * * or defendant * * *."

If the question here presented involved only the skidding of the Pedone car a situation comparable to that in the Fernholtz case would be presented. However, additional evidence was introduced which presented a further and conflicting question—that of speed. Therefore, under the principle expressed in both of the cited cases, whether or not Joseph Pedone was negligent in the operation of the car was a question of fact for the determination of the jury.

[2, 3] When, as in the present case, a judgment is attacked as being unsupported, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury (In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689), and when two or more inferences can be reasonably deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court (Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183), or if there be any reasonable doubt as to the sufficiency of the evidence to sustain a judgment appellate courts should resolve that doubt in favor of the judgment. In re Estate of Bristol, supra. Under such view of the law we cannot hold that the verdict of the jury is unsupported, and the judgment against the defendants Joseph Pedone and Fred Pedone must be affirmed.

The defendants Universal Film Exchange, Inc., and Bowman attack the judgment on the grounds that the implied finding of the jury that (1) Bowman was acting within the course and scope of his employment with the corporation is not sustained by the evidence; (2) that as a matter of law it could not be held liable on the ground of respondeat superior as all of the evidence establishes the fact that at the time of the accident the defendant Bowman had deviated from the business of the corporation and was not at that time acting within the scope of his employment, and (3) that if the question of whether he was or was not acting within the scope of his employment is considered as constituting a question of fact for determination by the jury, then the action of the trial court in admitting in evidence certain pleadings in another cause then pending in another county was prejudicial to the defendant Universal Film Exchange, Inc. and to the defendant Bowman.

The corporate defendant and Bowman both admit that he was pursuing the business of his employer up to the moment he stopped his car at the request of the injured woman. Their first question therefore resolves itself into a determination of whether, since the stopping in itself did not constitute an abandonment of his employer's business, could his motive in so doing be superimposed upon the parking so as to render it such a departure from the business of his employer as to render his act without the scope of his employment?

[4] Obviously Bowman's voluntary act in going to the assistance of the two women, commendable as it was, could not be held to have been within the scope of his employment. "The act of the servant must be connected directly or indirectly with the business of the employer and be in furtherance of the object for which the servant was employed." Kish v. California State Automobile Ass'n, 190 Cal. 246, 212 P. 27, 28.

[5-8] The ultimate result then of the first contention made by the defendant Universal Film Exchange, Inc., would be to have this court draw an overly fine distinction between the act of stopping and the act of parking his car (see Ryan v. Farrell, 208 Cal. 200, 280 P. 945) preparatory to the doing of an act of mercy for a third person, and to hold as a matter of law that because the act of mercy itself was not within the scope of his employment, that likewise the act of parking would be outside of the employment. With such contention we cannot agree. In some cases the deviation may be so marked and in others so slight that the court may properly say that no conclusion other than that the act was or was not such a departure may be sustained. But mere deviation by an employee from a strict course of duty does not release the master from liability. In order to have such an effect the deviation must be shown substantially to amount to an entire departure. The act of Bowman in parking his car along the highway was not such an act as would take him outside of his employment as a matter of law (Gammon v. Wales, 115 Cal.App. 133, 300 P. 988) nor is it such an act as might not have been reasonably expected of a traveling salesman driving long distances on his employer's business, and to which therefore the master's assent may be fairly assumed. Kruse v. White Bros., 81 Cal.App. 86, 253 P. 178. Whether a deviation is so material or substantial as to constitute a complete departure is usually a question of fact. Kruse v. White Bros., supra; Westberg v. Willde, 14 Cal. 2d 360, 94 P.2d 590. Here as in the case of Loper v. Morrison, 23 Cal.2d 600, 145 P.2d 1, all of the relevant facts and circumstances were properly presented to the jury to be weighed in relation to one another.

As regards the third question raised by the Universal Film Exchange, Inc., it appears that the trial court, over the objection of Bowman and the Film Exchange, allowed the plaintiff to introduce in evidence the answer of defendants filed in another case arising out of the same accident, which action was then pending in the Superior Court in and for the City and County of San Francisco. The answer of the defendant corporation in the pleadings so introduced did not deny the allegations of the complaint therein, which alleged that Bowman at the time of the accident was acting within the scope of his employment.

In support of their contention regarding this point it is argued that although the failure to deny the allegation of agency could be considered as an admission in that proceeding such answer could not be considered, nor could it bind them, in a subsequent action; that the answer was not verified by an officer of the corporation but was verified by their attorney in that action; that no authority was shown for

such verification, and that without a showing that the defendants knew of such admission in said answer it was not admissible as such in the present proceeding.

As authority for their argument the case of Davis v. Robinson, 50 Cal.App.2d 700, 123 P.2d 894, is cited as being directly in point. With this we cannot agree. Such case involved an oral stipulation not made in accordance with Section 283 of the Code of Civil Procedure. Here we are presented with a question involving an answer filed in a prior action which answer failed to deny a direct allegation of agency on the part of Bowman.

[9] It may be stated as a general rule that a pleading containing an admission is admissible against the pleader in a proceeding subsequent to the one in which the pleading is filed. Kamm v. Bank of California, 74 Cal. 191, 15 P. 765; In re Estate of McCarthy, 127 Cal.App. 80, 15 P.2d 223; Tieman v. Red Top Cab Co., 117 Cal.App. 40, 3 P.2d 381; Mellor v. Rideout, 83 Cal.App. 621, 257 P. 173. This is true even on behalf of a stranger to the former action. Duff v. Duff, 71 Cal. 513, 12 P. 570.

[10, 11] When a pleading is verified by counsel and the client allows it to remain as a pleading in the case so that it contains a solemn admission of record, it should be presumed that the allegations contained therein were inserted by his authority and hence admissible against him in other actions. Particularly would this rule seem to be proper under our modern system of pleading in which technical forms are abolished and pleadings are required but to state the facts. No longer is there any reason for considering the allegations of a pleading as the mere suggestion of counsel as did some of the earlier cases wherein the courts adhered to the old rules of pleading which were so involved and so technical that they could not be said to be the statements of the parties in whose behalf they had been drawn and filed. Under the rule herein enunciated it is always competent for the party against whom the pleading is offered to show that the statements were inadvertently made or were not authorized by him or made under a mistake of fact. Whether such explanation weakens or destroys the force of the statement contained in the pleading, is a proper question for the court or jury, but it only affects the weight, not the admissibility of such pleading in evidence. That California has followed this principle is evidenced by the early case of Coward v. Clanton, 79 Cal. 23, 21 P. 359, 361, wherein it is stated: "It should be presumed, where the pleading is filed by the attorney of the party, that such attorney was acting within his authority, and that the pleading should be regarded as the admission of the party, subject to his right to show that as a matter of fact the pleading was not authorized by him." Kamm v. Bank of California, supra.

[12] We can see no valid reason why there should be any distinction with reference to the admissibility of pleadings as admissions whether filed by attorneys for an individual or for a corporation.

In the case of Western Oil Fields Corp. v. Nowlin, Tex.Civ.App., 288 S.W. 554, 556, a case not wholly unlike the one now before this court, it was contended that the pleadings filed by an attorney in a previous suit could not be used as admissions against a corporation because a corporation could only act through its regularly constituted officers. The court, in its opinion, stated: "Attorneys are both agents and attorneys for their clients in the matters in which they are employed, and are presumed to obtain the information contained in the pleadings filed by them from their clients."

[13] The sole objection by appellant to the admission of the answer in the trial court was that it was "not binding upon the defendant Bowman in this case, also on the defendant Universal Film Exchange, Inc." No evidence was offered by appellants to rebut the implied admission of the agency of the defendant Bowman by its answer in the other action then pending nor that such admission was not authorized, that it was a mistake, or that it was inadvertently made. Immediately after the introduction of the pleadings in question the parties rested and the case was submitted to the jury. Upon defendants' motion for a new trial affidavits were filed showing that the answer in question was in error and that it was to be amended so as to deny the allegations of agency on the part of the defendant Bowman. In the case of Mellor v. Rideout, supra [83 Cal. App. 621, 257 P. 175], the court held "* * * if the first action has not been brought to trial and it is within the power of the pleader to destroy the effect of the admission as evidence by amending his pleading, the admission is not ordinarily entitled to overwhelming weight"; but as we have stated, the right of appellant to

destroy or weaken the force of such admission could go only to the weight of the proffered evidence, not as to its admissibility. Therefore the admission by the trial court of such pleadings was proper and did not constitute prejudicial error as contended by appellants.

The judgment appealed from is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



63 Cal.App.2d 135

In re HULL'S ESTATE.

BURGESS et al. v. BOHLE.

Civ. 14327.

District Court of Appeal, Second District, Division 1, California.

March 2, 1944.

Hearing Denied April 27, 1944.

1. Wills ⇐384

On appeal from order granting a nonsuit in will contest, facts were considered in light most favorable to contestants, conflicts in evidence were disregarded, and full credit was given only to that portion of evidence which tended to support allegations in contestants' petition.

2. Wills ⇐163(1)

Even though will may appear to be unnatural and may vary from expressions of testatrix in regard to her intentions concerning relatives or natural objects of her bounty, will is not invalidated by claim of undue influence in absence of actual showing of some kind of pressure which overpowered mind and conquered volition of testatrix at very moment of execution. Probate Code, § 20.

3. Wills ⇐163(4)

Where one who unduly profits as beneficiary under will occupied confidential relation to testatrix and has actually participated in procuring execution of will, he must assume burden of showing that neither coercion or fraud on his part procured execution of will. Probate Code, § 20.

4. Wills ⇐157

The fact that beneficiary under will occupies confidential relation to testatrix, standing alone, is not sufficient to invalidate will on ground of undue influence. Probate Code, § 20.

5. Wills ⇐166(7)

Mere proof of opportunity to influence mind of testatrix, even though shown to be coupled with an interest, or a motive to do so, does not sustain finding of undue influence in absence of testimony showing that there was pressure operating directly on her testamentary act. Probate Code, § 20.

6. Wills ⇐324(3)

Before question of undue influence in execution of will becomes one of fact for determination of trier of facts, there must be evidence, the probative force of which establishes relations between one charged with exercising undue influence and the testatrix, affording the former an opportunity to control the testamentary act, that the testatrix' condition was such as to permit of subversion of her freedom of will, that there was activity on part of person charged with exercising undue influence, and that such person unduly profited as beneficiary under will. Probate Code, § 20.

7. Wills ⇐163(1)

To establish that will was procured by undue influence, evidence must be produced that pressure was brought to bear directly upon the testamentary act. Probate Code, § 20.

8. Evidence ⇐591

Where proponent of will was called as witness under statute regarding examination of adverse party, contestants were entitled to rely on such portion only of proponent's evidence as was favorable to contestants' cause and were not bound by proponent's adverse testimony. Code Civ. Proc. § 2055.

9. Wills ⇐163(1)

In absence of evidence, it could not be assumed that proponent who was principal beneficiary of will was guilty of wrongdoing in procuring execution of will. Probate Code, § 20; Code Civ.Proc. § 1963, subd. 1.

10. Wills ⇐163(1)

In will contest, the burden was on contestants to show undue influence.

11. Wills ⇐324(3)

In will contest, evidence of undue influence on part of principal beneficiary and proponent was insufficient for trier of facts. Probate Code, § 20.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceedings in the matter of the estate of Annie B. Hull, deceased, wherein Alexina P. Burgess and another instituted will contest against Martin F. Bohle, individually and as beneficiary and executor named in the will of the deceased, dated March 26, 1943. From an order admitting will to probate and from an order granting a nonsuit, the contestants appeal.

Affirmed.

Hallam Mathews, of Los Angeles, and Chambers & Lyman, by Robert Chambers, all of Hollywood, for appellants.

Ralph J. Brown, Michael F. Shannon, and Thomas A. Wood, all of Los Angeles, for respondent.

WHITE, Justice.

This litigation involves a contest before probate of the last will of Annie B. Hull, deceased. The contest was instituted by Alexina P. Burgess of Suffield, Connecticut, a sister and sole surviving relative of the decedent, and Hollywood Congregational Church. The defendant and proponent of the will is Martin F. Bohle, who is not related to the testatrix.

At the time of her death on May 24, 1943, the testatrix was a widow of the age of 78 years. The will which gave rise to the instant proceedings was executed March 26, 1943. By it Annie B. Hull sought to dispose of an estate valued at approximately $7500 and yielding a probable annual income of about $1000. Under the terms of her will, decedent bequeathed to her sister Alexina P. Burgess, one of the contestants herein, the sum of $500 in cash. All of the rest, residue and remainder of her estate she bequeathed to the proponent and respondent herein, Martin F. Bohle, who was also named as executor without bond, and referred to in the testamentary document as "my dear friend Martin F. Bohle has been very good to me and has looked after me".

As grounds for their objections to the probate of and petition to contest the probate of the aforesaid will of decedent, the contestants alleged: First, that at the time she executed said will the testatrix was of unsound mind and memory, and did not possess testamentary capacity to make a valid will. Secondly, that the testamentary instrument was signed by Annie B. Hull while acting under undue influence and fraud of the proponent Martin F. Bohle.

The cause proceeded to trial before the court sitting without a jury and at the conclusion of the contestants' case the court granted a motion for a non-suit, and admitted the contested will to probate. Contestants prosecute this appeal from the order granting a non-suit and from the further order admitting the will to probate.

[1] Stating the facts in a light most favorable to contestants, disregarding any conflict in the evidence, and giving full credit only to that portion of the evidence which tends to support the allegations contained in contestants' petition, as we must do on an appeal from an order granting a non-suit, the record reflects that in her lifetime Annie B. Hull made three wills; the first of which, dated October 31, 1940, gave the home in which she lived to the church and the residue to her sister; the second testamentary instrument, dated March 8, 1943, gave certain stock to the church and the residue to the aforesaid sister. The contents of the last will are as hereinbefore stated.

About November 1, 1941, the proponent, Martin F. Bohle, met the decedent when he came to her home as a roomer. About the month of May, 1942, Mr. Bohle began taking his meals with the testatrix. About that time he also obtained certain amounts of money from the decedent, according to his testimony approximately $7000. Mr. Bohle used $5500 of this amount to make a down payment upon a small ranch, title to which he took in his own name. With other amounts of money received from the testatrix Mr. Bohle purchased three horses, an automobile, house furnishings for the ranch and certain livestock. It also appears from the evidence that Mr. Bohle looked after the decedent's affairs. On January 15, 1943, Mr. Bohle married his present wife. According to Mr. Bohle's testimony, the testatrix was very much perturbed and upset because of his second marriage. On March 8, 1943, which is the date upon which the second will was made, decedent filed an action against Mr. Bohle in the superior court of Los Angeles

county to recover the property purchased by Mr. Bohle with the money obtained from her. According to the complaint filed in that action she had given Mr. Bohle more than $8000. On the day following the filing of this action testatrix went to the hospital for an operation where it was found that she was in the last stages of cancer. From that date until the time of her death she was bedridden. During the time of her hospitalization, after her return home and up to the time of her death, Mr. Bohle and his wife saw the decedent every day, usually twice each day. On March 15th, while decedent was at the hospital she directed her attorneys to dismiss the aforesaid suit she had instituted against Mr. Bohle. On March 25, 1943, decedent was returned from the hospital to her home. The record indicates that on or about March 18, 1943, the testatrix asked the respondent if he knew an attorney upon whom she could rely to which he replied in the negative. Thereupon the decedent asked Mr. Bohle if he would inquire of his wife concerning an attorney, which he did. Through a friend, Mrs. Bohle was recommended to an attorney with whom an appointment was made for Mr. Bohle. The latter called at the lawyer's office, informed him that the testatrix desired to see an attorney and asked the lawyer to come to the Hull residence. On the evening of March 25th the attorney called at the home of decedent, was introduced to her by Mr. Bohle and thereafter the latter was requested to leave the room. The attorney was in consultation with the testatrix for approximately one hour. The next evening the attorney returned with the completed will which was duly executed; the attorney and Mrs. Hull's nurse acting as witnesses. Subsequent to the execution of the will respondent Bohle was called into the room and the testatrix requested that the will be read to him, which was done. Respondent Bohle testified that he had never discussed with the testatrix the matter of a will and at no time until he heard the will read did he know that he was to be a beneficiary thereunder. The attorney who prepared the last will of decedent testified that he called upon her at the request of respondent Bohle; that he was introduced to her by the respondent; that he asked Mr. Bohle to leave the room, and spent about an hour discussing with the testatrix her property and the terms of the will that she desired to make. According to the attorney the testatrix told him that she desired to leave the whole of her estate to the respondent, whereupon he inquired as to any blood relatives she might have and learned from her that she had a sister but did not desire to bequeath anything to such sister. The lawyer testified that after some discussion he suggested that some provision be made for the sister and the sum of $500 was agreed upon. The subscribing witnesses who, as heretofore noted, were the attorney who prepared the will and the nurse employed by Mrs. Hull, testified to the due execution of the testamentary document and to the further fact that at the time of the execution of the will the testatrix was of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person. It is also in evidence that on March 26, 1943, the testatrix executed a general power of attorney in favor of respondent Martin F. Bohle.

The lack of mental capacity of the testatrix to make the will in question, though pleaded as a ground of contest in the trial court, is not urged upon this appeal, and the sole question for determination by us is whether the will with which we are here concerned was procured by the undue influence of respondent Martin F. Bohle. Also, whether the evidence produced by appellants at the trial established a prima facie case of undue influence in the making of decedent's will, and therefore, that in granting a non-suit the court fell into error.

Section 20 of the Probate Code empowers every person of sound mind, over the age of 18 years, to dispose of his or her separate property by will. Such being the case, no such person is called upon to "consult or satisfy the wishes or views of juries or courts" (Matter of Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456, 457), and because, in the minds of others than the testator, the justice or injustice of a will is a matter of opinion, it is required that a court or jury must determine the question of incapacity only upon that substantial evidence which the law requires. Were the rule otherwise, courts and juries would be permitted to make disposition of a deceased person's property irrespective of the desires of a testator.

[2-4] However unnatural a will may appear to be and regardless of the fact that it may vary from expressions of the testator in regard to his intentions concerning relatives or the natural objects of his boun-

ty, the will is not invalidated by the claim of undue influence in the absence of an actual showing of some kind of pressure which overpowered the mind and conquered the volition of the testator at the very moment of execution. Estate of Burns, 26 Cal.App.2d 741, 749, 80 P.2d 77. Appellants, however, rely upon the equally well established exception to this general rule, that where one who unduly profits as a beneficiary under the will occupies a confidential relation to the testator, and has actually participated in procuring the execution of the will, he must assume the burden of showing that neither coercion or fraud upon his part procured execution of the will. In Estate of Burns, supra, this court cited numerous cases to support the statement that the confidential relation standing alone is insufficient. That there must be activity on the part of the beneficiary in connection with the preparation of the will. Thus, in Estate of Graves, 202 Cal. 258, 262, 259 P. 935, 937, relied upon by appellants, the court said: "but in this case it clearly appears that the appellant took an active part in securing the execution of the will at a time when there existed a confidential relation between himself and Mrs. Graves". A similar situation prevailed in Estate of Hampton, 39 Cal.App.2d 488, 103 P.2d 611, cited by appellants. In Estate of Bucher, 48 Cal.App. 2d 465, 120 P.2d 44, 45, also cited by appellants, the court said: "What she knew or did not know about her new will or its contents is not disclosed by any evidence in this record, other than the testimony of the draftsman of the will who was selected for her by the proponent", while in the case at bar both subscribing witnesses testified to the capacity of the testatrix to understand and fully comprehend what she was doing. In Estate of Miller, 16 Cal.App.2d 154, 60 P.2d 498, also relied upon by appellants, the decedent, at the time she executed her will was under the influence of opiates, while the beneficiary therein mentioned actively participated in the preparation of the will. In the case before us there was no evidence of any such infirmity or active participation. In Estate of Hartley, 137 Cal.App. 630, 31 P.2d 240, 242, cited by appellants, the testatrix resided in Redwood City, while the will was drawn in San Francisco, with the proponent and beneficiary furnishing the information upon which the instrument was drawn. The will was then brought to the testatrix at Redwood City for her signature. The witnesses to the testamentary document, who were fellow employees of the beneficiary, testified that the testatrix did not say that it was her will nor did she ask them to sign it as witnesses. The will being prepared by a lawyer who obtained all his knowledge from the beneficiary thereunder, and who was "neither requested to consult nor given opportunity of adequate conference with the testatrix" as the court said "speaks volumes against the good faith" of the beneficiary. No such conditions or circumstances are present in the case at bar.

[5, 6] In the instant case we are impressed that a confidential relation existed between decedent and respondent herein. In fact, the latter concedes the existence of such a relationship. It may also be conceded that the evidence supports an inference, if not the conclusion, that the relationship existing herein was such as to afford to respondent an opportunity to control the testamentary act of decedent, but as pointed out in Estate of Graves, supra, at page 262 of 202 Cal., at page 936 of 259 P. "mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with an interest, or a motive to do so, does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on her testamentary act." Before there is imposed upon the proponent of a will the obligation of presenting evidence of volition, and before the question as to undue influence becomes one of fact for determination by a jury or the court sitting without a jury, there must be evidence, the probative force of which establishes (1) the relations between the one charged with exercising the undue influence and the decedent, affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of her freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence, and (4) that such person unduly profited as beneficiary under the will. Estate of Graves, supra; Estate of Hampton, supra. And a presumption against the validity of the will is not created by the existence of any one of the circumstances just narrated, standing alone. It is only when a combination of all these circumstances is present in the evidence that their probative force is sufficient to justify the

denial of a non-suit, and place upon the proponent of a will the burden of submitting evidence that the testamentary document was executed free from the taint of undue influence.

[7-11] In the instant case we are unable to find in the record any evidence that the proponent used such influence upon the testatrix as would in effect destroy the latter's free agency and substitute therefor the will or desires of the former. It is also the law that evidence must be produced that pressure was brought to bear directly upon the testamentary act. Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25. And as heretofore pointed out, the mere opportunity to influence the mind of the testatrix is not sufficient to invalidate a will, even though such opportunity is coupled with a motive or interest so to do. Estate of Arnold, supra. As we read the record in this case, the only evidence of activity on the part of the proponent of the will is that he obtained the lawyer who prepared the document. However, the sole evidence in that regard is that the proponent contacted a lawyer at the request of the testatrix, and the lawyer in question was not the proponent's attorney, but one recommended through inquiry made of a friend of proponent's wife. The testimony of the lawyer who prepared the will, as well as that of the proponent, is uncontradicted to the effect that neither made any suggestions as to the contents of the will save and except that the attorney suggested that provision be made for the sister of the testatrix. The evidence further shows that the proponent was not present at any time while the attorney consulted with the testatrix, and that all of the information was obtained by the draftsman of the will from the testatrix herself. All the evidence in the record is to the effect that the will as drawn embodied and reflected the wishes and desires of the testatrix unaffected by any suggestion, influence or coercion on the part of proponent or anyone else. It is true, of course, that the proponent was called as a witness pursuant to the provisions of section 2055 of the Code of Civil Procedure, and contestants were entitled to rely only upon such portion of his evidence as was favorable to their cause and were not bound by such adverse testimony as was given by this witness called under the cited code section. But, the testimony nevertheless remained in the record and was not contradicted. As a matter of fact the testimony of the proponent was to a degree at least corroborated by both of the subscribing witnesses to the will who testified unequivocally that, in their opinion, the testatrix, at the time of the execution of the testamentary document was of sound and disposing mind and was free from any undue influence, fraud or coercion. There is no evidence that respondent ever discussed with the testatrix the matter of making a will, that he knew of her intention so to do, or that he was to be a beneficiary under the will, until after its execution, when at the request of the testatrix, he was called into the room and at her direction the will was read to him. In the absence of evidence it cannot be assumed that a person is guilty of wrongdoing. On the other hand it must be presumed, in the absence of evidence to the contrary, that one is innocent of crime or wrong (subdivision 1, section 1963, Code of Civil Procedure). The burden was on the contestants to show undue influence, and in meeting that obligation it is not sufficient for them merely to show circumstances consistent with the exercise of undue influence, but before a duly and solemnly executed will can be invalidated, circumstances must be shown that are inconsistent with freedom of action on the part of the testatrix, Estate of Burns, supra.

From what we have herein stated, it follows that a verdict in favor of contestants could not have been held to have sufficient support in the evidence, and therefore, the trial court committed no error in granting the motion for a non-suit.

The orders appealed from are and each is affirmed.

YORK, P. J., and DORAN, J., concur.

63 Cal.App.2d 127

ROSTAIN v. GUGGENHEIM et al.

Civ. 3111.

District Court of Appeal, Fourth District, California.

Feb. 29, 1944.

Hearing Denied April 27, 1944.

1. Municipal corporations ⇐579
Taxation ⇐733

Under statute providing that tax deed was subject to any lien for direct assessments, title acquired through tax deed and title acquired through sale for unpaid street assessment were on a parity, so that tax deed did not extinguish rights under previously issued certificate of sale based on default in payment of street assessment bond. Pol.Code, §§ 3833.2, 3836.1, 3897, 4390; Gen.Laws 1937, Act 8199.

2. Municipal corporations ⇐564

Where property was sold by city treasurer for default in payment of street assessment bonds and statutes authorizing such sale were complied with, statute requiring suit to foreclose street assessment lien to be brought within four years after last installment of bond becomes due was inapplicable. Gen.Laws 1937, Act 8199, §§ 67–72, 76a.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action to quiet title by Peter R. Rostain against Olga Guggenheim, Alexander Construction Company, and others. From an adverse judgment, Alexander Construction Company appeals.

Reversed and remanded.

Earle P. Thompson, of Los Angeles, for appellant.

H. E. Schmidt, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title. There is no dispute as to the facts. On February 2, 1926, a bond was issued as a lien on the property in question pursuant to the Improvement Act of 1911, Stats.1911, p. 730, Deering's Gen.Laws 1937, Act 8199, as amended. No payment of principal or interest was ever made on this bond and because of a default on the first payment the city treasurer advertised and sold the property in question and on September 2, 1927, issued a certificate of sale to the predecessor of the defendant Alexander Construction Company.

Municipal taxes on this property levied by the city of Delano were not paid and on December 27, 1933, the city tax collector duly sold said property to the city of Delano to satisfy said tax lien. At that time, Section 4390 of the Political Code provided that the mode of collecting city taxes was the same as provided in that Code for collecting state taxes. The right of the city to a deed to this property, if redemption was not made within five years, was preserved to the city in the act of 1937, which repealed Section 4390 of the Political Code, Stats.1937, Chap. 221, p. 516. On November 28, 1939, the city tax collector issued a tax deed to the city of Delano conveying title to this property for the nonpayment of the delinquent tax. On February 15, 1940, the city of Delano, through its tax collector, issued a tax deed to this property to the plaintiff herein.

In this action which followed the court found that the plaintiff's title under his tax deed was paramount, that he was the owner in fee of the property, and that the defendant Alexander Construction Company had no right, title or interest therein. Judgment was entered accordingly and the Alexander Construction Company has appealed.

The main question presented is whether the tax deed relied upon by the respondent had the effect of extinguishing the rights of the appellant under its certificate of sale based upon a default in the payment of the street assessment bond. This question depends upon the law in force on November 28, 1939, when the property in question was deeded to the city of Delano for the nonpayment of delinquent taxes. Campbell v. Woolner, 57 Cal.App.2d 511, 134 P.2d 822, 824. In that case, this court said:

"At that time, section 3897 of the Political Code had been repealed and, while the Revenue and Taxation Act was not yet in effect, sections 3833.2 and 3836.1 had been added to the Political Code, effective as of September 19, 1939. (Stats.1939, chap. 529, p. 1917.) Section 3836.1, thus added, provided that the deed from the tax collector to the state should convey a clear title free of all encumbrances except '(c) Any lien for direct assessments.' Section 3833.2 defined a direct assessment as 'an assessment levied by a district the bonds of

which are secured by assessments levied on a particular parcel of land described in the bond.' The assessment under which the appellant claims was a direct assessment, as thus defined, with the result that in 1940, when the deed was issued to the state, section 3836.1 of the Political Code provided that such a deed should not operate to extinguish the lien of the street improvement bonds issued pursuant to the Improvement Act of 1911. While section 3787 of the Political Code was repealed in 1939 (Stats.1939, Chap. 154, p. 1374), the repeal thereof did not become effective until February 1, 1941, the result being that during 1940, when the property here in question was deeded to the state, that section applied as it had been construed in the parity cases. It thus appears that the law, as it stood in 1940, was the same as it was when the parity cases were decided and those cases would seem to be controlling here, the amendment to section 3987 of the Political Code, which was followed in the case of Smith v. Addiego, supra [54 Cal.App.2d 230, 129 P.2d 953], being at that time ineffective."

[1] The situation existing here is precisely the same. On November 28, 1939, when the tax deed was issued to the city and on February 15, 1940, when the city deeded the property to the respondent, section 3897 of the Political Code had been repealed and sections 3833.2 and 3836.1 were in effect and provided that such a tax deed was subject to any lien for direct assessments. Section 3897 of the Political Code having been repealed, under the authorities cited in Campbell v. Woolner, supra, the title acquired through the tax deed and the title acquired through the sale for an unpaid street assessment lien were on a parity at that particular time and neither extinguished the other.

[2] The respondent argues that any rights of the appellant are barred by the statute of limitations since section 76a of the Street Improvement Act provides that a suit to foreclose the lien of such a street assessment must be brought within four years after the last installment of the bond becomes due, and since no such suit was here brought. The right to file and maintain a suit to foreclose the lien of such a street assessment bond is given by section 76a of the act, but it is particularly provided therein that this is "by way of a separate, distinct and cumulative remedy." Another procedure for a sale of property by the city treasurer in case of default in payments on such bonds is provided by sections 67 to 72 of the act. That method was here followed and no contention is made that these provisions of the law were not duly complied with. The matter of the statute of limitations, relied upon by the respondent, has no application here.

For the reasons given, the judgment is reversed and the cause remanded.

MARKS and GRIFFIN, JJ., concur.



63 Cal.App.2d 839

Peter R. ROSTAIN, Plaintiff and Respondent, v. Phil C. KATZ, as Administrator with the Will Annexed of the Estate of Olga Guggenheim, Deceased, et al., Defendants, Alexander Construction Company, a Corporation, Defendant and Appellant.

Civ. 3112.

District Court of Appeal, Fourth District, California.

Feb. 29, 1944.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Earle P. Thompson, of Los Angeles, for appellant.

H. E. Schmidt, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title. The material facts are precisely similar to those in the case of Rostain v. Guggenheim, Cal. App., 146 P.2d 247, and the issues and questions raised are exactly the same. For the reasons stated in the decision in that case the judgment is reversed and the cause remanded.

MARKS and GRIFFIN, JJ., concur.

63 Cal.App.2d 130

In re FARLEY'S ESTATE.

FARLEY et al. v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 3131.

District Court of Appeal, Fourth District, California.

Feb. 29, 1944.

1. Mortgages ⇐330

The statutes relating to necessity of recovering judgment for a deficiency remaining after sale of security under power of sale in deed of trust given to secure a note are inapplicable to deeds of trust executed before August 21, 1933, their effective date. Code Civ.Proc. §§ 580a, 580b, as amended by St.1933, pp. 1672, 1673; Civ.Code, § 2924½, as amended by St.1933, p. 1674.

2. Executors and administrators ⇐241

Where claim on note secured by deed of trust executed before August 21, 1933, was presented against deceased trustor's estate within time fixed by law, allowed, and approved in full, it became an "approved debt" of estate, and holder of note and trust deed was not required to bring action for deficiency remaining after sale of security under power of sale in trust deed; no question being raised as to justice of debt or propriety of any expense of foreclosure. Code Civ.Proc. §§ 580a, 580b, as amended by St.1933, pp. 1672, 1673; Civ.Code, § 2924½, as amended by St.1933, p. 1674; Probate Code, §§ 700 et seq., 713, 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Approved Debt".

3. Mortgages ⇐382

Judicial proceedings to foreclose trust deed authorizing sale of property on trustor's default in payment of note secured are proper only under extraordinary circumstances.

4. Common law ⇐11

When California became a state, the common law was adopted and put in force except where superseded by statute.

5. Executors and administrators ⇐1

The system of probate of estates in California is largely a creature of statutes.

6. Courts ⇐198

Probate courts derive their powers and have limitations placed on those powers by statute.

7. Executors and administrators ⇐275

The statutory direction that an allowed and approved claim against estate shall be paid in course of administration is a direction that it shall be paid in full to amount for which it is approved and allowed, if estate is not insolvent. Probate Code, §§ 713, 716.

Appeal from Superior Court, Kings County; Clark Clement, Judge.

Proceeding in the matter of the estate of James Henry Farley, also known as J. H. Farley, deceased, wherein Ernest Raymond Farley and another, executors of the estate of deceased, filed their first and final account and petitioned for distribution, opposed by Security-First National Bank of Los Angeles, claimant against estate. From an order refusing to settle the final account and distribute the estate, the executors appeal.

Affirmed.

John G. Covert, of Hanford, for appellants.

Farrand & Farrand, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order refusing to settle the final account and distribute the estate of James Henry Farley, deceased.

James Henry Farley died on April 7, 1929. At the time of his death he was indebted to Los Angeles-First National Trust & Savings Bank, now Security-First National Bank of Los Angeles, in the sum of $2500, evidenced by a promissory note dated May 15, 1928, due in instalments, with interest at 7% per annum. The note was secured by a deed of trust on property in the city of Hanford.

Deceased's will was admitted to probate and appellants were appointed and qualified as executors. Within the time fixed by law, respondent presented its claim in due form. It was allowed and approved by the executors and the probate judge and filed.

On March 20, 1931, the property was sold under the power of sale in the deed

of trust for the sum of $2000. The total amount of the indebtedness, due at that time, including interest and costs of sale, was $2993.77.

On May 4, 1943, the executors filed their first and final account, report, and petition for distribution in which it was stated that the only claim against the estate was that of respondent and that it had not commenced an action to recover judgment for a deficiency.

Respondent filed its objections setting up the foregoing facts and that $993.77, accrued, remained unpaid on its claim so that the estate was not in condition to be closed. After a trial the objections and exceptions were sustained. An order was entered refusing to settle the account and denying the petition, and this appeal followed.

[1, 2] The sole question presented is the necessity of recovering a judgment for a deficiency remaining after the sale of the security under a power of sale in a deed of trust given to secure a promissory note executed prior to August 21, 1933, St.1933, pp. 1672, 1673, 1674, the effective date of sections 580a and 580b of the Code of Civil Procedure and section 2924½ of the Civil Code. In so far as material here, those sections have been held inapplicable to deeds of trust executed before their effective date. Central Bank of Oakland v. Proctor, 5 Cal.2d 237, 54 P.2d 718; Brown v. Ferdon, 5 Cal.2d 226, 54 P.2d 712; Hales v. Snowden, 19 Cal. App.2d 366, 65 P.2d 847.

The precise question, as well as others, was presented to this court in Estate of Thurnell, 72 Cal.App.Dec. 685, 19 P.2d 14, 18. We held that the claim, having been presented, allowed and approved in full, became an approved debt of the estate and there was no necessity of bringing any action against the estate for the unpaid portion of the debt remaining after the sale of the security under the power contained in the deed of trust. There were several other questions presented by the appeal. The Supreme Court granted a hearing but the appeal was dismissed so the cause was never decided.

We have again reviewed the question there presented and have reached the same conclusion as before and we here adopt the portion of the opinion, written by Mr. Justice Pro Tem Harden, dealing with the question here presented:

"The declaration of trust having granted to the bank the power of sale of the property upon default in the payment of the notes, the death of one of the grantors did not operate as a revocation of that power of sale nor in any manner limit the effect of the instrument. There was no necessity to present any claim against the estate as a prerequisite to the exercise of said power of sale. The provisions of section 1493 of the Code of Civil Procedure, requiring the filing of claims against the estate of a deceased person, and of section 1500 of the Code of Civil Procedure, prescribing the conditions under which actions may be maintained to foreclose mortgages or liens upon the property of estates, have no application to the right of a trustee to sell property under a power of sale contained in a trust deed. More v. Calkins, supra, [95 Cal. 435, 30 P. 583, 29 Am.St.Rep. 128]. Neither statute nor judicial authority has been called to our attention holding that the exhaustion of such security for a promissory note by trustee's sale under a trust deed will operate to satisfy an unpaid balance remaining due thereon after proper application of the proceeds of the sale; and we are certain there is none. The allowance of the claims in the full amount was as if said notes had been unsecured by any lien, which was the case. The time for appeal from the order of September 5, 1930, expired without the raising of any question as to its validity. Said order was, therefore, a conclusive adjudication of the validity of said claims against all persons interested in the estate, except persons under legal disability. Section 1637, Code Civ.Proc.; Kingsley v. Miller, 45 Cal. 95; Estate of Grant, 131 Cal. 426, 63 P. 731; Kowalsky v. Superior Court, 13 Cal.App. 218, 109 P. 158; Harter Co. v. Geisel, 18 Cal.App. 282, 122 P. 1094; Kohn v. Rupley, 54 Cal.App. 565, 202 P. 163. Upon default of the trustors, the trustee had the right to sell the property at trustee's sale without judicial foreclosure. Indeed, it is only under extraordinary circumstances that resort may be had to judicial proceedings to foreclose. Bayer v. Hoagland, 95 Cal.App. 403, 273 P. 58; Bayer v. Barrett [127] Cal.App. [305] 15 P.2d 801. The sale of the property at trustee's sale and the application of the proceeds thereof to the satisfaction of the debt was a partial payment—nothing more."

Appellants argue that it has always been the law in California that where a secured

claim is presented, allowed and filed, and the security is sold under a power of sale for an amount insufficient to pay the debt in full, the deficiency is waived unless a judgment be recovered against the estate; that section 580a of the Code of Civil Procedure and 2924½ of the Civil Code merely continued this rule. They cite no case in point sustaining this contention and we have found none. They rely on Bank of America, etc., Ass'n v. Dennison, 8 Cal.App.2d 173, 47 P.2d 296, and Palo Alto, etc., Ass'n v. Cook, 17 Cal.App.2d 193, 61 P.2d 499, in support of their argument. Both notes and deeds of trust involved in those cases were given prior to August 21, 1933, and the actions to secure deficiency judgments were filed after that date. The necessity or propriety of bringing such actions was not touched upon in either opinion. They also rely upon Estate of Naegely, 31 Cal.App.2d 470, 88 P.2d 715, and Hatch v. Security-First Nat. Bank of Los Angeles, 19 Cal.2d 254, 120 P.2d 869. The notes and securities in both of those actions were executed after August 21, 1933, so those cases can not be considered as authority on the question before us.

[3-6] While California was under Mexican jurisdiction the disposition of estates of deceased persons was regulated by Spanish-Mexican law. When California became a State of the Union the common law was adopted and put in force except where superseded by statute. In 1850 (Stats.1850, p. 219) a statutory system of procedure for probate of estates was adopted and has been continued under various statutes which are now largely consolidated into the Probate Code. The system of probate of estates here is largely a creature of statutes. Probate courts derive their powers and have limitations placed upon those powers by statute. 11 Cal.Juris. 208, Sec. 3; 11A Cal.Juris. 49, Sec. 4; People v. Senter, 28 Cal. 502.

The matter of claims against estates is governed by Chapter XII, § 700 et seq., of the Probate Code as those sections and others in the Code of Civil Procedure preceding them have been interpreted by the courts. Here the note and deed of trust were executed, the deceased died and the claim was presented, allowed, approved and filed before the adoption of the Probate Code. For convenience our references will be to sections of that code and the Code of Civil Procedure. We need not concern ourselves with rejected claims.

Section 1496 of the Code of Civil Procedure contains the following: "Every claim allowed by the executor or administrator and approved by the judge shall be ranked among the acknowledged debts of the estate, to be paid in due course of administration." Sec. 713, Probate Code.

[7] Section 1500 of the Code of Civil Procedure (Sec. 716, Probate Code) prohibits the holder of a debt secured by a mortgage from suing an estate unless a claim is presented, except that the owner of such secured debt may bring an action for foreclosure of the lien if there be an express waiver of recourse to any other property of the estate, and subject to the further limitation that no counsel fees can be recovered in the absence of presentation of the claim. There is no special provision defining the status of allowed and approved secured claims so the general provisions of section 1496 of the Code of Civil Procedure (713, Probate Code) should apply. Thus we have in the statutes an express direction that an allowed and approved claim should be paid in the course of administration. This is a direction that it should be paid in full to the amount for which it is approved and allowed, provided the estate is not insolvent. There is no provision that a claim would be satisfied by its partial payment. This can only be done with the consent of the claimant.

The claim of respondent was allowed and approved in full. There was no contest of the claim so the full amount became an acknowledged debt of the estate to be paid before final distribution. No question is raised as to the justice of the debt nor to the propriety of any expense incurred during the foreclosure proceedings. In so far as appears here the estate justly owed respondent the entire amount claimed. Only part of the claim has been paid, with the balance long since due and unpaid. Prior to August 21, 1933, there seems to have been no requirement of law which would necessitate an action against the estate for the unpaid balance. In such a proceeding the courts should not demand that which the law does not require.

Nothing we have said should be construed to apply to any claim against an estate on a secured debt incurred on or after August 21, 1933.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

63 Cal.App.2d 209

TITLE GUARANTEE & TRUST CO. v. WOODY et al.

Civ. No. 3099.

District Court of Appeal, Fourth District, California.

March 4, 1944.

1. Taxation ⇐805(3)

An action, commenced about two years after date of county tax collector's tax deed, to quiet plaintiff's title to land conveyed as against grantee and assignees of interests therein on grounds of invalidity of tax assessment and sale was barred by six months' statute of limitations applicable to action to set aside or question validity of proceedings for state's sale of land conveyed to it for delinquent taxes. Pol.Code, §§ 3785, 3897, subd. 8.

2. Taxation ⇐674

The statute prohibiting county officers from purchasing property at sales made by them in their official capacities is sufficient expression of "public policy" not to extend such prohibition to other county officers, such as county auditor or his deputy purchasing land at county tax collector's sale. Pol.Code, §§ 921, 3897.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. Constitutional law ⇐68(4)

Whether county auditor or his deputy should be prohibited, in exercise of sound public policy, from purchasing land at county tax collector's sale, is matter for consideration of Legislature, rather than courts. Pol.Code, §§ 921, 3897.

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by the Title Guarantee & Trust Company against S. A. Woody and others to quiet title to realty. Judgment for defendants, and plaintiff appeals.

Affirmed.

Arch H. Vernon, Earl E. Johnson, Walter S. Home, and Gilbert E. Harris, all of Los Angeles, for appellant.

West & Vizzard, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an action brought by the record owner to quiet its title to certain real property against the holder, or successors of the holder, of a tax deed issued by the tax collector of Kern County.

The property was sold to the state by operation of law on June 30, 1928, for delinquent taxes of 1927, and after the expiration of five years was deeded to the state on September 6, 1933. No redemption having been made the land was noticed for sale under order of the board of supervisors, with the approval of the state controller, and under the provisions of section 3897 of the Political Code was sold at public auction on July 30, 1937, to George M. DeShields and a deed issued to him on that date. DeShields was a deputy county auditor of Kern County and on the same day he transferred an interest in the property to S. A. Woody, the county auditor of that county, and to an employee in the auditor's office. There were subsequent assignments and all of the defendants had knowledge of the official capacity of the purchaser and transferees.

This action was brought two years after this sale and conveyance to DeShields. The court held that there was no legal bar to the deputy auditor becoming a purchaser at this sale since no other elements of active or constructive fraud appeared, and that the action was barred by the provisions of subdivision 8 of section 3897 of the Political Code as it read when the sale was made. Findings were in favor of the defendants and the plaintiff has appealed from the judgment.

The appellant contends that the sale to the state in 1928 was void because there was an inseparable assessment upon property subject to taxation and upon property not subject to taxation. It appears that the assessment in question covered the entire south half of a certain quarter-section, although an existing road, which was dedicated to the county in fee, took approximately 2.73 acres of the property. It is also contended that the 1927 assessment was void for the reason that it attempted to subject the property to school district taxes levied for districts other than those within which the property was situated. In this connection it appears that the property was actually in the Delano Joint Union High School District and in the Delano Elementary School District. However, in

various parts of the budget and assessment proceedings the districts for which the school taxes were assessed were mentioned as the Delano Union School District, the Delano Union Grammar School District, the Delano Joint Union High School District, and the Delano Kindergarten School District. It is unnecessary to pass upon these contentions under our views on the next question considered.

[1] The main question presented is whether this action is barred by subdivision 8 of section 3897 of the Political Code, which provides that no action to set aside or question the validity of any proceedings under that section may be brought or maintained unless it is commenced within six months after the date of the execution of the deed of the tax collector, issued pursuant to the provisions of that section. This action was not commenced until about two years after the date of that deed and if that limitation is applicable this action was barred.

Based upon its contention that the original sale to the state in 1928 was void for the reasons above set forth, the appellant contends that the state was not the owner of the land in question and that, therefore, section 3897 of the Political Code has and can have no application to the instant case. It is argued that this section applies only, as stated in the first sentence thereof, "whenever the State shall have become the owner of any property sold for taxes and the deed to the State has been filed with the Controller as provided in section 3785," and that since there was a defect in the original tax proceedings the state did not become the owner of the property in question and section 3897 does not apply.

This contention is without merit. It is settled that section 3897, as it read at the time of the sale here in question, governs the sale thereunder. Bray v. Jones, 20 Cal. 2d 858, 129 P.2d 357. See, also, Mercury Herald Company v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111. Section 3897, as it then read, provided a method for the sale by the state of land theretofore deeded to the state for delinquent taxes and which had not been redeemed. Subdivision 8 of that section established a limitation of six months, after the date of a deed from the state thus issued, within which an action seeking to set aside or question the validity or regularity of such proceedings might be brought. The second paragraph of that subdivision placed the burden of proof in any such action filed within the time allowed upon the plaintiff therein to show any "invalidity of [the] taxes, assessments, or sales" of which he might complain. This indicates that this subdivision was designed to cover not only any invalidity or irregularity in the proceedings by which the state sold the property, but also any invalidity or irregularity in the assessment or sale to the state and through which the state acquired whatever title it had. This subdivision clearly contemplates that an action may be brought to contest the state's right to sell the property and places a limitation upon the time within which such an action may be brought. It would be an idle act to provide for the bringing of such an action, and to provide rules therefor, if the same and the entire procedure made subject to such an attack was intended to apply and have effect only in cases where the state had a perfect title, where all the prior proceedings contained no flaws or questionable acts and where no grounds existed for questioning the right of the state to sell the property. The language used in the first sentence of section 3897, "whenever the State shall have become the owner of any property sold for taxes and the deed to the State has been filed with the Controller as provided in section 3785", must be given a reasonable interpretation. Taken by itself, and also in connection with the language of the rest of the section, the only reasonable interpretation of that language is that it means that whenever the state shall have become the owner of the property insofar as it has received the deed provided for in section 3785, and when this deed has been filed with the controller, the other provisions of section 3897 are to apply and the land may be sold by the state in the manner therein provided. Subdivision 8 of that section is not a curative act, but it is a statute of limitation and repose, and the period of limitation thus provided is a reasonable one. Mercury Herald Company v. Moore, 22 Cal.2d 269, 138 P.2d 673, 147 A.L.R. 1111. We hold, therefore, that section 3897 of the Political Code was applicable here and that this action was barred by subdivision 8 of that section.

[2, 3] It is further contended that it is against sound public policy to permit the county auditor or his deputy to buy property at a tax sale held by the tax collector of the same county. Assuming that this is a matter not covered by the statute of limitations just discussed, it is one within a

field covered by legislative action. Section 921 of the Political Code provides that county officers must not be purchasers at any sale made by them in their official capacity. The sale here in question was made by the tax collector and this statutory provision would apply to him. In thus providing, the legislature refrained from extending the prohibition to the county auditor or his deputy, who do not in their offical capacity conduct the sale. This is a sufficient expression of public policy on this particular matter and there is neither express nor implied authority to extend this prohibition in order to cover other officers of the county. While good reasons might be advanced for so doing, this is a matter for the consideration of the legislature rather than for the courts. Without some further showing of unfairness in connection with the sale this contention cannot be sustained.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



63 Cal.App.2d 42

ANGLIN v. CUTLER et al.

Civ. 3116.

District Court of Appeal, Fourth District. California.

Feb. 25, 1944.

1. Trial ⇐60(2)

In action to recover for labor and materials alleged to have been furnished by plaintiff's assignor to defendants in connection with oil well drilling projects, there was sufficient showing of authority of one who acted as superintendent on the project to render admissible his testimony as to plaintiff's assignor doing extra work and furnishing extra material at witness' request.

2. Frauds, statute of ⇐83, 89(1)

Where material for oil well derrick was supplied and derrick erected for special use of buyers in an isolated location and was accepted by buyers, the contract for derrick was not unenforceable under statute because there was no written memorandum, no part payment and no acceptance by buyers. Code Civ.Proc. § 1973a, subds. 1, 2.

3. Payment ⇐52

Fact that plaintiff's assignor had received a check from oil company for secondhand derrick purchased from him by that company which was marked "Balance on derrick in full", did not preclude plaintiff from recovering for work and materials furnished for benefit of oil lease on which derrick was erected, where it appeared that the claim was for extra labor and material which was furnished on defendants' order.

4. Appeal and error ⇐1054(1)

In action to recover for labor and materials alleged to have been furnished by plaintiff's assignor to defendants in connection with oil well drilling projects, alleged error in admission of certain letters between attorneys for parties for purpose of proving an account stated was not prejudicial, where trial court stated that it would pay no attention to such letters and there was other ample evidence of an account stated.

5. Mines and minerals ⇐100

Entry of judgment against one of defendants as trustee for defendant partnership was not error, where it appeared from such defendant's own testimony that he was acting as trustee for the partnership, that income from oil properties was coming at frequent intervals into his hands as such trustee, and that he paid such income out on changing orders given him from time to time by members of the partnership.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by M. H. Anglin, doing business and operating under the fictitious name of Commercial Business Bureau, against C. L. Cutler and M. Peter Ochs, also known as Max Peter Oxman, individually and as partners doing business and operating under the fictitious name of Cutler-Ochs Producing Company, a copartnership, and others, to recover for labor and materials alleged to have been furnished to the defendants. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Kendall & Howell, of Bakersfield, and Kaplan & Livingston and Eugene S. Goodwin, all of Los Angeles, for appellants.

Waldo R. Bergman, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for labor and materials alleged to have been furnished to the defendants.

The plaintiff's assignor was in the business of selling lumber and building oil well derricks. The defendants Cutler and Ochs operated the Cutler-Ochs Producing Company, as copartners, and also controlled the Kenneth Oil Producing Company, of which they and their wives were the only directors. They were also directors and officers of the Philip Oil Producing Company, of which their secretary was the only other director. The Kenneth Oil Producing Company owned a lease near Newhall and was also conducting operations on another lease in the Kettleman Hills, the title of which was in the Philip Oil Producing Company. One White was employed by the Kenneth Oil Producing Company and was acting as superintendent of the operations on both of these leases, although Cutler and Ochs were in active charge of all of these operations. The defendant Kaplan was attorney for the Cutler-Ochs Producing Company and for the Kenneth Oil Producing Company, and under a written authorization was acting as agent and trustee for the partnership in collecting income from certain oil properties which he was to disburse on orders given him from time to time by Cutler and Ochs.

In July, 1941, the Kenneth Oil Producing Company contracted with Rosemead Oil Company to drill an oil well on the Newhall lease. The Rosemead Company purchased a derrick from the plaintiff's assignor which was moved to this property and which was fully paid for. However, certain extra work was done by plaintiff's assignor of the value of $100, which was ordered by the defendants' superintendent, White, and which was not paid for. Also, certain lumber of the value of $50 which was on the Newhall property when the rig was completed was kept by White for the defendants and was not paid for.

Shortly thereafter, White, at the direction of Ochs, arranged with the plaintiff's assignor to furnish the material and labor and erect a second-hand derrick on the Kettleman Hills property, and agreed to pay $1,000 therefor. Plaintiff's assignor delivered the material to that property and completed the work, the operations there being in charge of White, who was acting for the partnership and for the Kenneth Oil Producing Company. This was not paid for. About the same time lumber of the value of $54.08 was delivered to a different lease owned by the Kenneth Oil Producing Company, which admits receiving it and that it is liable therefor.

In this action which was brought to collect the $1,204.08 the court found in all respects in favor of the plaintiff, finding, among other things, that material and labor had been furnished at the request of the defendants, that they were of the reasonable value of $1,204.08, that the defendants had orally agreed to pay that amount for them, and that there was an account stated with respect to the smaller items totaling $204.08. Judgment was in favor of the plaintiff and the defendants have appealed.

[1] It is first contended that the "extra judicial statements" of White, who acted as superintendent on these projects, were not admissible and were not sufficient to "prove the extent of his authority." There is no merit in this contention as applied to the facts shown by the record. White testified that he was employed as superintendent by the Kenneth Oil Producing Company and was in charge of both the Newhall and Kettleman Hills leases; that respondent's assignor did extra work on the Newhall job for which he agreed to pay him $100; that he also agreed to pay him $50 for extra lumber which was left on that job at the request of the witness; that he had full authority to make such arrangements and frequently had to do so in getting his work done; and that after the derrick was completed at the Kettleman Hills lease he heard Ochs tell respondent's assignor that he would pay him the next morning. Plaintiff's assignor testified that after the Newhall job was completed he had a talk with Ochs; that Ochs expressed satisfaction with the job and told him he wanted him to build another derrick near Kettleman City; that he told Ochs, "You can let Mr. White know and he will let me know"; that he told Ochs that the Kettleman job would run between $900 and $1,000; that a few days later White called him on the phone and told him to go ahead and build the rig; and that it was agreed that $1,000 would be paid therefor. He further testified that White was acting as superin-

tendent at Newhall and at Kettleman Hills and that Ochs told him that White was in charge of these jobs. He also testified that in other instances on these jobs Cutler and Ochs had paid for material that White ordered, that while they were building the Newhall rig Ochs was there three or four times, and that after all of the matters were completed both Cutler and Ochs promised several times to pay the $1,204.08. There was a sufficient showing of White's authority in this connection.

[2] It is next argued that the contract for the derrick on the Kettleman property is unenforceable under section 1973a of the Code of Civil Procedure since there was no written memorandum, no part payment, and no acceptance by the buyer. However, subdivision 2 of that section provides that the requirements of the first subdivision shall not apply where the goods are to be manufactured for the buyer and are not suitable to others in the ordinary course of business. The material for this derrick was supplied and the derrick erected for the special use of the buyer in an isolated location. Moreover, the court was justified in holding that the completed work was accepted by these defendants, and the fact that the legal title to the lease may have been in the Philip Oil Producing Company is not conclusive to the contrary.

[3] It is next urged that the $150 claimed for work and materials for the benefit of the Newhall lease cannot be collected because respondent's assignor received a check from the Rosemead Oil Company for the derrick purchased from him by that company which was marked "Balance on derrick in full." No contention has been made in this action that this derrick was not paid for in full. The $150 in question was for extra labor and material which was furnished on the order of the appellants and not of the Rosemead Oil Company.

[4] The next point raised is that certain letters between attorneys for the parties were not admissible for the purpose of proving an account stated. Assuming that this is correct, the court, in effect, stated that it would pay no attention to these letters and there was other ample evidence of an account stated with respect to the smaller items amounting to $204.08.

[5] Appellants' final contention is that the entry of the judgment against Leon Kaplan, as trustee, was improper for the reason that he testified that he had no funds belonging to the other defendants in his possession at the time suit was filed or at the time of trial. While he so testified, it appears from his own testimony that he was acting as trustee for the partnership, that income from oil properties was coming at frequent intervals into his hands as such trustee, and that he paid this income out on changing orders given him from time to time by Cutler and Ochs. Under the circumstances, we see no reversible error in making the judgment run against him as trustee.

While there is some conflict, the evidence as a whole is amply sufficient to sustain the findings and judgment as to all of the appellants.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.



63 Cal.App.2d 201

BOURDIEU v. SEABOARD OIL CORPORATION et al.

Civ. 3091.

District Court of Appeal, Fourth District, California.

March 4, 1944.

1. Appeal and error ⇐1099(6)

Where Court of Appeal had twice decided that amended complaint stated a cause of action and Supreme Court had denied petitions for hearings, whether the amended complaint stated cause of action was not open to question on third appeal.

2. Appeal and error ⇐1097(1)

When the precise question before the court has been decided in a former appeal in the same action under substantially the same facts, the parties are estopped from again litigating the question in any subsequent proceeding in either the trial or the appellate court.

3. Mines and minerals ⇐5

Oil and gas lease from federal government did not entitle lessee to use without

homesteader's consent as much of the surface of section occupied by homesteader as might be reasonably required for efficient operation of section as a part of lease covering a large area.

4. Mines and minerals ⇐5

So long as holder of oil and gas lease from federal government confined its use of the surface to producing oil and gas from land occupied by homesteader, the holder was not a "trespasser," but when it entered and used the surface for the production, treatment, and handling of oil and gas from other lands, it became a trespasser and to that extent the homesteader's use of surface was exclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

5. Appeal and error ⇐1099(7)

Where court on former appeal held that certain evidence was admissible and that it supported plaintiff's cause of action as pleaded and on a retrial plaintiff introduced such evidence, it could not be contended on subsequent appeal that evidence was insufficient to show that plaintiff had been damaged.

6. Mines and minerals ⇐5

In action by homesteader against holder of oil and gas lease for trespass, instructions that in finding damages jury might take into consideration the value of the use of the surface to the defendant were erroneous.

7. Witnesses ⇐406

In action by homesteader against holder of federal oil and gas lease for trespass where homesteader testified that damages resulting from a pipe line and tank site on one acre and a compressor plant site on 2.7 acres amounted to $70,000, exclusion of evidence that homesteader had granted an easement for a sump covering .77 of an acre, to oil company for $25, and had granted other rights of way involving similar acreage on which he had placed the value of $10, was error.

8. Appeal and error ⇐1056(4), 1064(1)
Mines and minerals ⇐5

$8,000 for trespass upon homestead by holder of federal oil and gas lease for a three-year period on an area of less than four acres of sheep pasture land was excessive and rendered errors in instructions and exclusion of evidence prejudicial.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Jean Bourdieu against Seaboard Oil Corporation and others for injuries to surface rights of land occupied by plaintiff under certain United States stockraising-homestead acts. From a judgment for plaintiffs for $8,000 against Kettleman North Dome Association, such association appeals.

Reversed and remanded for a new trial solely upon the amount of damages.

Martineau & Stratton, L. R. Martineau, Jr., Warren Stratton, Joseph P. Rinnert and George W. Nilsson, all of Los Angeles, for appellant.

Chandler & Wright, of Los Angeles, Walter H. Stammer, of Fresno, and J. F. Gilbert and Oliver S. Northcote, both of Los Angeles, for respondent.

GRIFFIN, Justice.

This is an action for damages for claimed injuries to surface rights of land occupied by respondent under certain United States stockraising-homestead acts, against Kettleman North Dome Association, a corporation (hereinafter referred to as KNDA), and others, who acquired certain leasehold mineral rights therein from the United States under a mineral leasing act.

The original pleadings and issues in this action are set forth and the nature of respondent's cause of action is fully stated and discussed in two former appeals. Bourdieu v. Seaboard Oil Corporation, 38 Cal.App.2d 11, 100 P.2d 528; and Bourdieu v. Seaboard Oil Corporation, 48 Cal. App.2d 429, 119 P.2d 973. We will not therefore encumber this opinion by a reiteration of the facts pleaded. Suffice it to say this court, in the first appeal, held that a cause of action had been stated in each of two counts and reversed a judgment entered following an order sustaining a demurrer without leave to amend.

The first cause of action alleged that defendants wrongfully dispossessed plaintiff from a portion of his surface rights on the north one-half of section 30, and prayed for damages in the sum of $50,000. The second cause of action was based upon an alleged wrongful dispossession of plaintiff's rights on the south one-half of that same section, and sought damages in the sum of $20,000. After reversal of the first judgment and after answers were

filed, plaintiff proceeded to trial before a jury and offered certain evidence in support of his claimed injuries and damage. A judgment based upon a directed verdict for defendants was subsequently entered. An appeal therefrom was perfected and resulted in a reversal of that judgment. At the last trial a jury awarded plaintiff $3,000 on the first and $5,000 on the second cause of action, against appellant KNDA. It now appeals from the judgment based thereon.

[1, 2] Appellant again contends that no cause of action was stated in the amended complaint and requests this court to "reconsider the whole question and review the matter of" appellant's liability. This question has been twice determined adversely to appellant's contention, not only by this court, but by the Supreme Court of this state on petitions for hearing, which petitions were denied. No inconsistency appears in the two decisions in respect to the questions here presented. Appellant's argument that further consideration should be given to it is not meritorious. When the precise question before the court has been decided in a former appeal in the same action under substantially the same facts, the parties are estopped from again litigating the question in any subsequent proceeding either in the trial or appellate courts. Penziner v. West American Finance Co., 10 Cal.2d 160, 169, 74 P.2d 252; Bourdieu v. Seaboard Oil Corporation, 48 Cal.App.2d 429, 433, 119 P.2d 973.

[3] The next argument is that appellant is, under the lease, entitled to use and occupy as much of the surface of section 30 as may be reasonably required for the efficient and economical operation of section 30 as a component part of a United States oil and gas lease and of the united operation of the entire field even though it may consume all of respondent's surface rights in section 30. The former decisions on appeal determined that issue adversely to appellant. Bourdieu v. Seaboard Oil Corporation, 38 Cal.App.2d 11, at page 22, 100 P.2d 528; and Id., 48 Cal.App.2d 429, at page 437, 119 P.2d 973. Notwithstanding that, it may be reiterated here that we find no provision in the language of any of the acts here involved which in any way grants the mineral lessee any additional right to the free and uninterrupted use of respondent's homestead in connection with operations involving an entire field. The field here concerned covers an area of 17 miles in length and 1½ miles in width. It would be unfair to hold that appellant's lease entitled it to further burden respondent's property with such additional facilities of all types as might be used in connection with the unit operation of the entire field without the consent of the homesteader.

If appellant's argument is sound, it would be entitled to occupy all of respondent's homestead after 1930, construct facilities of all types, numbers and sizes, and use the entire surface of the homestead as long as the facilities were a part of the "unit operation of the field" and not pay the homesteader for the additional burden. This use could be carried on indefinitely and long after all of the oil had been produced and taken from the homestead.

[4] It is next contended that this court, in the first decision on appeal herein, expressly stated that appellant association was not a trespasser on section 30, and that therefore, in view of this determination, its acts could not be "in the nature of a continuing trespass"; and that an action for damages cannot be maintained unless the plaintiff has the exclusive title or the exclusive right to possession as against the alleged trespasser, citing 63 Corpus Juris, pages 905, 946 and 1019. The appellate court, in the first decision, speaking through Mr. Justice Thomson, pro tem., did state that it felt the entries of defendants onto the portion of section 30 to which defendants were entitled to enter *under their leases* did not constitute a trespass. It was, no doubt, true that the original entry upon the property which they were entitled to enter under their leases would not be a trespass, but their entry on and taking of additional lands in section 30 for additional independent uses, or the original entering and taking of property in that section for uses not permitted under the lease, and maintaining thereon additional facilities used in connection with the unit operation of the entire field, was an act in the nature of a continuing trespass, for which plaintiff might recover for resulting damages. This was the effect of the previous statements. As long as appellant confined its use of the surface to producing oil and gas from the homestead, it was not a trespasser, but when it entered and used the surface for the production, treatment and handling of oil and gas from

other lands, to that extent it became a trespasser and to that extent respondent's use of his homestead was exclusive. Brandt v. Wheaton, 52 Cal. 430; Grover v. Hawley, 5 Cal. 485; Kellogg v. King, 114 Cal. 378, 46 P. 166, 55 Am.St.Rep. 74.

[5] The result of the next few contentions raised by appellant is that the evidence produced by respondent fails to support the allegations of the amended complaint as to any liability of appellant for damages or injury to respondent on either cause of action. In this connection it argues that there is no evidence that appellant used or occupied more land than would be required for the operation of section 30 as a separate parcel. In this connection it may be sufficient to say, without restating the evidence produced, that respondent, as a part of his case, reintroduced, in a great part, the evidence referred to in the former opinion (48 Cal. App.2d 429, 434, 435 and 436, 119 P.2d 973, 976, 977), which evidence we previously held was admissible and, assuming its truth, determined that it supported respondent's cause of action as pleaded. A reiteration of that determination becomes unnecessary. The evidence supports the conclusion that respondent was damaged in some amount. The extent of such damage will be later considered in conjunction with the objection to the size of the verdict rendered. The decision on the second appeal (page 439 of 48 Cal.App.2d, page 978, of 119 P.2d) reversed the judgment and instructed the trial court to permit the plaintiff to present evidence showing the extent of the claimed unlawful use by defendants of plaintiff's lands and to permit him to introduce, as the proper measure of damages for such unlawful use, evidence of the reasonable value of the land for such use for the period and for the purposes for which defendants used plaintiff's land during that period in excess of the rightful use thereof allowed under the several acts. The question of the wrongful use of the land was not confined necessarily to the amount of land used, but also to the extent of the claimed wrongful use of the homestead.

The next question presented involves the measure of proof of damages allowable under the facts related. The question of the measure of damages was fully discussed in the previous opinion, pages 437, 438, of 48 Cal.App.2d, at page 977 of 119 P.2d. In the last trial and at the request of respondent, the trial court instructed the jury:

"You are instructed that in considering the damages sustained by plaintiff for the use the defendant has made of facilities and structures on plaintiff's homestead in connection with its operations off of Section 30, you are not to consider the market value of Section 30 nor the fact that there may have been no substantial physical damage to the land by such wrongful use, but you are to consider the wrongful use which the defendant has made of plaintiff's land during the period from March 31st, 1935, to March 30th, 1938, and the extent thereof, and the value of such use *to said defendant.*" (Italics ours.)

This was followed by an instruction offered by respondent:

"That the measure of damages for a continuing trespass is the rental value or the value of the use of the premises for the period and for the purposes for which the trespasser wrongfully uses the property. In determining the rental value or the value of the use you must find the worth of the use of the property *to the trespasser* * * *." (Italics ours.)

[6] The main vice of the given instructions is the italicized portions thereof, which in effect instructed the jury that in fixing damages it might take into consideration the value of the use *to the defendant,* the claimed trespasser.

In United States v. Bernard, 9 Cir., 202 F. 728, 731, it was said that "the measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property." This rule is restated in 25 C.J.S., Damages, p. 631, § 89, as follows:

"The measure of damages for the loss of use for rental value of property occasioned by defendant's wrongful conduct is, as a general rule, the ordinary value thereof, and where property is not rentable, proof of the actual worth of the use thereof may be resorted to."

See, also, Lindberg v. Linder, 133 Cal. App. 213, 23 P.2d 842, citing Jacob Tome Institute of Port Deposit v. Crothers, 87 Md. 569, 40 A. 261, 262, 267, wherein the Maryland court reversed a judgment for plaintiff and held that one of the instructions covering the measure of damages was erroneous. The instruction there involved was that if the jury should find

for the plaintiffs and should find that defendant had used the land for its own purpose "then the said plaintiffs are entitled to damages on the basis of what would be a reasonable sum to be paid for the use of his land by the defendant, for the purpose of building and maintaining its institute." The appellate court of Maryland pointed out the error in the instruction in the following words:

"On the hypothesis of the thirteenth prayer, the plaintiffs ought to recover compensation for the damage done by the defendant. This is usually measured by a reasonable rent for the land wrongfully occupied, where there is nothing in the case to authorize punitive damages, and there is no such element in this case. The prayer is not clear on this point, and might mislead the jury into believing that they could allow damages commensurate with the benefit derived by the defendant from the use of the land. The law will not permit such a rule. In the absence of circumstances of aggravation, it allows the injured party indemnity for his loss, and nothing more."

See, also, Herond v. Bonsall, Cal.App., 140 P.2d 121.

In Edgar et al. v. Bank of America, etc., 50 Cal.App.2d 827, 123 P.2d 885, which involved an action for breach of trust under Civil Code, section 2237, this court held that the true criterion of rental value of land or water is not what the land or water would rent for under special or extraordinary circumstances or what its worth to the owner or to a particular occupant or person would be, but its fair rental value on the market when offered for rent under ordinary circumstances. See, also, Nathan v. Dierssen, 164 Cal. 607, 130 P. 12.

Appellant offered an instruction that "* * * compensation to the plaintiff cannot be based and must not be calculated upon the amount of benefit to or gain by the defendant". The trial court's refusal to give the proffered instruction merely emphasized the probability that the jury followed plaintiff's instructions as given and based its verdict upon the amount of "benefit to the defendant" or the value or worth of the use of the property *to the defendant*. The weakness of respondent's evidence to show that any great amount of actual damage was sustained impels this conclusion and the record substantiates it.

It is true that respondent's witnesses testified that the reasonable value of the use of respondent's land for "the purpose of bringing thereon (N. ½ sec. 30) the 1,003,215 barrels of oil that were produced on section 20, storing them there, and after such storage shipping them off", was, for the three-year period, "in round figures $10,000", and the sum of $10,000 per year for the south half of section 30.

[7] Respondent Bourdieu testified that the value of damages to his land by appellant from its operations (three in number, i. e., a pipe line and tank site on one acre and a compressor plant site on 2.7 acres) was $70,000. Immediately thereafter appellant offered to show that respondent, on June 9, 1934, granted an easement for a sump on section 30, covering .77 of an acre, to the Standard Oil Company for $25, and offered to show other rights of way granted by Bourdieu across said sections involving similar acreage as here involved on which he placed a value of $10. The trial court refused such offer and struck all testimony in reference thereto. This was error. Had this evidence been admitted it may well be assumed that its effect on the jury would have been pronounced and that it would have enabled the jury to evaluate more correctly the expert opinion testimony which respondent introduced on the question of damages, as well as respondent's testimony concerning the damage or rental value placed on the property by himself. Appellant's witnesses contended throughout the trial that there was no additional burden placed upon respondent's homestead by reason of its operations, and if so, the greatest possible value of such use did not exceed $50.

[8] Notwithstanding respondent's testimony, it must be remembered that he had only a surface right in and to the property herein involved. On that property he grazed his sheep and occupied it for purposes incidental thereto. It is apparent from an inspection of the entire evidence on the subject that the additional burden placed on respondent's surface rights to the homestead was not of such a character as to warrant any large judgment for damages. The judgment herein obtained was for an injury or trespass covering an area of less than four acres of sheep pasture land for a three-year period. The claimed injury consisted mainly of appellant's acts, not of taking

much more extra land than was otherwise needed in the operation of the project, but in using its own facilities in bringing additional gas and oil onto respondent's premises for treatment and later discharging it through other channels and off of the premises.

The verdicts appear to be unreasonable when measured by the correct rule of law respecting damages. We must conclude that the errors complained of were prejudicial.

The judgment is reversed and the cause is remanded for a new trial solely upon the issue of the amount of damages, with directions to the trial court to render judgment in favor of the respondent for the amount of damages so found upon a determination of that issue.

BARNARD, P. J., and MARKS, J., concur.



PEOPLE v. LIMA.*

Cr. 1847.

District Court of Appeal, Third District, California.

Feb. 29, 1944.

Rehearing Denied March 14, 1944.

Hearing Granted March 30, 1944.

1. Receiving stolen goods ⇐8(4)

The mere possession of stolen property is not sufficient to sustain conviction for receiving stolen goods knowing that they were stolen. Pen.Code, § 496.

2. Receiving stolen goods ⇐8(1)

In prosecution for receiving stolen goods, burden was on the prosecution to affirmatively prove that defendant knew that property which he purchased was stolen, unless it was bought from a minor under age of 18 years who did not himself maintain a fixed place of business or whose employer had no such regular place of business. Pen.Code, § 496.

3. Receiving stolen goods ⇐8(4)

In prosecution for receiving stolen property, guilty knowledge of a theft may be established by proof of circumstances from which it may be reasonably inferred, such as concealing the property, purchasing it for an inadequate price, or failing to keep a record of transaction as required by law. Pen.Code, § 496; St.1933, p. 60, as amended.

4. Receiving stolen goods ⇐8(4)

Evidence was sufficient to sustain conviction for receiving olives with knowledge that they had been stolen. Pen.Code, § 496; St.1933, p. 60, as amended.

5. Criminal law ⇐511(6)

In prosecution for receiving stolen olives with knowledge that they had been stolen, admissions of persons who stole the olives were sufficiently corroborated by other circumstances to sustain conviction. Pen.Code, §§ 496, 1111.

6. Receiving stolen goods ⇐7(5)

Where each count of indictment charging defendant with receiving stolen olives alleged that defendant unlawfully purchased certain quantity of olives on designated days from named person for defendant's own gain and to prevent owners from repossessing their properties, there was a sufficient description of stolen property to definitely inform defendant of identical olives involved and indictment was not defective for failure to name owners of stolen olives. Pen.Code, § 496.

7. Receiving stolen goods ⇐1

The crime of knowingly receiving stolen goods may be consummated whether goods are bought by accused for his own gain or to prevent owner from again possessing his properties. Pen.Code, § 496.

8. Receiving stolen goods ⇐7(6)

In prosecution for receiving stolen goods, it is sufficient to allege and prove either that property was acquired by accused for his own gain or to prevent owner from again possessing his property. Pen. Code, § 496.

9. Criminal law ⇐1035(6), 1063(5)
Jury ⇐110(1)

Defendant waived alleged irregularity in selecting and impaneling jury by failing to challenge panel or to raise that question at trial or on motion to set aside verdict and judgment, or on motion for new trial. Code Civ.Proc. §§ 204, 206.

* Subsequent opinion 154 P.2d 698.

10. Criminal law ⇐1035(6)

A defendant may not accept a jury and remain silent regarding alleged irregularities in its selection or impaneling, speculating on obtaining a favorable verdict, and then for first time challenge those irregularities on appeal from judgment. Code Civ.Proc. § 206.

11. Criminal law ⇐507(5)

The confessed thieves are not "accomplices" of person who knowingly buys stolen property for his own gain and the testimony of the confessed thieves that they stole property and sold it to defendant with knowledge on his part that property had been stolen need not be corroborated. Pen.Code, §§ 496, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

12. Criminal law ⇐507(5)

Vendee may be convicted of receiving stolen property on the uncorroborated testimony of the thief. Pen.Code, §§ 496, 1111.

13. Criminal law ⇐370, 371(2)

In prosecution for receiving stolen olives knowing that they had been stolen, evidence of other offenses of receiving stolen olives committed about the same time was competent as tending to prove defendant's purpose, intent and guilty knowledge of fact that olives had been stolen. Pen.Code, § 496.

14. Criminal law ⇐1174(1)

Where court fully and properly admonished jury pursuant to statute at first adjournment after jury was impaneled, failure to repeat to jury on two occasions before court adjourned the admonition required by statute was not reversible error in absence of showing of prejudice. Pen. Code, § 1122.

15. Criminal law ⇐1163(2)

Where defendant's motion for directed verdict of acquittal was made in absence of jury and was taken under advisement, denial of motion in presence of jury with statement that "there was a motion made, and it is now denied" was not prejudicial error, in absence of showing of prejudice. Pen.Code, § 1118.

16. Witnesses ⇐270(2)

Where witness being cross-examined by defendant's attorney first replied, "I don't think that is any of your business", but after giving answer defendant's attorney requested witness to explain why he first said that it was none of the attorney's business, objection was properly sustained as immaterial.

17. Witnesses ⇐267

It is duty of trial judge to confine cross-examination within reasonable bounds.

18. Witnesses ⇐267

The extent to which cross-examination of witness may be permitted is within discretion of court.

19. Criminal law ⇐703, 1171(2)

The prosecuting attorney's opening statement which was a reasonably fair statement of evidence that he expected to and did substantially prove at the trial did not constitute reversible misconduct.

20. Criminal law ⇐1129(1)

The objections to any alleged improper portions of prosecuting attorney's opening statement were waived by failure to assign them as prejudicial misconduct.

21. Criminal law ⇐730(2)

In prosecution for receiving stolen olives, unwarranted assertion in prosecuting attorney's opening statement that olives were being stolen throughout the vicinity was cured where statement was withdrawn and jury admonished to disregard it.

22. Criminal law ⇐878(1)

Where indictment contained three separate counts charging defendant with knowingly receiving different quantities of stolen olives on designated dates and three separate verdicts were returned, each specifying particular count to which it referred and definitely declaring that jury found defendant guilty as to charge in designated count, the forms of the verdicts were neither uncertain nor indefinite. Pen.Code, §§ 496, 1151.

23. Criminal law ⇐878(1)

It is necessary only that verdicts clearly indicate that jury intended to find the defendant guilty of identical crimes charged in indictment. Pen.Code, § 1151.

24. Criminal law ⇐824(10)

In prosecution for receiving stolen olives, failure to give cautionary instruction applicable to testimony of witnesses who admitted that they stole the olives

was not error, especially where cautionary instruction was not offered by defendant. Pen.Code, §§ 496, 1111.

25. Criminal law ⇐811(5)

Ordinarily, it is error for court to single out particular witnesses in its instruction and to caution jury with respect to weight to be given to their testimony.

26. Criminal law ⇐824(1)

Ordinarily, a defendant may not complain of the failure of court to give to jury an instruction on particular phase of case in absence of proffered instruction on that issue.

27. Criminal law ⇐554

The testimony of a defendant in a criminal case requires no corroboration if it is believed by the jury.

28. Criminal law ⇐1137(3)

Defendant could not complain of challenged instruction where it was given to jury at defendant's request.

29. Criminal law ⇐1141(2)

The burden is on the party challenging on appeal an instruction as erroneous and prejudicial to affirmatively show that it was not requested by the appellant.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Toto Lima, also known as Sam Lima, Jr., also known as Salvatore Lima, was convicted of buying olives for his own gain, knowing that they had been stolen, and he appeals.

Affirmed.

J. Oscar Goldstein, of Chico, Seth Millington, of Gridley, and Raymond D. Williamson, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty Gen., for respondent.

THOMPSON, Justice.

The defendant was convicted by a jury on three counts of an indictment charging him, under Section 496 of the Penal Code, with buying different quantities of olives on separate specified dates for his own gain, knowing that they had been stolen. A demurrer to the indictment was overruled. A motion for new trial was denied. From the judgment of conviction which was rendered, and from the order denying the motion for new trial, the defendant has appealed.

The appellant contends as grounds for reversal that: (1) The information fails to state a public offense chiefly because the names of the owners of the stolen olives are not mentioned, (2) the list of jurors for Butte County was selected by the Supervisors contrary to the manner provided by Section 206 of the Code of Civil Procedure, (3) the verdicts and judgment are not supported by the evidence, (4) the admissions of the persons who stole the olives are not corroborated by other circumstances as required by Section 1111 of the Penal Code, (5) the court erred in failing to give a cautionary instruction regarding the testimony of the confessed thieves, (6) the court erred in giving and refusing certain other instructions, and (7) the prosecuting officer was guilty of prejudicial misconduct in his statement to the jury, which deprived the defendant of a fair and impartial trial.

The defendant operated a small olive crushing plant in Butte County where he purchased olives from which he produced olive oil for marketing. He bought small quantities of olives from several boys, some of whom were under eighteen years of age. There is some evidence indicating that he paid for those olives slightly less than market value. It also appears he failed to enter in his account books the names of the vendors or the other information of such transactions required by the Agricultural Code, St.1933, p. 60, as amended. Numerous larcenies of olives in that vicinity led to an investigation and the apprehending of several boys. Two young men, Earl Larkin and William Amos, who were companions living in that neighborhood, sold to the defendant on different occasions in January, February and March of 1943, small quantities of olives. Neither of the young men owned or operated an olive orchard. Amos, who had been working in January, 1943, in the orchard belonging to Delbert D'Amico, was seen in company with his companion hauling olives in a Ford automobile from that orchard to the defendant's plant, where they sold them for five cents per pound. The young men were followed to that plant by a neighbor and charged with stealing the olives. One of them then admitted the theft. Their acknowledgment led to the indictment of the defendant for receiving stolen property. Both Larkin and Amos

took the witness stand and admitted the larcenies, charging the defendant with knowledge of their thefts. There is a conflict of evidence in that regard, but the testimony of the boys is corroborated to some extent.

[1-3] The record contains substantial proof of the guilt of the defendant as charged in the information. It is true that the mere possession of stolen property is not sufficient upon which to convict one of a violation of Section 496 of the Penal Code. The burden is on the prosecution to affirmatively prove that the defendant knew that the property which he purchased was stolen, unless it is bought from a minor under the age of eighteen years who does not himself maintain a fixed place of business or whose employer has no such regular place of business, in which event there is a presumption that the purchaser knows the property was stolen. Sec. 496, Penal Code. Guilty knowledge of a theft, however, may be established by proof of circumstances from which it may be reasonably inferred, such as concealing the property, purchasing it for an inadequate price, or failing to keep a record of the transaction as required by law. People v. Clausen, 120 Cal. 381, 52 P. 658; People v. Jacobs, 73 Cal.App. 334, 238 P. 770; People v. Taylor, 4 Cal.App.2d 214, 40 P.2d 870; People v. Silvas, 34 Cal.App. 638, 167 P. 1155; 22 Cal.Jur. 560, § 7.

[4] In the present case there is adequate evidence to support the verdicts and judgment of conviction, which are necessarily based upon an implied finding that the defendant knew that the olives had been stolen. In addition to the admissions of Earl Larkin and William Amos that they stole the olives mentioned in the information and that the defendant knew they had stolen them, it appears that the defendant also bought stolen olives about the same time in 1943, from four other named boys under the age of eighteen years, for five cents per pound; that he paid Larkin and Amos only five cents per pound for the olives which he purchased from them, and that he failed to give them "weighmaster's certificates", or to enter in his account books the names of the sellers, the addresses, weights of the olives or other information of the transactions required by the Agricultural Code. Mr. William Slawson, an investigator for the Bureau of Market Enforcement of the Department of Agriculture of the State of California, testified that he examined the defendant's books in March, 1943, and found no reference to purchases of olives from either Larkin or Amos conforming to the requirements of the Agricultural Code, or at all. He also testified that the market price of olives in the vicinity of Oroville at that time was from six to seven cents per pound. The purchased olives were immediately converted into oil. These circumstances furnish some evidence indicating that the defendant had knowledge of the fact that the olives in question had been stolen by Larkin and Amos. It has been held that the failure of a purchaser of goods to enter in his account books the names and other circumstances of the transaction as required by statute is some evidence of his guilty knowledge of the fact that the property was stolen, on the theory that such omissions may reasonably infer that he was concealing the evidence of the transaction because he knew it was unlawful. People v. Clausen, supra.

Earl Larkin and William Amos testified that they stole the olives in question from various orchards in that vicinity in January and February, 1943, as they had previously stolen olives and sold them to the defendant. They gave the names of the owners from whose orchards they stole the olives, and they designated the approximate dates and quantities of such sale. Both young men not only said that the defendant knew they had stolen the olives, but they asserted he told them of at least one orchard where they could secure olives. William Amos testified that the defendant told him he could get olives in "Mitchell's orchard" and instructed him how to approach that orchard without being seen. He also said the defendant warned him to "be careful and don't get caught." Earl Larkin testified that on or about January 17, 1943, he and William Amos stole from the D'Amico orchard about 180 pounds of olives and conveyed them in a borrowed Ford automobile to the defendant's plant and sold them to him for $9; that they also stole olives from the Mitchell orchard, the Superior orchard and from other named orchards in that vicinity, and sold them to the defendant, and that he knew the olives had been stolen. Delbert D'Amico testified that he owned an olive orchard in Palermo from which he had picked and placed in boxes, just prior to

January 18, 1943, about 200 or 220 pounds of olives, which he left in the orchard overnight, and which were subsequently stolen. He said that he "Missed them on January 18th." He also stated that William Amos worked for him two days, on January 15 and 16, 1943. This gave Amos knowledge that the picked olives had been left in the orchard. George Firestine, a neighbor of Mr. D'Amico, testified that he knew both Earl Larkin and William Amos and that "in the fore part of the year 1943" in the evening about "half past five or six o'clock", he saw those boys in the D'Amico orchard, loading some olives in the back end of the Model A Ford, in sacks; that he immediately went to that orchard and found some empty boxes turned over, from which the olives had evidently been transferred. He said he followed the young men directly to the defendant's plant and charged them with stealing the olives from D'Amico's orchard, and that one of the boys said, "If you want to snitch on us, we got the olives at D'Amico's." In an interview they later related to the officers the entire story of their larcenies and sales.

[5] The record contains several corroborating circumstances in addition to the admissions and declarations of Larkin and Amos, strongly indicating that they stole the olives involved in this action in the approximate quantities and upon the dates mentioned, from the D'Amico orchard and from other named owners, and that the defendant bought the olives from them knowing that they had been stolen.

[6-8] The defendant's demurrer to the indictment was properly overruled. The chief contention regarding the alleged insufficiency of the allegations of the indictment is that it fails to name the owners of the stolen olives. We are of the opinion the indictment is not defective on that account, or otherwise. It is couched in three counts, each of which charges the defendant, under Section 496 of the Penal Code with *buying* a specified quantity of olives on a particular date, from Earl Irvin Larkin and William H. Amos "knowing the same to have been stolen," and that the defendant "did so receive and buy said personal property *for his own gain* and to prevent the owner from again possessing said property." The first count charges the defendant with the unlawful purchase of 165 pounds of olives on January 15, 1943, knowing them to have been stolen by said last mentioned persons. The second count charges him with buying from said individuals 500 pounds of olives on February 1, 1943. The third count charges the buying of 190 pounds of olives from the same named persons on February 6, 1943. Each count alleges that the olives were so unlawfully purchased by the defendant *"for his own gain* and to prevent the owners from repossessing their said properties." This was a sufficient description of the stolen property to definitely inform the defendant of the identical olives he was charged with buying "for his own gain", knowing that they had been stolen. The crime of knowingly receiving stolen goods may be consummated under the language of the statute, whether it is bought by the accused "for his own gain", or to "prevent the owner from again possessing his property." Those elements of the offense, with respect to the purpose for which the property is acquired by the defendant, are stated in the alternative. Both are not required. It would have been sufficient to have alleged in the indictment and to have proved either purpose for buying the property. If the defendant knowingly bought specified stolen property *for his own gain,* he would be guilty under Section 496 of receiving stolen property contrary to that statute, regardless of who owned the olives. The designation of the names of the owners may aid in identifying the property, but if it is otherwise sufficiently identified, it becomes unnecessary to name the owners. The offense charged may involve neither the thief nor the owner of the property. It is obvious that it may be impossible to identify the owners of stolen olives which are taken from several orchards of different owners and mingled for the purpose of sale. A rule of pleading which would absolutely require the naming and identification of the owners of stolen property under such circumstances would defeat the very purpose of the statute.

There is an apparent conflict of authorities in some jurisdictions regarding the necessity of alleging in an information or indictment for knowingly receiving stolen goods the name of the owner of the stolen property. Some of those cases may be reconciled by the difference in the language of the various statutes under consideration. The case of People v. Grahle, 67 Cal.App. 183, 227 P. 227, 228, upon which the respondent in this case relies, is not directly in point for the reason that the owner of

the goods was named. In that case the defendant was charged with and convicted of knowingly purchasing a quantity of stolen cigarettes, belonging to the "Pacific Railway Company, a corporation." The judgment was affirmed. In upholding the sufficiency of the allegations of the information in that case the court said: "All that is required of an information regarding the matter to which attention is directed is that it contain a statement of the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended."

In commenting with approval on the case of People v. Nunley, 142 Cal. 105, 75 P. 676, involving the larceny of a horse, the court further said in the Grahle case: "The conclusion there reached is that, where the act charged is otherwise identified, an erroneous allegation of ownership or possession of the subject-matter of the larceny is immaterial; from all of which it follows that appellant's contention in this regard cannot be sustained."

In the last cited cases the names of the owners of the property were really mentioned in the informations, but it was claimed there was a fatal variance in the proof of ownership. Those cases therefore support the respondent on this appeal. In the present case the indictment fails to give the names of the owners of the olives. Those omissions, however, are immaterial since the stolen property was otherwise adequately identified.

In accordance with the weight of authority and sound reason we are convinced that, under the circumstances of this case, it was not necessary to name the owners in the indictment since the stolen property was sufficiently identified by description of the fruit, by a designation of the quantities of olives delivered, and by stating the exact dates of sales thereof. People v. Ribolsi, 89 Cal. 492, 26 P. 1082; Woodruff v. State, 56 Okl.Cr. 409, 41 P.2d 129; Butcher v. State, Okl.Cr.App., 279 P. 973; State v. Sakowski, 191 Mo. 635, 90 S.W. 435, 4 Ann.Cas. 751; Thompson v. United States, 9 Cir., 202 F. 401, 47 L.R.A., N.S., 206, 212; 14 Cal.Jur. 101, § 76; 45 Am.Jur. 397, sec. 14. In the text last cited, it is said: "An allegation that the accused knew the goods were stolen *from a named owner* is unnecessary and immaterial, and if made, may be disregarded as surplusage."

In 14 California Jurisprudence, at page 101, it is said with relation to the necessity of alleging in the information or indictment the name of the owner of property affected in a criminal charge, that: "Ownership may or may not be an essential matter of description according to the offense charged and the circumstances of its commission. The general rule is that ownership must be proved as alleged because it identifies the offense. This is the rule at common law. But under section 956 of the Penal Code, *an erroneous allegation as to the person injured is not material,* if the offense is described with sufficient certainty in other respects to identify it. This section applies to burglary, larceny, robbery, *receiving stolen goods,* and other cases. *The name of the owner of property affected is not a material part of a crime.* It is only required to identify the transaction, so that the defendant by a proper plea, may protect himself against another prosecution for the same offense. And if the property in question is otherwise sufficiently described, and there is no proof that there is other property answering the description, an averment of ownership is surplusage and need not be proved as alleged." (Italics added)

In the Butcher case, supra, quoting with approval from the case of White v. State, 23 Okl.Cr. 198, 214 P. 202, the court says [279 P. 974]:

"'It is claimed that the amended information is further insufficient, because it did not contain all the essential averments necessary to charge larceny. It has been held that averments necessary to charge larceny are not essential in an information charging the felonious receiving of stolen property, based on section 2113, Comp.Stat. 1921 [21 O.S.1943 § 1713]. In such an information it is not necessary to state the ownership of the property. (Citing numerous authorities.)'

"The White Case effectually disposes of this contention of defendant's counsel. *The allegation as to ownership being immaterial, there could be no material variance of proof.*" (Italics added.)

And in the case of Wertheimer v. State, 201 Ind. 572, 169 N.E. 40, 43, 68 A.L.R. 178, at page 183, the same principle is announced as follows: "Where, as in this state [of Indiana], the crime of receiving stolen goods is an independent, substantive offense and not merely an accessorial one, it is not necessary to prove that the ac-

cused knew from whom the property was stolen, or when or where it was stolen, or who stole it, or the circumstances under which it was stolen. 2 Brill, Cyc. Cr.Law, § 929, 1188–9; Holford v. State, 1827, 2 Blackf. [Ind] 103; Kaufman v. State [1874, 49 Ind. 248], supra. Proof that the accused knew the property was stolen property cannot often be, and need not be, made directly, by absolute and positive evidence, but such knowledge may be proved or inferred from the circumstances."

The authorities are uniform in holding that the name of the person who stole the goods need not be alleged or proved in a charge of receiving stolen property. People v. Avila, 43 Cal. 196, 199; People v. Clausen, 120 Cal. 381, 52 P. 658; People v. Grahle, 67 Cal.App. 183, 227 P. 227; 45 Am.Jur. 400, sec. 16.

The cases of People v. Myers, 20 Cal. 76, and People v. Ribolsi, 89 Cal. 492, 26 P. 1082, upon which the appellant relies, are not favorable to him upon the issue as to whether it is necessary to allege in the information or indictment the name of the owner of stolen property. The Myers case is not in point. It involved a charge of arson. In the Ribolsi case the Supreme Court held on page 496 of 89 Cal., 26 P. on page 1083, that the information was "entirely sufficient to save all the defendant's legal rights as to a proper statement of the ownership of the property feloniously received and bought." The appellant in that case contended that his demurrer to the information should have been sustained on the ground that "it does not set forth the names of the persons from whom the goods were received, or the names of those who stole them; *that it is not direct and certain as to the ownership of such goods.*" That judgment was reversed on account of the giving of an erroneous instruction with respect to the burden of proof. But the Ribolsi case appears to have definitely held that an information charging the crime of receiving stolen goods is not defective for failure to name the owner of the stolen property. We believe the correct rule of pleading in a criminal action for receiving stolen goods is that when the stolen property is described with sufficient particularity to enable the defendant to identify it as the property he is charged with unlawfully buying for his own gain, it is not necessary to name the owner of the stolen property in the information or indictment. In the present case we think the stolen property was sufficiently identified.

[9] The defendant waived the alleged irregularity in selecting and impaneling the jury by failing to challenge the panel or to raise that question at the trial, or on a motion to set aside the verdict and judgment, or upon motion for new trial. The defendant challenges for the first time on this appeal the legality of the selection of trial jurors by the Supervisors pursuant to Sections 204 and 206 of the Code of Civil Procedure. That question is raised by means of affidavits filed. It is claimed that instead of designating jurors in Butte County for the year 1943 from each district "in proportion to the number of inhabitants therein", the Supervisors selected no names from the remote fourth district. That procedure was followed for the asserted purpose of economizing on gas and rubber tires, pursuant to the Federal war rationing plan. No challenge to the panel was made. No objection to the jury on that account or otherwise was urged at the trial. No motion to quash the verdict or judgment for that reason was presented, and that alleged irregularity was not included in defendant's motion for a new trial. A regular venire of seventy jurors was drawn, summoned and sworn, from which list the jury was regularly impaneled in the usual manner, without objection on the part of the defendant. He accepted the jury without exhausting his peremptory challenges.

[10] It has been held that the provisions of Section 206 of the Code of Civil Procedure are merely directory and that irregularities in the selecting and impaneling of jurors will be deemed to have been waived unless they are objected to at the proper time. A defendant may not accept a jury and remain silent regarding alleged irregularities in its selection or impaneling, speculating on obtaining a favorable verdict, and then for the first time challenge those irregularities on appeal from the judgment. People v. Coffman, 24 Cal. 230, 234; People v. Patterson, 58 Cal.App.2d 837, 138 P.2d 341; People v. Tennant, 32 Cal.App.2d 1, 88 P.2d 937; People v. Crossan, 87 Cal.App. 5, 10, 261 P. 531; People v. Danford, 14 Cal.App. 442, 112 P. 474; 15 Cal.Jur. 385, § 56. In the Coffman case, supra, it is said: "If he [the defendant] omits at the proper time to interpose his objections to any irregularity, he is deemed to have waived them.

They cannot be raised for the first time on a motion for a new trial. He will not be permitted to take the chances of a trial before a jury that he knows has not been impaneled in strict conformity to law, and, after an adverse verdict, to move to set it aside on account of an irregularity that he can fairly be deemed to have assented to."

[11] It was not necessary, under the provisions of Section 1111 of the Penal Code, to corroborate the evidence of Larkin and Amos, the witnesses who testified that they stole the olives in question and sold them to the defendant with knowledge on his part that they had been stolen. The confessed thieves are not deemed to be accomplices of a person who knowingly buys the stolen property for his own gain. Section 1111 of the Penal Code defines an accomplice as one who may be prosecuted for the "identical offense" charged against a defendant. Neither Earl Larkin nor William Amos was guilty under Section 496 of the Penal Code of buying stolen property. They are the thieves who stole the property and they are guilty of larceny and not the crime of buying stolen property for their own gain.

[12] Numerous cases in California and in other jurisdictions hold that one who steals property and sells it to another is not an accessory to the purchaser thereof in an action against the latter for knowingly receiving stolen goods. The vendee may be convicted of receiving stolen property on the uncorroborated testimony of the thief. In re Morton, 179 Cal. 510, 177 P. 453; People v. Burness, 53 Cal.App.2d 214, 127 P.2d 623; People v. Evans, 34 Cal.App. 284, 289, 167 P. 190; People v. Gordon, 41 Cal.App.2d 226, 106 P.2d 208; People v. Williams, 7 Cal.App.2d 600, 46 P.2d 796; 1 Bishop's Crim.Law, 9th ed., 501, § 699; 9 A.L.R. 1397, note; 136 A.L.R. 1088, note.

However, the record in this case contains circumstances corroborating the testimony of Larkin and Amos of both the theft of the olives and defendant's knowledge thereof.

[13] The court did not err in receiving evidence of defendant's purchases in January, 1943, of olives from three other boys under eighteen years of age. The evidence of other violations of Section 496 of the Penal Code was competent as tending to prove defendant's purpose, intent and guilty knowledge of the fact that the olives had been stolen. People v. Stollmack, 18 Cal.App.2d 471, 475, 64 P.2d 162; Winfield v. State, Okl.Cr.App., 280 P. 630; 8 Cal.Jur. 63, § 169; 22 Cal.Jur. 560, § 7. In the Stollmack case, supra, in which the defendant was convicted of receiving stolen property, and in which a hearing was denied by the Supreme Court, it was said with respect to the competency of evidence of other similar offenses [18 Cal.App.2d 471, 64 P.2d 164]: "While the defendant was not charged in the indictment upon which he was convicted with any of the last three mentioned transactions, we hold that, as bearing upon the motive or intent actuating the defendant at the time of the offenses charged against him, the court committed no error in permitting testimony concerning them to go to the jury."

In the present case, the evidence of other similar offenses committed at about the same time tends to prove that the defendant knowingly purchased stolen olives, and that he followed a uniform system of attempting to conceal his violations of the statute by failing to furnish the sellers thereof "weighmaster's certificates", and by omitting from his account books all reference to the names and transactions contrary to the requirements of the Agricultural Code. People v. Robinson, 107 Cal.App. 211, 224, 290 P. 470; People v. Tibbitts, 35 Cal.App. 2d 669, 674, 96 P.2d 812; People v. De Vaughn, 136 Cal.App. 746, 29 P.2d 914; 8 Cal.Jur. 69, § 173.

[14] It does not constitute reversible error that the court may have omitted to repeat to the jury on two occasions before the court adjourned the admonition required by Section 1122 of the Penal Code. It appears that the court fully and properly admonished the jury pursuant to that statute at the first adjournment after the jury was impaneled. The trial lasted several days. The clerk's minutes of the trial show that the court called the attention of the jury to the former admonition at every recess or adjournment throughout the trial, except on two occasions regarding which the minutes are silent. Assuming, however, that the court occasionally omitted to repeat its admonishment or to call it to the attention of the jury, in the absence of a showing of prejudice such omissions do not constitute reversible error. People v. French, 12 Cal. 2d 720, 764, 87 P.2d 1014; People v. Pearson, 41 Cal.App.2d 614, 620, 107 P.2d 463; People v. Coyne, 116 Cal. 295, 48 P. 218; People v. Olds, 86 Cal.App. 130, 260 P. 321;

People v. McKeehan, 11 Cal.App. 443, 105 P. 273; 8 Cal.Jur. 386, sec. 417. In the French case, supra [12 Cal.2d 720, 87 P.2d 1037], it is said in that regard: "Granting as a fact that the omission to admonish the jury did actually occur on said occasion, * * * in the light of the facts as found by the trial court, a 'technical error' and 'not of that importance to demand a reversal of the judgment and a new trial.' People v. Coyne, 116 Cal. 295, 297, 48 P. 218, 219. Prejudice will not be presumed from an omission to give the admonition if no injury appears to have resulted from such omission."

It is a reasonable presumption that a complete and proper admonition given to the jury at the outset of the case will be recalled and adhered to by the jury throughout the trial.

[15] It was not prejudicial error for the court, in the presence of the jury, to have denied, under Section 1118 of the Penal Code, defendant's motion for a directed verdict of acquittal. The motion was made in the absence of the jury. That motion was taken under advisement. When the court next convened, and in the presence of the jury, the court denied that motion in the following language: "There was a motion made, and it is now denied in the presence of the jury."

We are cited to no authority holding that such a motion shall necessarily be decided out of the presence of the jury. In the case before us, however, the motion was made and argued out of the presence of the jury. There is nothing in the record to indicate that the jurors had any knowledge of the nature of that motion. The court does not state that it was the defendant's motion. For aught that appears in the record, the jury may have thought the prosecution made a motion, the ruling on which was favorable to the defendant. In the absence of a showing of prejudice to the defendant, that ruling may not be held to be reversible error even if we concede it should have been made out of the presence of the jury.

[16-18] The court did not unduly restrict the cross-examinations of the witnesses Amos and Firestine. Both witnesses were examined at great length by the attorney for defendant. The matters complained of appear to have been immaterial. To the question propounded by defendant's attorney to the last mentioned witness, "What were you doing on the road?" he first replied, "I don't think that is any of your business." But upon instruction to answer the question, the witness later replied, "I was driving from my place over to my father's place." To the further demand, by defendant's attorney, for the witness to explain why he first said it was none of the attorney's business, an objection was properly sustained. It is not only the province but the duty of the trial judge to confine the cross-examination within reasonable bounds. The extent to which the cross-examination of a witness may be permitted is within the sound discretion of the court. People v. McReynolds, 31 Cal.App.2d 219, 224, 87 P.2d 734; 27 Cal.Jur. 95, § 75. In the present case the court did not abuse its discretion in that regard.

[19-21] The prosecuting attorney's opening statement to the jury does not constitute reversible misconduct. It appears to have been a reasonably fair statement of the evidence which he expected to and did substantially prove at the trial. The objections to any alleged improper portions thereof were waived by failure to assign them as prejudicial misconduct. People v. Berryman, 6 Cal.2d 331, 336, 57 P.2d 136. The only portion to which the defendant did object was the statement that "olives were being stolen throughout this vicinity." That statement was withdrawn, and, at the request of the defendant, the court adequately instructed the jury to disregard it. That admonition cured the unwarranted assertion. People v. Berryman, supra; 8 Cal. Jur. 623, § 603.

[22] The forms of verdicts which were returned in this case are neither uncertain nor indefinite. They adequately conform to the provisions of Section 1151 of the Penal Code. The indictment contains three separate counts charging the defendant with knowingly receiving different quantities of stolen olives on designated dates. Three separate verdicts were returned by the jury. Each of them specifies the particular count to which it refers and definitely declares that "We, the jury * * *, find the defendant guilty as charged in Count No. —— (One, Two or Three) of the Indictment." That form of verdict has received uniform approval. People v. Mercado, 59 Cal.App. 69, 209 P. 1035; People v. Flohr, 30 Cal. App.2d 576, 581, 86 P.2d 862; People v. Cassella, 58 Cal.App. 547, 209 P. 40; 8 Cal. Jur. 400, § 430.

[23] It is necessary only that the verdicts shall clearly indicate that the jury intended to find the defendant guilty of the identical crimes charged in the indictment. People v. Flohr, supra; People v. Tilley, 135 Cal. 61, 67 P. 42.

[24-26] The court did not err in failing to give a cautionary instruction applicable to the testimony of the witnesses Larkin and Amos who admitted that they stole the olives in question. As we have previously held, they were not accessories to the crime of receiving stolen goods. It does not appear they were induced to admit their thefts by a promise of immunity or other reward for their testimony. It is ordinarily error for the court to single out particular witnesses in its instructions and to caution the jury with respect to the weight to be given to their testimony. People v. Zirbes, 6 Cal.2d 425, 57 P.2d 1319; People v. Longland, 52 Cal. App. 499, 199 P. 546; People v. Lonnen, 139 Cal. 634, 73 P. 586; People v. Blunkall, 31 Cal.App. 778, 161 P. 997; People v. Kilfoil, 27 Cal.App. 29, 148 P. 812. This case was not tried on the theory that Larkin and Amos were accessories to the crime of receiving stolen goods. No cautionary instruction was offered by the defendant. Ordinarily a defendant may not complain of the failure of the court to give to the jury an instruction on a particular phase of a case in the absence of a proffered instruction on that issue. 16 C.J. 1056, § 2498; 23 C.J.S., Criminal Law, § 1325. It is true that a defendant is entitled to a cautionary instruction on a charge of contributing to the delinquency of a child of immature years on account of the nature and the usual secret circumstances attending that offense. People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, People v. Putnam, 20 Cal. 2d 885, 129 P.2d 367. It has also been held that the court should instruct the jury in a proper case on its own motion concerning the law with respect to an accomplice and the necessity of corroborating evidence, as required by Section 1111 of the Penal Code, when that issue is involved and relied upon. People v. Warren, 16 Cal.2d 103, 116, 104 P.2d 1024; People v. Putnam, supra. The defendant, however, was not entitled to a precautionary instruction under the circumstances of this case.

The appellant assigns as prejudicial error the giving of an instruction which reads in part: "While you have the right to take into consideration the interest he [the defendant] may have in the result of this trial, you have also the right, and *it is your duty, to consider whether he has been corroborated by other credible evidence.*"

[27] Assuming, without so deciding, that the foregoing language may infer that it was necessary to corroborate the evidence of the defendant before his testimony could be given full credence, that instruction would not constitute reversible error under the circumstances of this case. It is true that the testimony of a defendant in a criminal case requires no corroboration if it is believed by the jury. State v. Patterson, 98 Mo. 283, 11 S.W. 728; State v. Sanders, 106 Mo. 188, 17 S.W. 223; 23 C. J.S., Criminal Law, p. 722, § 1182. The preceding portion of the same instruction charged the jury that in considering his testimony "You are to treat him the same as any other witness, and subject him to the same tests and only the same tests, as are legally applied to other witnesses." The jury was elsewhere instructed that they were the exclusive judges of the weight and credibility to be attributed to all witnesses, and that it was their duty to determine "whether his statements are reasonable or unreasonable and whether they are or are not consistent with other statements made by the witness or with facts established by other evidence or with admitted facts."

[28, 29] In the present case the defendant may not complain of the challenged instruction for the reason that an examination of the record on appeal together with the original instructions discloses the fact that it was given to the jury at the request of the defendant himself. It is included in a charge headed "Defendant's Instruction No. 1", typed on office paper upon each page of which there is printed the name and address of one of the attorneys representing the defendant. Moreover, the burden is on the party challenging on appeal an instruction as erroneous and prejudicial to affirmatively show that it was not requested by the appellant. People v. Mesa, 121 Cal. App. 345, 8 P.2d 920; People v. Jan You, 26 Cal.App. 148, 146 P. 63; People v. Casselman, 10 Cal.App. 234, 101 P. 693; People v. Cebulla, 137 Cal. 314, 70 P. 181; 2 Cal. Jur. 870, § 509. Under that rule we are precluded from considering the alleged error in that instruction for the reason that it affirmatively appears it was offered and

given to the jury at the appellant's own request.

We find no prejudicial error in the other instructions challenged by the appellant.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.



63 Cal.App.2d 198

C. I. T. CORPORATION v. BRECKENRIDGE et al.
Civ. 3100.

District Court of Appeal, Fourth District, California.

March 3, 1944.

1. Licenses ⇐39

The codal provision prohibiting one not having a contractor's license from recovering compensation for any act for which a license was required did not extend disability to a person who lent money to pay for improvements on building, where such person acted in good faith and did not know that contractor was not licensed. St. 1939, p. 384, §§ 7028, 7030, 7031.

2. Contracts ⇐103

Generally, a contract founded on an illegal consideration, or which is made for purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void.

3. Contracts ⇐103

The rule that a contract founded on an illegal consideration, or which is made for purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void, applies to every contract which is founded on a transaction malum in se, or which is prohibited by statute on ground of public policy.

4. Contracts ⇐140

The test in determining whether a demand connected with an illegal transaction is capable of being enforced at law is whether plaintiff requires aid of the illegal transaction to establish his case, and if plaintiff cannot open his case without showing that he has broken the law, the court will not assist him.

5. Licenses ⇐39

One who in good faith lent money to pay for improvements on building was not precluded from recovering on note evidencing such loan by reason that money furnished was used to pay unlicensed contractor in performance of his contract, notwithstanding that note was made payable to unlicensed contractor who then endorsed and delivered it to one making the loan. St. 1939, p. 384, §§ 7028, 7030, 7031.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by C. I. T. Corporation against Bruce Breckenridge and another to recover unpaid balance on a note, together with interest, attorney's fees and costs. From a judgment in favor of plaintiff, the defendants appeal.

Affirmed.

Milo E. Rowell and Paul Staniford, both of Fresno, for appellants.

J. A. Chase, of Visalia, for respondent.

MARKS, Justice.

This is an appeal from a judgment for the balance of $1,117.77, besides interest, attorney's fees and costs, unpaid on a promissory note for $2,874.47, signed by defendants, dated November 25, 1939, payable in instalments to E. O. Sears and by him endorsed without recourse and delivered to plaintiff in consideration of the payment to him of $2,500.

Defendants were the owners of a cafe in Eureka, California. They employed Sears as contractor to remodel the building and applied to plaintiff for a loan to help finance the improvements. The application was approved and the loan was made in the manner indicated. While the note was payable to Sears, he did not enter into the transaction other than to endorse it and deliver it to plaintiff on the payment of $2,500. The loan was negotiated by defendants.

No officer or agent of plaintiff knew or ever saw Sears during these negotiations.

Their dealings were with defendants who had contracted with Sears to furnish the materials and do the work of making the improvements.

[1] At no time material here was Sears licensed as a contractor under the provisions of Chapter Nine of the Business and Professions Code St.1939, p. 381 et seq. It is therefore clear that Sears could not recover on his contract with defendants. Sec. 7031, Business and Professions Code; Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114; Siemens v. Meconi, 44 Cal.App.2d 641, 112 P.2d 904; Phillips v. McIntosh, 51 Cal.App.2d 340, 124 P.2d 835. It is now argued that the same disability attaches to plaintiff's demand and that it cannot recover because it furnished money used to pay the unlicensed contractor in the performance of his contract. There is no evidence indicating that either plaintiff or defendants knew that Sears was unlicensed and the trial court found that neither of them had any knowledge of that fact, so plaintiff acquired the note before maturity, for a valuable consideration and without notice of any defect in it.

Section 7028 of the Business and Professions Code makes it unlawful for any unlicensed person to act as a contractor. Section 7030 of the same code makes it a misdemeanor for an unlicensed person to act as a contractor and for a person to conspire with another to violate the provisions of Chapter Nine. Section 7031 provides as follows: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

It is to be noted that the prohibition of the section is placed on the contractor and that the language used does not extend the disability to a person who lends money to pay for the improvement where such person acts in good faith and does not know that the contractor is not licensed.

[2-4] The rule to be applied here is stated in Berka v. Woodward, 125 Cal. 119, 57 P. 777, 779, 45 L.R.A. 420, 73 Am.St. Rep. 31, as follows: "And in our own state it has been said (Swanger v. Mayberry, 59 Cal. 91): 'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction malum in se, or which is prohibited by a statute on the ground of public policy.' Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. 'The test,' says Judge Duncan in Swan v. Scott, 11 Serg. & R. [Pa., 155], 164, 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'"

The same language from Swan v. Scott, supra, was quoted with approval in Moore v. Moore, 130 Cal. 110, 62 P. 294, 80 Am. St.Rep. 78, and in Holm v. Bramwell, supra.

[5] When we apply this rule to the instant case the conclusion follows that the judgment must be affirmed. The action was on a promissory note signed by defendants for a valuable consideration. To prove its case plaintiff had only to prove the due execution of the note, its endorsement by Sears and the amount of the unpaid balance. No proof of the illegal transaction was necessary to establish its case.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

63 Cal.App.2d 116

MADRUGA et al. v. BORDEN CO. et al.

Civ. 7004.

District Court of Appeal, Third District, California.

Feb. 29, 1944.

1. Mandamus ⇐187(3)

Where trial court, in mandamus to review action of administrative agency, specifically found that plaintiffs were not aggrieved by decision and had no standing to bring mandamus and plaintiffs appealed on judgment roll alone, plaintiffs were not "parties aggrieved" by judgment so as to be entitled to appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

2. Appeal and error ⇐907(3)

When an appeal is upon judgment roll alone, finding as to a litigant's interest in controversy cannot be questioned on appeal.

3. Mandamus ⇐63

In general, mandamus is proper remedy to review acts and decisions of an administrative agency.

4. Mandamus ⇐3(4)

A statutory limitation that a writ of mandate may issue only when, in judgment of court, there is not a plain, speedy, and adequate remedy in ordinary course of law, is applicable to the writ when used to review an administrative order. Code Civ.Proc. § 1068.

5. Mandamus ⇐154(4)

Where a petitioner is not entitled to writ of mandate as a matter of right, it is incumbent upon him to state a prima facie case entitling him to relief.

6. Mandamus ⇐3(4), 16(1), 87

A proceeding for a writ of mandate against Director of Agriculture, requiring director to annul an order denying petitioner's application for a fluid milk license, and praying that application of another company be denied, was properly denied in view that petitioners had an adequate remedy at law to recover damages, no showing was made that issuance of writ would promote justice, or that director or the trial court abused their discretion. Code Civ.Proc. § 1068; St.1933, p. 60, as amended.

7. Judgment ⇐948(1)

A litigant, to avail himself of plea of res judicata, must allege affirmatively such prior judgment in his pleadings, if there be an opportunity so to do, or, in absence of such opportunity, the judgment may be used as evidence. Code Civ.Proc. § 1908; § 1962, subd. 6.

8. Judgment ⇐665, 714(1)

A plea of res judicata is ineffective unless subject matter of litigation and parties are the same. Code Civ.Proc. § 1908; § 1962, subd. 6.

9. Appeal and error ⇐173(9)

Plea of res judicata asserted for first time on appeal was not timely. Code Civ. Proc. § 1908; § 1962, subd. 6.

10. Food ⇐3

Proceeding before Director of Agriculture involving validity of agency agreement between two milk distributors was not res judicata in subsequent proceeding to determine whether one distributor had paid debt to other, established by former proceedings, by a valid set-off. Code Civ. Proc. § 1908; § 1962, subd. 6.

11. Mandamus ⇐172

The filing of a petition for mandamus to review an order of an administrative agency does not ipso facto nullify order and throw matter open for an entirely new hearing before the court, and, ordinarily, determination of administrative board will not be disturbed unless petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts.

12. Constitutional law ⇐287

The rule requiring judicial review on application of one whose license has been revoked by an administrative agency in keeping with due process of law does not apply to objections of a third party to issuance or renewal of such license.

13. Food ⇐3

Where first proceeding before Director of Agriculture determined invalidity of agency contract between two milk distributors, order on second proceeding determining that debt created by first order was properly paid by set-off was not subject to objection that director had no power to review, annul, or vacate previous order since orders were entirely distinct.

14. Food ⊂3

Order of Director of Agriculture made in 1942 granting milk distributor a 1941 license was an idle act and any question as to validity of that portion of order granting license was "moot," precluding judicial review. St.1941, p. 3021, § 737.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

15. Food ⊂3

Code section granting Director of Agriculture power to license milk distributor upon such conditional and probational provisions as he may deem proper did not prevent a distributor, who once violated a codal provision, from thereafter obtaining a license and authorized issuance of license upon compliance with conditions prescribed by director. St.1941, p. 3021, § 737.11.

Appeal from Superior Court, Sacramento County; Andrew R. Schottky, Judge.

Mandamus by M. H. Madruga and others against the Borden Company, United Milk Producers of California, R. I. Morse, and W. J. Cecil, as Director of Agriculture to direct defendant Director of Agriculture, to annul order granting defendant Borden Company a license for the year 1941 and for the year 1942 as a fluid milk distributor, and for other relief. From a judgment denying the writ, plaintiffs appeal.

Affirmed.

Howard B. Crittenden, Jr., J. Kingsley Chadeayne, and John H. Machado, all of Tracy, for appellants.

Pillsbury, Madison & Sutro, Sigvald Nielson, Francis R. Kirkham, and Fredrick H. Hawkins, all of San Francisco, for respondent Borden Co.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondents Morse and Cecil.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment rendered against them and in favor of the defendants The Borden Company, United Milk Producers of California, R. I. Morse and W. J. Cecil, as Director of Agriculture of the State of California.

United Milk Producers of California, hereinafter referred to as United, is a non-profit, co-operative association, organized under the provisions of the Agricultural Code St.1933, p. 60, as amended, to handle and market the milk produced by its members. The Borden Company, hereinafter referred to as Borden, is a corporation engaged in the distribution of fluid milk in California. Under a contract dated August 1, 1940, Borden agreed to act as distributing agent for United, collect amounts receivable, deduct expenses and remit the balance to United. Under such agreement the producer-members of United received less than the minimum price applicable under the Agricultural Code, to the purchase of milk.

On August 1, 1941, the plaintiffs, who previously were producer-members of United, brought proceedings before the Department of Agriculture which resulted in an order of the Department dated August 7, 1941, which is as follows:

"It is hereby ordered that the application of the respondent United Milk Producers of California for a license for the year 1941 as a fluid milk distributor under the provisions of Article 3, Chapter 10, Division IV of the Agricultural Code of this state be and the same is hereby denied, and the application of the respondent The Borden Company for a license for the year 1941 as a fluid milk distributor under the same article of the same code for its plant at 2743 San Pablo Avenue in the City of Oakland, County of Alameda, State of California, be and the same is hereby denied; provided, however, that such application of said respondent The Borden Company may be renewed upon presentation of satisfactory evidence to the Director of Agriculture that said contract between it and United Milk Producers of California dated August 1, 1940, has been terminated and abandoned and that said The Borden Company has paid to the individual producer-members and to all other producers from whom it has received fluid milk since August 1, 1940, the full, applicable minimum prices therefor as established under the stabilization and marketing plan or plans effective during said time."

The basis for the foregoing order was the finding by the hearing officer for the

department that said agency contract was merely a subterfuge to circumvent the minimum price schedule and that Borden was in reality the purchaser of the milk of the producer-members of United.

Immediately thereafter Borden and United petitioned this court for a writ of mandate to compel the Director of Agriculture to rescind and revoke the order previously made and to issue to each of the petitioners a license for the year 1941. The court concluded that there was ample evidence to sustain the order in question and the demurrer of the respondent director was sustained. United Milk Producers v. Cecil, 47 Cal.App.2d 758, 118 P.2d 830.

Since United, under the agency agreement, had received approximately $55,000 less than the minimum price, said order and decision further established the existence of a debt due from Borden to United in such amount.

In conformity with said order and decision the agency contract was terminated. The amount so found to be due United was applied by Borden against a debt of approximately $73,000 then owing from United to Borden. Such setoff was agreed to by a majority of the members of United. Appellants, however, objected to such procedure and insisted that the members of United should be paid in cash.

Thereafter Borden sought a renewal of its 1941 license and made application for its 1942 license. The validity of the setoff was directly in issue in the second hearing.

In the second hearing the director found that Borden had complied with the conditions of the first order in abandoning the agency contract. The director also found that Borden, in good faith, had setoff the $55,000 against the debt owing to it from United. His order among other things, provided "* * * that the applications of the Borden Company for a license for the year 1941 and for a license for the year 1942 as a fluid milk distributor * * * be and the same are, and each of them is, hereby granted; provided, however, that in the event said applicant does not pay to all producers from whom it has received fluid milk in the Alameda County Marketing Area since August 1, 1940, the full applicable minimum prices therefor as established under the Stabilization and Marketing Plan in effect in said area during said period in the amount or amounts as finally determined by a court of competent jurisdiction in this State in an action to be commenced within thirty days from the date of this order, then such licenses may be forthwith revoked by the Director of Agriculture and any further such licenses denied."

In accordance with such order and within the time therein prescribed, Borden filed an action in the Superior Court in and for the County of Alameda, and also filed a bond in the sum of $60,000 guaranteeing the payment of all sums that should be found due to the producers. Respondent Borden states in its brief that such action is now at issue and ready for trial.

The present proceeding is one entitled "Complaint for Writ of Mandate and Statutory Review of Administrative Act" and prays that a writ issue directing the director to annul his order of January 7, 1942, and that the application of Borden for licenses be denied.

At the conclusion of the hearing of appellants' petition the trial court found (1) that it was within the power of the director to make the decision and order of January 7, 1942; that there was ample evidence to sustain the order, and that such order was within the sound discretion of the director; (2) that plaintiffs were not aggrieved by said order nor were any rights of theirs affected substantially or at all by said order; (3) that plaintiffs have no interest or standing to prosecute this proceeding; (4) that plaintiffs have no interest in the granting or denial of the applications of The Borden Company for a license, and (5) that plaintiffs have a plain, speedy and adequate remedy at law to recover from The Borden Company such damages, if any, as may be due and owing from The Borden Company to them. Judgment was entered accordingly and the writ was denied.

It is the contention of plaintiffs in this appeal (1) that they are proper parties herein under the provisions of section 737.11 of the Agricultural Code, St.1941, p. 3021, which provides: "The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require * * *"; that the director impliedly found they were interested persons within the purview of said section by permitting them to appear in the administrative proceedings, and that the trial court's findings in this regard are

against law. In addition it is argued that since Borden claimed the right to setoff the debt of United against the amounts owing the producers, including plaintiffs herein, they are therefore definitely interested; (2) that mandamus proceedings are the proper remedy to review acts and decisions of a statewide administrative agency which are in violation of law or where no other remedy is provided, and (3) that the director, having found Borden in violation of the law and refused it a license until certain conditions were performed, he could not thereafter grant Borden a license either upon other and different conditions or otherwise until such violation had been cured by compliance with the conditions imposed. In regard to the third point raised by appellants it is contended (a) that the claim of payment by Borden by means of the setoff against the money then owing to it by United is res judicata under the decision of this court in United Milk Producers v. Cecil, supra; (b) that the director had no power to review, annul or vacate his order of August 1, 1941, and (c) that a distributor, once having violated a provision of the statute is thereafter forever foreclosed from obtaining a license.

In support of plaintiffs' first contention reliance is placed upon the case of Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935. The court did hold that parties to the administrative proceeding should be permitted to retain their status as such throughout the final judicial review by the court of law for the fundamental issues in litigation remain essentially the same. However, such case does not appear to be particularly in point as it was heard upon a demurrer to the complaint for a writ of mandate and on a motion to quash the alternative writ. Therefore the allegations of the complaint relating to the interest of the plaintiff therein as an employer were admitted for the purposes of the demurrer. No question of findings made upon evidence taken at the trial was involved.

In the present case the appeal is upon the judgment roll alone. The trial court specifically found that "plaintiffs herein are not aggrieved by the said decision and order of January 7, 1942, and plaintiffs have no standing to prosecute this proceeding. No rights of the plaintiffs are affected substantially or at all by said decision and order."

By virtue of the record before us it would appear that the case of Williams v. Savings & Loan Soc., 133 Cal. 360, 65 P. 822, 823, which likewise was upon the judgment roll alone, is more nearly in point. There the Supreme Court, commenting upon a finding of the trial court that the plaintiff was not, at a particular time, the owner of the property in controversy, stated: "This was a finding to the effect that plaintiff had no right to bring the suit, and was not interested in the controversy. That being so, she was not a party aggrieved by the judgment."

[1, 2] The finding and statement in the case cited is comparable to the situation in the instant case wherein there is a specific finding by the trial court that plaintiffs are neither aggrieved by the decision and order nor are any rights of theirs affected thereby. The court, in the Williams' case, further stated that when an appeal is upon the judgment roll alone such a "finding cannot be questioned on appeal." See Blythe v. Ayres, 102 Cal. 254, 36 P. 522; In re Blythe's Estate, 108 Cal. 124, 41 P. 33.

[3] Appellants' second contention that mandamus proceedings are the proper remedy to review acts and decisions of an administrative agency is in general a correct statement of the law. Bodinson Mfg. Co. v. California Employment Commission, supra. However, such general statement of the law is subject to certain qualifications.

[4-6] The statutory limitation that a writ of mandate may issue only when, in the judgment of the court, there is not a "plain, speedy, and adequate remedy" (Sec. 1068, C.C.P.) in the ordinary course of law is applicable to the writ when used as a writ of review of administrative order. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848. However, as petitioner is not entitled to the writ as a matter of right (Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674), it is therefore incumbent upon him to state a prima facie case entitling him to relief. Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425. That appellants herein failed in this regard is evidenced by the specific finding of the trial court that "plaintiffs have a plain, speedy and adequate remedy in the ordinary course of law to recover from The Borden Company such money damages, if any, as may be

due and owing from The Borden Company to said plaintiffs, or any of them."

No showing is made in the record before this court that appellants made any attempt to prove either that the issuance of a writ of mandamus denying to Borden a license to engage in business would promote justice (Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947); that the director in making his order of January 7, 1942, abused his discretion, or that the judgment of the trial court was in abuse of its discretion. Silver Burdett Co. v. State Board of Education, 36 Cal.App.2d 714, 98 P.2d 533.

In support of subdivision (a) of their last contention plaintiffs state, without further amplification, that "all of the evidence pertaining to the claim of payment made by The Borden Company at the second hearing before the director was before the director on the first hearing," and that "it also appears from the decision and the records in United Milk Producers of California v. Cecil * * * that this evidence was also before the court on that mandamus proceeding;" and therefore respondents are precluded by the doctrine of res judicata.

[7-9] While the judgment or order in respect to the matter adjudged is conclusive as between the parties and their successors (Section 1908, C.C.P.), yet a party in order to avail himself of the plea of res judicata must allege affirmatively such judgment in his pleading if there be an opportunity so to do, or if there be no such opportunity the judgment may be used as evidence. Sec. 1962, Sub. 6, C.C.P.; Pillsbury v. Superior Court, 8 Cal.2d 469, 472, 66 P.2d 149; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826. However, such a pleading is of no effect unless the subject mattter of the litigation and the parties are the same. Estate of Smead, 219 Cal. 572, 578. Without having heretofore entered such plea or having offered in evidence the judgment and record in the case of United Milk Producers v. Cecil, supra, appellants cannot now urge the doctrine of res judicata.

[10] We cannot agree with appellants' contention that the same evidence was presented at both hearings before the director.

The first hearing involved the validity of the so-called agency agreement between United and Borden. No issue was raised therein regarding the payment to the producers.

The second hearing before the director involved an entirely different question i. e. whether Borden had paid this debt by a valid setoff. The setoff was made after this court had found that the agency agreement in question was invalid and that the transaction was a direct purchase of milk and therefore subject to the price statute. Nor could this question have been determined in the case of United Milk Producers v. Cecil, supra, for it was not then in issue, and obviously no evidence concerning it could have been introduced, as the alleged payment by means of the setoff had not at that time been made.

But appellants argue that in any event even if such evidence had not been before the director and the court, nevertheless, it is the rule that proceedings for review of administrative orders by mandate include a trial de novo in which any factual matter, even though not in the administrative record, is properly a matter for an independent judicial consideration and determination, and as authority for such statement cite the case of Laisne v. California State Board of Optometry, 19 Cal. 2d 831, 123 P.2d 457.

[11] Apparently it is the theory of appellants that when a petition for mandamus to review an order of an administrative agency of this state is filed it ipso facto nullifies such order of the agency and throws the matter open for an entirely new hearing before the court. Such a broad conception of a trial de novo on mandamus proceedings for a review of an administrative order is no longer the rule in this state since the case of Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304.

In the later case of Sipper v. Urban, supra, the court affirmed the order of the trial court denying the petition for a writ of mandate on the ground that the record of the proceedings before the real estate commissioner showed sufficient evidence to sustain the findings of the commissioner. On appeal, the petitioner contended that the trial court erred to his prejudice in not according him a hearing on his petition. Mr. Justice Schauer, in his concurring opinion, stated [22 Cal.2d 138, 137 P.2d 427]: "The complete trial de novo doctrine of the Laisne case has been aban-

doned." He further stated that the rule since the Dare case is that "the procedure as now declared gives the reviewing court the power and duty of exercising an independent judgment as to both facts and law, but contemplates that the record of the administrative board shall come before the court endowed with a strong presumption in favor of its regularity and propriety in every respect and that the burden shall rest upon the petitioner to affirmatively, competently, and convincingly, support his challenge. In other words, rarely, if ever, will a board determination be disturbed unless the petitioner is able to show a jurisdictional excess, a serious error of law, or an abuse of discretion on the facts."

[12] It is to be noted that the cases granting a review to one whose license has been revoked by an administrative agency do not establish the principle that a third party should be accorded such right as an "interested party". Affording a licensee or an applicant judicial review is predicated upon the theory that administrative agencies, due to constitutional limitations, do not exercise judicial powers, and that to allow a non-judicial body to exclusively determine one's right to practice a profession or engage in a licensed business would be violative of due process of law. Such reasoning is not applicable to the objections of a third party to the issuance or renewal of such a license as are raised herein by appellants.

[13] The opinion herein expressed in relation to the question raised in subdivision (a) under appellants' third contention appears to be a complete answer to the argument made in subdivision (b) of the same contention that the director had no power to renew, annul or vacate his previous order. As has been previously pointed out the first order determined the invalidity of the agency contract while the second order was concerned solely with the question of whether the debt thereby created had been properly paid by the setoff of Borden.

[14] Even if it be assumed that appellants' contention in this regard is correct and that the director by his order of January 7, 1942, granted a license to Borden upon different conditions than did the order of August 1, 1941, and thereby exceeded his authority, the error, if any, was confined to that portion of the second order granting a license for the year 1941. However, because of its date the order of January 7, 1942, was but an idle act insofar as the 1941 license was concerned, and any question which could arise from such portion of the order is now moot. E. J. Carroll Co., Ltd., v. Insurance Commissioner, 2 Cal.2d 60, 38 P.2d 780.

With the last point (Subdivision (c) third contention) made by appellants we likewise cannot agree. The two cases cited by them in support thereof (Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577 and Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665) do not appear to be in point. In the first case the court was directly presented with an attack upon the constitutionality of the Milk Stabilization Act, St.1935, p. 922, and that of Section 737.5(a) of the Agricultural Code as an unlawful delegation of legislative power to the director, and that the section provided no standards for guidance of the director in the issuance of licenses to distributors. The court held that such section, when read in connection with section 737.11, provided adequate standards not only to guide the director in refusing a license but also revoking or suspending licenses already issued. In the Ray case the court merely reiterated the language of the previous case. In neither of the two cases was the court called upon nor did it pass upon the additional provisions of section 737.11 providing for the "affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any of the provisions hereof or of any stabilization and marketing plan formulated hereunder."

[15] The legislature, in granting the director the power under such section to issue a license upon such conditional and probational provisions as he may deem proper, has recognized that all violations do not carry the same degree of culpability. In the present case there was apparently no thought of punitive measures. The director apparently believed that full payment of the established minimum prices under the Milk Stabilization Act should be made in lawful money and that such payment could not be accomplished through the means adopted by Borden. However, he also recognized that such facts presented a problem which had not been passed upon by the courts of this state; that a contrary view was urged in good faith by Borden that it had deposited sufficient security for the payment of such

minimum prices; that compliance with the law was assured, and that under such circumstances to withhold the license from the applicant and deprive it of the right to do business was such a drastic penalty and could not be imposed upon the applicant.

Under such circumstances it cannot be said that the order of the director was not within the power conferred by the statute.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



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BABCOCK v. BABCOCK.

Civ. 14081.

District Court of Appeal, Second District, Division 3, California.

Feb. 29, 1944.

Rehearing Denied March 21, 1944.

Hearing Denied April 27, 1944.

1. Divorce ⇐167

Allegation that, after entry of interlocutory decree of divorce, parties became reconciled and resumed marital relations and that defendant procured entry of final decree upon an affidavit stating that there had been no reconciliation, stated cause of action for vacating such final decree.

2. Divorce ⇐167

In action to vacate final decree of divorce allegedly procured by false affidavit of no reconciliation, affirmative defense, alleging the entries of interlocutory and final decrees and that such decrees were not appealed from, annulled, vacated, or modified and continued in full force, was insufficient.

3. Divorce ⇐171

Action to vacate final decree in first divorce action differed from cause of action stated in second divorce action, so that adjudication in second divorce action, if sufficient to prevent plaintiff from proving case in action to vacate, operates by way of an estoppel and not by way of a bar.

4. Judgment ⇐540, 582

Where judgment is for or against plaintiff, original cause of action is extinguished.

5. Judgment ⇐713(2), 720

Where subsequent action is upon a different cause of action from that upon which prior action was based, judgment in prior action, under doctrine of "collateral estoppel", is conclusive between parties as to questions actually litigated and determined but is not conclusive as to questions which might have been but were not litigated.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Estoppel".

6. Divorce ⇐171

In action to vacate final decree of divorce allegedly procured on false affidavit of no reconciliation, where defendant interposed plea of res judicata, burden of proving that question of reconciliation was tried and determined in prior divorce action was on defendant. Code Civ.Proc. § 1981.

7. Divorce ⇐171

In action to vacate final decree of divorce allegedly obtained on false affidavit of no reconciliation, finding in second divorce action that interlocutory decree in first action continued in full force did not encompass a finding that there had been no reconciliation so as to preclude plaintiff from proving her case. Civ.Code, §§ 131, 132.

8. Divorce ⇐156

Conduct of parties subsequent to entry of an interlocutory divorce decree does not effect a change therein although it may affect right of parties to a final decree, and interlocutory decree remains in full force and effect. Civ.Code. § 131.

9. Divorce ⇐170

The requirement that a final divorce decree is not to be entered until one year has expired after entry of interlocutory decree is statutory, and is not dependent upon any provision inserted in interlocutory decree. Civ.Code, § 132.

10. Divorce ⇐156

The interlocutory divorce decree determines, as of its date, that parties are entitled to a divorce, but parties cannot obtain divorce for a year, and intervening events, not affecting interlocutory decree, may deny divorce to parties when year is up. Civ.Code §§ 131, 132.

11. Divorce ⇐171

Finding in second divorce action that interlocutory decree in first divorce action was still in effect did not warrant conclusion that question of reconciliation had been tried out and decided adversely to wife so as to estop wife from maintaining subsequent action to vacate final decree in first action allegedly obtained on false affidavit of no reconciliation. Civ.Code, §§ 131, 132.

12. Judgment ⇐951(1)

Where defendant, who had burden on plea of res judicata to establish that issue had been tried out in former proceeding, adduced no evidence indicating that such issue was tried, fact that it may have been tried was unavailing to defendant.

13. Divorce ⇐171

Where desertion was a ground of divorce available to plaintiff in former action brought on ground of cruelty, decree denying divorce was a bar, as distinguished from a collateral estoppel, to subsequent action on ground of desertion.

14. Husband and wife ⇐249

Community property may be acquired up to entry of final divorce decree, since an interlocutory decree does not put an end to marriage relation.

15. Divorce ⇐171

Under rule that litigation of community property rights is not essential to a divorce action and if such rights are not covered by divorce action an adjudication may be had in an independent action, wife could not complain that she was being deprived of opportunity to enforce community property rights by adjudication barring her divorce action by reason of a former decree.

16. Divorce ⇐171

Where question of property interest is incidental to an action essentially for divorce, it is proper to hold action barred by decree in former divorce action although, as an incident to decision, action is made unavailable as a vehicle for presenting incidental question.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ella Churchill Babcock against F. W. Babcock for divorce and to set aside a final decree of divorce entered in a former action. Judgment for defendant, and plaintiff appeals.

Reversed. Appeal from order denying a new trial dismissed.

Saul S. Klein, of Los Angeles, for appellant.

P. V. Davis and Ben C. Cohen, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Three successive actions brought by the same plaintiff against the same defendant furnish the threads in which the problems of this appeal are enmeshed. The first of these was an action for divorce brought on the ground of cruelty in Santa Barbara County in 1926 and in which, before the year was over, an interlocutory decree was entered granting the plaintiff a divorce. Four years later the second action, also for a divorce, charging the defendant with cruelty, was commenced, this time in Los Angeles County. Plaintiff was unsuccessful in this second suit, a judgment denying her a second divorce being entered in 1932. In 1935 a final decree of divorce was entered in the Santa Barbara action, upon defendant's motion, and it was to have this final decree set aside, as well as to secure a fresh decree, based on defendant's claimed desertion, that the present suit was instituted in 1941. The defendant presented two affirmative pleas of res judicata, to this third action, and the trial was limited to a consideration of these pleas. They were found to state the truth and the trial court determined that they constituted a complete defense to plaintiff's entire action. This determination, we have concluded, was too broad, so that the resulting judgment of dismissal, from which the plaintiff has appealed, should be reversed.

[1] The second cause of action in the instant case alleged that shortly after the entry of the interlocutory decree, in the Santa Barbara action, the parties to it became reconciled and resumed marital relations, yet the defendant in 1935 filed an affidavit that there had been no reconciliation, and so procured the entry of a final decree. These facts make out a case for the setting aside of the judgment. McGuinness v. Superior Court, 1925, 196 Cal. 222, 229, 237 P. 42, 40 A.L.R. 1110; Gump v. Gump, 1940, 42 Cal.App.2d 64, 108 P.2d 21, and cases cited.

[2] It is quite obvious that the first affirmative defense does not state a defense to this second cause of action, for in that defense the defendant does no more than

set up the bringing of the Santa Barbara action, the entries of the interlocutory and of the final decrees, and that, as to each decree, it "has not been appealed from, annulled, vacated or modified in any manner whatsoever and ever since [its entry] said decree has been and now is in full force and effect."

The second affirmative defense is not so easily disposed of. In it the defendant calls attention to the bringing of the second action and alleges that in that action he had, by way of an affirmative defense, pleaded that an interlocutory decree had been entered in the Santa Barbara action and that it remained in full force and effect. He further alleged that the trial court found this plea to be true and denied the plaintiff a divorce. Later we shall note the exact wording of the plea and of the finding. Enough has been said to indicate that our task is to determine whether or not the plaintiff is precluded by the adjudication in the second divorce action from proving the reconciliation and resumption of marital relations.

[3-5] To begin with it is clear that as the second count of the present suit, by which the plaintiff seeks to set aside the final decree, is a different cause of action from that presented by the second divorce suit, if the adjudication in the second suit operates to prevent the plaintiff from proving her case in the present action, it is by way of an estoppel and not by way of a bar. Bank of America, etc., Ass'n v. McLaughlin, 1937, 22 Cal.App.2d 411, 416, 71 P.2d 291, 72 P.2d 554; Panos v. Great Western Packing Co., 1943, 21 Cal.2d 636, 638, 134 P.2d 242. This distinction is not of academic interest only. It has this practical consequence, recognized in the Bank of America case, just cited, and stated in the comment following section 68 of the Restatement of the Law of Judgments in these words:

"It is important to distinguish the effect of a judgment as a merger of the original cause of action in the judgment or as a bar to a subsequent action upon the original cause of action from its effect by way of collateral estoppel in a subsequent action between the parties based upon a different cause of action. If a judgment is rendered in favor of the plaintiff, the cause of action upon which the judgment is based is merged in the judgment, and the plaintiff cannot thereafter maintain an action on the original cause of action (see sec. 47). If the judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see sec. 48). In either case the original cause of action is extinguished by the judgment no matter what issues were raised and litigated in the action, or even if no issues were raised or litigated and judgment was rendered by default.

"On the other hand, where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel."

[6, 7] Our problem narrows; we now see that it is to determine whether the question of the reconciliation of the parties had been actually tried and determined in the second divorce action. The burden of proving that it was tried and determined was, of course, upon the defendant. Code Civ.Proc. sec. 1981; Rideaux v. Torgrimson, 1939, 12 Cal.2d 633, 638, 86 P.2d 826. In an endeavor to discharge his burden the defendant introduced the file of that action. That file fails to show that the question of reconciliation was either tried or determined.

Plaintiff's complaint, there, alleged many acts of cruelty as the basis for her prayer for a divorce. The answer denied these allegations and they were, incidentally, found to be untrue. The answer, as will be remembered, also set forth, as an affirmative defense, that an interlocutory decree for divorce had been entered in the Santa Barbara action and then continued in these words: "That said interlocutory decree has not been annulled, vacated or set aside and is now in full force and effect." Judge Sheldon, the trial judge, found it to be true "that said interlocutory decree has not been annuled, vacated or set aside and is now in full force and effect." If the fact which plaintiff must prove in support of her second count has already been adjudicated adversely to her, the adjudication is encompassed in the finding just quoted.

[8-10] We have come to the conclusion that the finding is not an adjudication precluding the plaintiff from proving her case. We are of the opinion that the conduct of

the parties subsequent to the entry of an interlocutory decree, while it may affect their right to a final decree, does not effect a change in the interlocutory decree; it remains "in full force and effect." By section 131 of the Civil Code it is provided that "If [the court] determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides *is entitled* to a divorce." (Emphasis is ours.) By virtue of section 132 of the same code, and not because of any provision to be inserted in the interlocutory decree, a final judgment is not to be entered until one year has expired after the entry of the interlocutory decree. In other words, the interlocutory decree determines, as of its date, that the parties are entitled to a divorce; they cannot obtain the divorce for a year, and intervening events, not affecting the standing of the interlocutory decree, may deny it to them when the year is up.

There are several cases which illustrate this principle. It is given expression in these words in Borg v. Borg, 1938, 25 Cal. App.2d 25, 29, 76 P.2d 218, 221 (the emphasis being that of the court) declaring that an interlocutory decree "is a final judicial determination that, as of the date of its entry, the parties were *entitled* to a dissolution of the status of married persons * * *. In so far as the interlocutory judgment decrees a dissolution of the marital status, its operation is suspended for a full year thereafter. The right of the prevailing party to have a final decree entered at that time is then dependent upon conditions arising *after* the entry of the interlocutory decree * * *." In Gloyd v. Superior Court, 1919, 44 Cal.App. 39, 42, 185 P. 995, it was decided that the death of the plaintiff terminated the right of the defendant to have a final decree entered, not on the ground that the death affected the interlocutory decree itself, but because it dissolved the marriage. In Dell v. Superior Court, 1921, 53 Cal.App. 436, 438, 200 P. 85, 86, we find that a wife, in whose favor an interlocutory decree of divorce had been entered, was attempting to have it set aside on the ground that she and her husband, subsequent to the decree, had become reconciled and lived together again as man and wife. In holding that the lower court was without jurisdiction to entertain the wife's motion the appellate court expressed the view that the "integrity" of the interlocutory decree "is unaffected by subsequent relations of the parties." In Carp v. Superior Court, 1926, 76 Cal.App. 481, 485, 245 P. 459, the plaintiff sought by a writ of mandate to compel the entry of a final decree. The defendant, it appears, had brought an action to set aside the interlocutory decree on the grounds of extrinsic fraud. Judgment had gone against her and she had appealed. Not on the theory that her so far unsuccessful but pending effort to set aside the interlocutory decree had affected it in any way, but on the ground that the court had the discretion and it was proper that it should withhold a final decree until the result of the wife's effort was finally known, the writ of mandate was denied. A petition for a similar writ was also denied in Weeks v. Superior Court, 1921, 187 Cal. 620, 622, 203 P. 93, 94, because the petitioner was in contempt, the Supreme Court saying: "It is within the contemplation of the section [Civil Code, sec. 132] that facts arising subsequently to the granting of the interlocutory judgment should have their influence in determining the right to a final decree."

[11] We concluded, therefore, in the light of the principle just noted, that whether it is to be treated as a finding of fact or a conclusion of law, the finding made by Judge Sheldon that the Santa Barbara interlocutory decree was still in full force and effect does not of itself warrant the conclusion that Judge Sheldon had been confronted with the contention that the parties had become reconciled and resumed their marital relations, and had resolved the issue against the plaintiff.

[12] It is possible that the question of the reconciliation of the parties was a subject of attention at the trial of the second divorce action, for the plaintiff may have attempted to counter the effect of the existing interlocutory decree by proving that a reconciliation had been effected. If the matter was tried it avails the defendant nothing in this case, however, for he introduced no evidence at the trial of the present case other than the file, to which we have already referred, which would serve to disclose the issues actually tried in the second divorce case; and, as we have seen, the file fails to reveal that the issue which the plaintiff now seeks to have determined had previously engaged the attention of the court.

[13] We now turn to plaintiff's first cause of action with the knowledge that the final decree in the Santa Barbara case may be set aside. Even so, we find the first

cause of action barred. It pleads a cause of action for a divorce on the ground of desertion. This is the pertinent paragraph: "V. That during the middle of July, 1928, defendant wilfully deserted plaintiff, and during the time subsequent thereto has refused to return and live with plaintiff." In the second suit for divorce the complaint alleged, "For statistical purposes": "2. Date of separation—Approximately the middle of July, 1928." This allegation was denied, but found to be true. Now it is true that the ground upon which the divorce was sought, in the second case, was cruelty. But the ground upon which a divorce is now sought was in existence at the time the second action was brought, in 1930, and a divorce denied; the plaintiff may not now secure a divorce on a ground then existing. The former judgment is a bar, not a collateral estoppel. Helpling v. Helpling, 1920, 50 Cal.App. 676, 681, 195 P. 715; Cardinale v. Cardinale, 1937, 8 Cal.2d 762, 767, 68 P.2d 351; See also Little v. Smith, 1920, 47 Cal.App. 8, 12, 189 P. 1059 and Panos v. Great Western Packing Co., supra, 21 Cal.2d 636, 638, 134 P.2d 242.

[14-16] With respect to this cause of action, the one for a divorce, the plaintiff makes some argument that the judgment of dismissal deprived her of her day in court respecting any community property that the parties may have. The matter of community property was expressly involved in the second divorce action, and it was found that there was none of more than nominal value. Since an interlocutory decree does not put an end to the marriage relation (Nelson v. Nelson, 1936, 7 Cal.2d 449, 453, 60 P.2d 982), community property may be acquired up to the entry of a final decree. Brown v. Brown, 1915, 170 Cal. 1, 7, 147 P. 1168. The plaintiff, therefore, may have rights which have arisen since the second divorce action, rights which have not been adjudicated. She is in no position, however, to complain that she is being deprived of an opportunity to enforce those rights by having her present divorce cause barred. The litigation of community property rights is not essential to a divorce action, and if they are not covered by it an adjudication may be had in an independent action. Callnon v. Callnon, 1935, 7 Cal.App.2d 676, 680, 46 P.2d 988, and cases cited. Respecting community property the plaintiff in her present suit alleged: "IV That plaintiff is uninformed as to the existence of any community property and asks that the same be ascertained and divided equally between the parties hereto." The cause of action remains essentially one for divorce, in which the question of property interests is quite incidental. It is proper to hold the action to be barred although as an incident to the decision the action is made unavailable as a vehicle for presenting the incidental question.

The judgment is reversed. The appeal from the order denying a new trial, that not being an appealable order, is dismissed.

DESMOND, P. J., and SHINN, J., concur.

23 Cal.2d 745

Ex parte SHULL.

Cr. No. 4519.

Supreme Court of California.

March 1, 1944.

1. Criminal law ⇐1208(6)

The section of Deadly Weapon Act regarding an added punishment for felonies generally where defendant is armed with a pistol or other weapon designated therein does not create a separate offense, but merely imposes additional punishment. St.1923, p. 696, § 3.

2. Criminal law ⇐1216(2)

The imposition of imprisonment under section of Deadly Weapon Act requiring added punishment for felonies generally where defendant is armed with a pistol or other weapon designated therein is additional, and must be made consecutive to term imposed for felony committed, and, hence, no discretion is reposed in court under Penal Code to determine whether additional term shall run concurrently or consecutively. St.1923, p. 696, §§ 1–3; Pen. Code, § 669.

3. Assault and battery ⇐100

An additional sentence under section of Deadly Weapon Act requiring added punishment for felonies generally where defendant is armed with a pistol or other weapons designated therein could not be assessed against one who had been convicted of assault with a pistol. St.1923, p. 696, §§ 1–3; Pen.Code, § 245.

4. Statutes ⇐225½

Generally, a special statute controls over a general statute.

5. Criminal law ⇐1208(6)

The Legislature's purpose, in enacting section of Deadly Weapon Act requiring added punishment for felonies generally where defendant is armed with a pistol or other weapon designated therein, was to provide for added punishment where a deadly weapon is not a necessary factor in the offense. St.1923, p. 696, § 3.

6. Prisons ⇐15

Where prisoner had been allowed credits for good behavior and by reason thereof his reduced term had expired, his term, as not reduced, could not thereafter be revived by a forfeiture of credits for conduct occurring after expiration of reduced term. Pen.Code, §§ 2940, 2942.

In Bank.

Original proceeding in habeas corpus by Earl Vier Shull to secure release from custody.

Writ granted.

Earl Vier Shull, in pro. per., for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Petitioner seeks his release from Folsom prison on the ground that he has completed his term of imprisonment.

Petitioner was charged with two crimes in two counts in an information. It was alleged in the first count that he had committed an assault with a deadly weapon, a pistol capable of being concealed upon the person, which he had no permit to carry, a violation of section 245 of the Penal Code; that he was in possession of a deadly weapon at the time of his arrest; and that previously he had been thrice convicted of felonies in Michigan. In the second count it was alleged that he, having suffered three prior felony convictions in Michigan, was in possession of a deadly weapon, the pistol. That count was based upon the Deadly Weapons Act. Stats. 1923, p. 696, sec. 2. He was found guilty as charged on both counts, except that only two prior convictions were found under the second count. He was sentenced to state prison by the judgment for the term prescribed by law under both the first and second counts, the terms to run concurrently.

Petitioner was received at the prison on March 28, 1937. On March 14, 1939, the Board of Prison Terms and Paroles, pursuant to the authority vested in them, Pen. Code, sec. 1168; now Pen.Code, secs. 3000–3025, fixed petitioner's term on the first count at ten years. That was authorized by section 245 of the Penal Code, which states:

"Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State

prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment."

Section 1168(2) (b) of the Penal Code (now sec. 3024(b)) states that:

"The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence: (a) For a person not previously convicted of a felony, but armed with a deadly weapon either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, five years; (b) *For a person previously convicted of a felony either in this State or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, 10 years;* * * *". (Emphasis added.)

The board fixed his term at five years under the second count. Section 2 of the Deadly Weapons Act provides that no person who has been convicted of a felony shall have in his possession a pistol and that anyone violating the act shall be punished by imprisonment in the state prison for a term not exceeding five years.

The foregoing terms under the first and second counts were fixed to run concurrently and it is conceded by respondent that with the credit allowances available petitioner has served those terms and would be entitled to release. However, under the first count the board fixed an additional term of five years to run consecutively, thus making fifteen years in all. That additional term was imposed under section 3 of the Deadly Weapons Act, which reads in part as follows:

"If any person shall commit or attempt to commit any felony within this state while armed with any of the weapons mentioned in section one hereof or while armed with any pistol, revolver or other firearm capable of being concealed upon the person, without having a license or permit to carry such firearm as hereinafter provided, upon conviction of such felony or of an attempt to commit such felony, he shall *in addition to the punishment prescribed for the crime of which he has been convicted, be punishable by imprisonment in a state prison for not less than five nor for more than ten years.* Such additional period of imprisonment shall *commence upon the expiration or other termination of the sentence imposed for the crime of which he stands convicted and shall not run concurrently with such sentence.*" (Emphasis added.) Stats.1923, p. 696; Act 1970, Deering's Gen.Laws. The weapons mentioned in section one of the act are: "* * * a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, * * * or * * * concealed upon his person any dirk or dagger, * * *."

[1, 2] It is contended by petitioner that the imposition of the additional five-year term under section 3 of the act is double punishment and jeopardy because the integral part of both assault with a deadly weapon and being armed with such weapon when the felony is committed is the same; that section 2 does not apply in a case where the basic offense is assault with a deadly weapon; and that the court, not the board, should have fixed the punishment.

The court properly imposed the sentence for the term prescribed by law under both counts and determined that they should run concurrently. See Pen.Code, secs. 669, 1168. It is clear that the board was authorized to fix a term of ten years on the first count and five years on the second count, to run concurrently. Such authority is given by section 1168, now 3024, of the Penal Code. The court declared that the terms imposed under counts one and two should run concurrently, hence whether the term under the first count was ten years or fifteen years if the added five years was proper, the terms under the two counts would run concurrently. It cannot be said that it should have determined whether the added five-year term should run concurrently or consecutively. The provisions of section 3 of the act do not create a separate offense. They merely impose additional punishment for the felony committed, when armed with the weapons mentioned. See In re O'Donnell for and on behalf of Rodgers, 121 Cal.App. 370, 9 P.2d 223. The imposition of the imprisonment under section 3 is *additional* and must be made *consecutive* to the term imposed for the felony committed. It is mandatory. Hence, there is no discretion reposed in the court under section 669 of the Penal Code to determine whether the additional term shall run concurrently or consecutively. The court in imposing, as it

should, the term prescribed by law necessarily embraced therein the law as stated in section 3. Facts were found by the court placing petitioner within section 3. It follows that if section 3 is valid and applies in the instant case the board properly fixed the additional five-year term to run consecutively.

[3] We do not believe, however, that the Legislature intended that section 3 of the Deadly Weapons Act should be applied where the felony of which the person stands convicted is that of assault with a pistol under section 245 of the Penal Code. The subject of the latter section (heretofore quoted) has been in the law of this state since 1850. Stats.1850, ch. 99, sec. 50. The language at that time was substantially the same as now, the subject being assault with a deadly weapon. The maximum penalty was imprisonment for two years. It was amended in 1855 (Stats. 1855, ch. 82), made a part of the Penal Code in 1872, and amended in 1873 (Stats. 1873-74, p. 428), without substantial change with regard to the portion here pertinent. In 1921 it was amended to increase the maximum penalty to ten years' imprisonment, the same as at present. Stats.1921, p. 86. It was amended in 1933, but no substantial change was made. Stats.1933, p. 2216. The Deadly Weapons Act was adopted in 1923, Stats.1923, p. 695, and although other sections of the act have been amended, section 3 has been left unchanged. It is apparent that section 245 of the Penal Code is a specific provision. It defines and determines the punishment for a specific kind of a crime, assault with a deadly weapon, in the instant case, a pistol. On the other hand, section 3 of the Deadly Weapons Act which imposes the additional penalty refers to no particular crime, but purports to require an added punishment for felonies generally where the one committing the same is armed with a pistol or the other weapons designated therein and in section 1.

[4, 5] It is the general rule that a special statute controls over a general statute. 23 Cal.Jur. 706–708. It is not unreasonable to suppose that the Legislature believed that for felonies in which the use of a gun was not one of the essential factors, such as rape, larceny, and the like, an added penalty should be imposed by reason of the fact that the defendant being armed with such a weapon would probably be more dangerous because of the probability of death or physical injury being inflicted by the weapon. Hence, such a condition would be reasonable grounds for increasing the penalty where felonies are involved which do not include as a necessary element being armed with a pistol. The Legislature has by other acts imposed an increased punishment where the only additional factor, being armed with a deadly weapon, is present. The only difference between a simple assault and one with a deadly weapon is the latter factor. The commission of a simple assault is declared a misdemeanor, and the punishment therefor is a fine of not over $500 or imprisonment in the county jail for six months, or by both. Pen.Code, secs. 240, 241. When there is added to the assault the use of a deadly weapon the punishment is increased to imprisonment in the state prison not exceeding ten years or in the county jail not exceeding one year or a fine not exceeding $5,000 or by both fine and imprisonment, Pen.Code, sec. 245, and if section 1168(2) (a) or 3024(a) is applicable and the weapons therein mentioned are used the minimum term is fixed at five years where the perpetrator is not one previously convicted of a felony. Briefly, the Legislature has fixed the punishment for an assault where a deadly weapon is used, a particular crime, and it is not to be supposed that for the same offense without any additional factor existing the added punishment should be imposed. In felonies where a deadly weapon is not a factor in the offense, the additional punishment is imposed by section 3 of the Deadly Weapons Act, because of the additional factor of a deadly weapon being involved.

The foregoing view of the legislative intent is further fortified by the very wording of section 3. It refers to the commission of a felony as *complete in itself* and then *adds* "while armed" with a pistol. The felony of assault with a deadly weapon would not be complete in itself unless the element of the weapon were present. Hence, there is no occasion for *adding* the weapon factor.

The foregoing conclusion finds support in Re O'Donnell for and on behalf of Rodgers, 121 Cal.App. 370, 9 P.2d 223. In that case defendant was charged with and convicted of violating section 2 of the Deadly Weapons Act, that is, possession of a pistol by one having been previously convicted of a felony, a crime which is declared to be a felony punishable by not

less than one nor more than five years' imprisonment in the state prison. The Board of Prison Terms and Paroles imposed a term of fifteen years. The court held that such term was not authorized, stating at page 372 of 121 Cal.App., at page 224 of 9 P.2d:

"This section [referring to section 3 of the Deadly Weapons Act] and the sections of the Code which are amendatory thereof relate to the conviction not of the offense of carrying a concealed weapon, but of the felony for which the accused is prosecuted. Thus, using the illustration of burglary, it relates to the offense of burglary for which the defendant is arrested, prosecuted, and convicted. It is not an added punishment for the carrying of a concealed weapon, as provided for in section 2. Section 2 of the act provides its own punishment for an ex-convict. The words in the statute 'armed with a deadly weapon at the time of his commission of the offense,' refers to the time of commission of the felony, for example, burglary, for which the defendant is prosecuted and convicted, and does not refer to his conviction for the separate and distinct offense of carrying a concealed weapon. Thus, in order to make the defendant liable to the added penalty, it is necessary that the defendant, at the time of the commission of the burglary, was armed with a deadly weapon, or at the time he was arrested for the commission of the crime of burglary, he was likewise armed with a deadly weapon. It does not mean that an ex-convict arrested and prosecuted for the simple offense of carrying a concealed weapon, shall have added to his punishment any of the periods provided for in what was originally section 3 of the act of the Legislature, approved June 13, 1923, or the provisions of the Penal Code enacted since said date.

"The words found in one of the paragraphs of section 1168 of the Penal Code, to wit: '[but] The following shall be the minimum term of sentence and imprisonment in certain cases, notwithstanding any other provisions of this code, or any provision of law specifying a lesser sentence' —do not modify, amend, change, or in any manner whatsoever limit or enlarge the language of section 2 of the act of the Legislature approved June 13, 1923, under which Roy Rodgers in this case stands convicted. All that is said after the words which we have quoted in section 1168 of the Penal Code relates only to added penalties which are affixed in the event that the defendant was armed at the time of committing the principal offense for which he was arrested, prosecuted, and convicted, or was so armed at the time he was arrested for the commission of such principal offense, and not to an arrest for simply carrying a concealed weapon, and being a member of the proscribed class.

"Subdivision (b) of section 1168(4) of the Penal Code as it now reads enforces the interpretation which we are here giving to the statute and Code provisions. Subdivision (b) reads: 'For a person previously convicted of a felony either in this state or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, 15 years,' explicitly stating that the defendant must be armed with a deadly weapon at the time of the commission of the principal offense for which he is arrested, prosecuted, and convicted, or must be so armed at the time he is arrested for the commission of the principal offense for which he is prosecuted and convicted."

[6] The record discloses that petitioner was entitled to certain credits for good behavior which were allowed him by the Board of Prison Directors. The allowance of these credits had the effect of reducing his term so that he was entitled to his release except for the additional five-year term imposed under section 3 of the Deadly Weapons Act. After the expiration of his term as so reduced, petitioner violated a regulation of the prison and all of his credits were declared forfeited. In declaring such forfeiture the board exceeded its authority. By reason of the allowance of credits, under the correct interpretation of the law, petitioner's term as reduced had expired and he was entitled to his discharge before the act upon which the forfeiture was based occurred. Section 2940 of the Penal Code provides that a prisoner shall be discharged upon completion of his term as fixed by the board. Section 2942 states that the discharge date mentioned in section 2940 "shall be shortened to the extent of any time credits allowed and not forfeited." It has been held that once a prisoner has been allowed credits and by reason thereof his reduced term has expired, his term, as not reduced, may not thereafter be revived by a forfeiture of credits for conduct occurring after the

expiration of his reduced term. Ex parte Ray, 18 Okl.Cr. 167, 193 P. 635; Henratty v. Zerbst, D.C., 9 F.Supp. 230; see Christianson v. Zerbst, 10 Cir., 89 F.2d 40; In re Herriff, 104 Cal.App. 222, 285 P. 927. In Re Taylor, 216 Cal. 113, 13 P.2d 906, the conduct occurred prior to the expiration of the reduced term, but the order of forfeiture was made afterward.

For the foregoing reasons the petitioner is ordered discharged from custody.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.



63 Cal.App.2d 88

RINGIS v. OTTING.

Civ. 14054.

District Court of Appeal, Second District, Division 3, California.

Feb. 29, 1944.

1. Appeal and error ⇐1013

The amount of damages for personal injuries was for trial court sitting without jury in exercise of court's sound discretion.

2. Appeal and error ⇐1013

An appellate court will not disturb a judgment insofar as amount of damages is concerned unless amount is so grossly excessive as to immediately suggest passion or prejudice.

3. Damages ⇐132(14)

$19,000 to 40-year-old man for loss of left eye and other minor injuries, who remained in hospital for 46 days, who had suffered extreme pain and was under medical care some 12 months after the accident, and who was required to irrigate his eyes twice daily, was not excessive.

4. Trial ⇐404(4)

A specific finding controls an inconsistent general finding.

5. Appeal and error ⇐1013

Although certain paragraphs of complaint containing allegations as to extent of plaintiff's injury were included by reference in general findings as true, that such paragraphs also contained allegations that amount of plaintiff's damages was more than twice the amount awarded by trial court did not indicate, in view of specific findings as to plaintiff's damage, that court did not exercise dispassionate judgment in awarding damages.

6. Witnesses ⇐282½

Where cross-examiner's question had been repeatedly answered, objection to further repetition was properly sustained.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Theodore D. Ringis against Harry Otting for injuries resulting from defendant's negligence in firing a shotgun while plaintiff and defendant were quail hunting. From a judgment for plaintiff, defendant appeals.

Affirmed.

Walker, Adams & Duque, of Los Angeles, for appellant.

D. A. Boone, of Long Beach, for respondent.

PARKER WOOD, Justice.

In this action for damages for personal injuries resulting from the alleged negligence of defendant in firing a shotgun while plaintiff and defendant were quail hunting, plaintiff obtained judgment, in a trial without a jury, for $19,000 general damages for the loss of an eye and for minor injuries to other parts of his body, and $948.40 special damages. Defendant appeals from the judgment and asserts that (1) the amount of general damages was excessive; (2) the findings as to general damages were unsupported by the evidence; and (3) the court erred in restricting the cross-examination of plaintiff.

The evidence, in the view most favorable to plaintiff, shows: Plaintiff and defendant had been friends about 3½ years, and had gone hunting together about 15 times. On November 30, 1941, they went quail hunting on a ranch of defendant's friend near Lancaster. The hunting place in the vicinity of the accident was covered with sagebrush ranging from knee high to waist high, and the ground was generally flat except for a dry wash or "little depression," which varied in width from 50 fe

to 300 feet, had gradually sloping sides from the level of the surrounding land to a depth of about 2 feet, and extended northerly across the ranch. Before they started to hunt, plaintiff and defendant agreed that, while hunting, they would stay in sight of each other, would walk 125 or 175 feet apart in the same direction and would keep approximately "parallel" or equally advanced except as the distance would vary when they deviated to go around sagebrush or to pick up quail they had shot. It was a clear day, and plaintiff was wearing a red plaid shirt, green trousers and a "dirty" white hat. They proceeded to hunt in a northerly direction along the wash. When they arrived at a point where defendant was on the east side of the wash, in brush about 4 feet high, and plaintiff was in the center of the wash, about 125 feet to the west and left of defendant, in brush about "waist high," a quail suddenly flew out of the brush about 15 feet to the rear of, and "between," plaintiff and defendant, and flew toward defendant. Defendant turned to his left, fired his 16-gauge shotgun, and shot the quail which was "about three feet above the brush, possibly waist high." The gun "was pointed straight at" plaintiff. A bird-shot from the charge struck plaintiff in the left eye. Other shots struck plaintiff—one on the head, one on the left side, one on the right wrist, and one on the knee. The shots, other than the one that struck in the eye, caused slight injury. Plaintiff "dropped" to the ground. Defendant, and defendant's wife and plaintiff's wife (who had accompanied them on the trip and were following behind them), went to plaintiff's assistance. A "bloody fluid" was coming from plaintiff's eye, and they went immediately to Lancaster where he received medical treatment. Then they went to Pasadena, where he received further medical attention, then to Alhambra where X-rays were taken of plaintiff's eye, and then to a hospital in Long Beach where plaintiff remained 46 days and his eye was removed.

The trial court found defendant was negligent, and plaintiff was not contributively negligent. Defendant does not contend on this appeal that those findings were not supported by the evidence. Defendant does not make an issue as to the item of special damages.

As to defendant's first contention, that the amount of the general damages was excessive, the evidence shows: Plaintiff entered the hospital on November 30, 1941, the date of the injury, and at that time his eyeball was collapsed, and he "had a feeling of a red hot poker" in his eye. The next morning, December 1st, additional X-rays were taken, and he was removed to the operating room where a small part of the iris was removed from his injured eye, an incision made in the cornea, the eye irrigated, and a flap of conjunctiva tissue pulled over the cornea to protect the wound and sutured in place. The lids of both eyes were closed and sutured to keep them closed, and morphine was administered to plaintiff every 4 or 6 hours for a few days. The sutures were removed from the right eye about 2 days later, and from the left eye about 7 days later. There was a slight improvement in the injured eye for a few days, and then there was a marked inflammation of the eye, some infection of the lid, and severe pain. About two weeks later the "pain seemed to be somewhat subsided." Treatment was continued, but the eye remained in the same condition with considerable watering, irritation and pain. On January 3, 1942, plaintiff was given a general anesthetic, and his left eye was removed. A glass ball was then placed and sewed in the eye socket, preparatory to fitting an artificial eye, and kept there until January 21, 1942. Plaintiff left the hospital on January 15, 1942, at which time there was still a slight infection of the socket, and plaintiff was required to return for treatments once or twice each week. An artificial eye was placed in the socket on February 16, 1942. The vision of the right eye had not been affected, but on September 9, 1942, upon the advice of his doctor, plaintiff was required to wear glasses to relieve a strain on his right eye. At the time of the trial plaintiff was still under medical care; and twice daily plaintiff was required to irrigate his eye socket with a boric acid solution and apply an ointment thereto, and to irrigate the right eye with another solution. Mucus collected on his artificial eye, and he was required to keep a mirror with him and use it while working in order to keep the eye clean, and at times while working he had to remove the eye in order to clean it. Plaintiff's doctor testified, at the trial in October, 1942, that plaintiff probably would require medical attention for another "one or two months," for the reason that the first artificial eye, a temporary one used while

the eye socket was swollen, was being replaced by another artificial eye and plaintiff should be watched to be sure it fitted properly.

The evidence shows further: Plaintiff was 40 years of age at the time of the accident. He had been employed by the Ford Motor Company at Long Beach since 1939. He worked 40 hours a week only, and his salary was $215 a month with two weeks' annual vacation. His duty was to compile complete daily schedules for the entire production. While he was in the hospital his employer informed him that his employment had been terminated. In the latter part of February, plaintiff's doctor advised him he was able to do a little work. Plaintiff thereupon applied for employment at several places, but was unable to obtain work at those places. On August 6, 1942, he obtained employment as a schedule clerk to keep records of the progress of production in the tooling department of an aircraft company, and he held that position at the time of the trial. He was hired on a 40-hour week basis, at 90¢ an hour, or $156 a month, and additional pay for overtime. With full overtime he received $260 a month. He performed his work by making the records of progress on a series of 64 charts, each of which was 3 feet by 4 feet in size. He could not see an entire chart at one time and constantly had to turn his head back and forth to follow the chart lines.

[1-3] The matter of the amount of damages was for the determination of the trial court, upon the evidence, in the exercise of its sound discretion. An Appellate Court will not disturb a judgment insofar as the amount of damages is concerned unless the amount is so grossly excessive as to immediately suggest passion or prejudice. Loper v. Morrison, Cal.Sup. 1944, 145 P.2d 1. There are several reported cases in which similar amounts have been held to be proper awards for the loss of an eye. Among such cases are: Katz v. Helbing, 1932, 215 Cal. 449, 10 P.2d 1001,–$30,000.00; Conner v. East Bay Mun. Utility Dist., 1935, 8 Cal.App.2d 613, 47 P.2d 744, 48 P.2d 982–$20,597.93; and Szasz v. Joyland Co., 1927, 84 Cal.App. 259, 257 P. 871,–$20,000.00. The evidence was sufficient to justify the amount awarded.

[4, 5] The next contention of appellant, that the findings as to damages were unsupported by the evidence, is based upon 2 general findings made by reference to the complaint that the allegations of 2 paragraphs of the complaint were true. Those general findings, as shown by the references, were: (1) That plaintiff "has suffered a fifty per cent disability and that his future earning power will be proportionately reduced to his damage in the sum of $20,000.00"; and (2) that plaintiff has suffered excruciating pain, sustained severe shock to his nervous system, and throughout his life will suffer "by reason of the loss of his left eye, humiliation and embarrassment * * * to his further damage in the sum of $25,000.00." Defendant asserts that if those findings were supported by the evidence the damages should have aggregated $45,000, and that said findings indicate that the "trial court did not in awarding damages exercise a cool and dispassionate discretion." In addition to the general findings, the court made specific findings: (1) That plaintiff "sustained great, grievous and permanent injuries"; and (2) that "as a result of the permanent injuries and damage proximately caused by defendant Harry Otting's negligence plaintiff has sustained damage in the sum of $19,948.40." A specific finding controls in the event there is an inconsistency between a general finding and a specific finding. Lobb v. Brown, 1929, 208 Cal. 476, 481, 281 P. 1010; People v. Hawley, 1929, 207 Cal. 395, 403, 279 P. 136. Although certain paragraphs of the complaint, containing allegations as to the extent of plaintiff's pain and physical injury, were included by reference in the general findings as true allegations, the fact that such paragraphs also contained allegations that the amount of his damages was $45,000, does not indicate, in view of the specific findings, that the court did not exercise a cool and dispassionate judgment in awarding damages.

[6] The last contention of appellant is that the court erred in restricting the cross-examination of plaintiff. That contention is based upon a ruling of the court sustaining plaintiff's objection to a question by defendant which, in substance, was whether plaintiff had told various persons that the accident was unavoidable. Before that objection was sustained, the same question was asked in varying language several times, and was answered. On cross-examination defendant asked plaintiff whether he had told the investigating officers that it was an accident and nobody

was to blame. Plaintiff answered, "I recall telling them it was an accident, yes, but I don't recall the other part of it." Defendant also asked plaintiff whether he had told other persons that "this incident was just an accident and that no person was to blame." Plaintiff answered, "I told people it was an accident." Thereupon the court said, "The question is, Did you tell other people that it was just an accident and that no one was to blame?" Plaintiff answered, "I told people it was an accident, but I can't recall telling them no one was to blame." Defendant asked plaintiff whether he had told defendant in the presence of others on many occasions that defendant 'should not feel so badly about it, it was just an accident and he was not to blame." Plaintiff answered, "I have told people it was an accident." Thereupon plaintiff was asked a few questions concerning other subjects, and defendant then asked plaintiff whether he had "on many occasions told your mutual friends that this was just an accident, and that Tex [defendant] should not feel badly, nobody was to blame." Plaintiff objected to the question on the ground that it had been asked and answered, and the court sustained the objection. It therefore appears from the above references to the testimony that the court did not err in sustaining the objection.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.



63 Cal.App.2d 214

In re ISENBERG'S ESTATE.

KENNEDY v. ISENBERG et al.

Civ. 14259.

District Court of Appeal, Second District, Division 2, California.

March 6, 1944.

Rehearing Denied March 29, 1944.

1. Appeal and error ⇐345(1)

Where judgment was entered on claim against decedent's estate on February 25, notice of intention to make motion for new trial was filed on March 6, motion was denied on May 3 and notice of appeal was filed on May 28, appeal was timely. Code Civ.Proc. § 939.

2. Executors and administrators ⇐216(2)

In proceeding on claim against decedent's estate for attorney's services, substantial evidence sustained findings that there was no agreement relative to fees and that petitioner rendered extraordinary services by obtaining reductions of taxes, by corresponding with ancillary administrators, and by representing estate in unlawful detainer action.

3. Appeal and error ⇐931(1), 1010(1)

An appellate court will view evidence in light most favorable to respondent, will not weigh evidence, will indulge all intendments which favor sustaining finding of trier of fact and will not disturb such finding if supported by substantial evidence.

4. Appeal and error ⇐989

When finding of fact is attacked because not supported by any substantial evidence, power of appellate court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding.

5. Executors and administrators ⇐216(2)

The amount of compensation for extraordinary services rendered an estate by attorney for administrator rests in discretion of trial court, and its allowance will not be disturbed on appeal, in absence of showing of plain abuse of discretion.

6. Executors and administrators ⇐216(2)

$1,400 was not an improper allowance for extraordinary services rendered decedent's estate by attorney who obtained reductions of taxes, corresponded with ancillary administrators, and represented estate in unlawful detainer action.

7. Executors and administrators ⇐216(2)

A judgment against administrators for attorney's services should have provided that it be paid "in due course of administration". Probate Code, § 730.

8. Executors and administrators ⇐239

In proceeding on claim against decedent's estate for attorney's services, failure of judgment against administrators to provide that it be paid "in due course of administration" was not prejudicial and could

be rectified by modification on appeal. Probate Code, § 730.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in the matter of the estate of Warren D. Isenberg on the claim of Arthur W. Kennedy, contested by J. W. Isenberg and another, administrators. From a judgment allowing recovery, contestants appeal and petitioner moves to dismiss the appeal.

Motion denied; judgment modified, and, as modified, affirmed.

Saul S. Klein, of Los Angeles, for respondent.

Leland S. Bower, of Los Angeles, for appellants.

McCOMB, Justice.

There are presented for our determination:

(1) A motion to dismiss the appeal on the ground that the notice of appeal was not filed within the time prescribed by law.

(2) An appeal from a judgment in favor of respondent for the sum of $1,400 as attorney's fees for extraordinary services performed for the estate of Warren D. Isenberg, deceased.

I

The undisputed facts pertaining to the motion to dismiss the appeal are these:

Judgment was entered in favor of respondent on February 25, 1943. On March 6, 1943, appellants filed with the clerk of the superior court a notice of intention to make a motion for a new trial. On May 3, 1943, the trial court made an order denying appellants' motion for a new trial. On May 28, 1943, appellants filed their notice of appeal with this court.

[1] The appeal, having been taken within thirty days after the denial of the motion for a new trial, was in time. Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a judgment within thirty days after the entry in the trial court of an order determining a motion for a new trial, therefore the motion to dismiss the appeal should be denied.

Palomar Refining Co. v. Prentice, 47 Cal.App.2d 572, 118 P.2d 322, relied on by respondent, is not here in point for the reason that the order in such case was one denying a motion for a change of venue. As more than sixty days had elapsed from the time the order was entered until the notice of appeal was filed, and the case did not fall within any provision of section 939 of the Code of Civil Procedure extending the time beyond sixty days within which an appeal might be taken, the appellate court was clearly right in refusing to entertain the appeal. The instant case, however, falls within the provision of section 939 of the Code of Civil Procedure which permits an appeal within thirty days after the entry in the trial court of an order terminating the proceedings on a motion for a new trial.

II

On appeal from the judgment there are two questions necessary for us to determine which will be stated and answered hereunder seriatim.

First: *Was there substantial evidence to sustain the trial court's finding that (a) respondent and appellants had not entered into an agreement relative to the fees respondent should charge appellants for acting as attorney for the administrators of the estate of Warren D. Isenberg, deceased, (b) respondent rendered extraordinary services to the estate of Warren D. Isenberg, by (1) obtaining a reduction of the federal inheritance tax, (2) corresponding with ancillary administrators in Texas and Missouri, (3) obtaining a reduction in the state inheritance tax, (4) representing the estate in an unlawful detainer action in Kings County, California?*

[2] This question must be answered in the affirmative, and is governed by the following pertinent rules:

[3] (1) It is the general rule that on appeal an appellate court will (a) view the evidence in the light most favorable to the respondent (b) not weigh the evidence (c) indulge all intendments which favor sustaining the finding of the trier of fact, and (d) not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (California Emp. Comm. v. Betthesda Foundation, 54 Cal.App.2d 348, 350, 128 P.2d 874; People v. Dukes, 90 Cal.App. 657, 659, 266 P. 558.

[4] (2) When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or

uncontradicted which will support the finding of fact. (In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720; 2 McK. Dig. (1930), p. 701, Appeal and Error, sec. 1235.)

[5] (3) The amount of compensation for extraordinary services rendered an estate by an attorney for an administrator rests in the discretion of the trial court, and its allowance will not be disturbed on appeal in the absence of a showing of a plain abuse of discretion. (In re Estate of Neff, 56 Cal.App.2d 728, 731 et seq., 133 P.2d 413; In re Estate of Hardenberg, 18 Cal. App.2d 307, 310, 63 P.2d 1200.)

Applying the foregoing rules to the present case, an examination of the record discloses substantial evidence to sustain the questioned findings of fact, and each and every finding of fact upon which the judgment was necessarily predicated. For example:

(a) Respondent's testimony relative to any agreement that he had with appellants was as follows:

"Q. Did you have any agreement with him (J. W. Isenberg) regarding extraordinary fees or any extraordinary fees in your matter? A. We discussed the matter of ordinary and extraordinary fees, and I stated to them what ordinary fees covered, and that when anything or an extraordinary nature would come up we would discuss that, and we did discuss it on each and every occasion when money was borrowed, lawsuits filed, Howard and Comstock case, and all that.

"Q. With whom did you discuss it? A. Joe Isenberg.

"Q. Was Mrs. Copple present? A. No. Mrs. Copple never attended any conference of the estate except about twice."

(b) The record discloses that respondent (1) made and filed an affidavit for reappraisal of the estate with the federal government, and participated in a hearing which lasted five days and which resulted in a reduction of the federal inheritance tax, (2) wrote fourteen letters relative to properties of the estate located in the states of Texas and Missouri, (3) was substituted as attorney for the administrators of the estate of Warren D. Isenberg; that at the time of such substitution, the appraised value of the estate was more than $70,000 and funds of the widow of decedent had been commingled with those of the estate, with the result that it took considerable time for respondent to correct the records in accordance with the actual facts, segregating the property belonging to the estate from that belonging to the widow of decedent, (4) did considerable research work in connection with a demurrer, briefs, findings of fact, and a motion for a new trial, in an unlawful detainer action filed on behalf of the estate in Kings County, California.

[6] Further discussion of the evidence would serve no useful purpose, however the evidence referred to above fully justified the trial court in finding that respondent had rendered extraordinary services for the administrators of the Isenberg Estate, reasonably worth the sum of $1,400.

Second: *Was the judgment erroneous because it did not provide that it should be paid by the administrators in due course of administration?*

[7] This question must be answered in the affirmative. So far as material here, the judgment read thus:

"Wherefore, by reason of the law and the findings of fact aforesaid, it is Ordered, Adjudged and Decreed by the Court that petitioner, Arthur W. Kennedy, Esq., do have and recover from J. W. Isenberg and Dorthy I. Copple as administrators of the Estate of Warren D. Isenberg, also known as W. D. Isenberg, deceased, the sum of Fourteen Hundred ($1400.00) Dollars."

Section 730 of the Probate Code provides that a judgment rendered against an administrator upon a claim for money against the estate of his testator must provide that it be paid "in due course of administration."

[8] It is evident that the judgment in the instant case does not comply with the foregoing rule. (See Bank of Stockton v. Howland, 42 Cal. 129, 132.) Such error, however, is not prejudicial to appellants and may be rectified by a modification of the judgment. (Weygandt v. Larson, 130 Cal.App. 304, 311, 19 P.2d 852.)

For the foregoing reasons:

(1) The motion to dismiss the appeal is denied.

(2) The judgment is modified by adding at the end thereof the words, "said sum to be paid in due course of administration." The judgment as modified is affirmed, respondent to recover his costs.

MOORE, P. J., and W. J. WOOD, J., concur.

PACIFIC STATES SAVINGS & LOAN CO. v. HISE, Building and Loan Com'r (STATE GUARANTY CORPORATION, Intervener).

Civ. 12349.

District Court of Appeal, First District, Division 1, California.

March 3, 1944.

Rehearing Denied April 1, 1944.

Hearing Granted May 1, 1944.

1. Building and loan associations ⇐42(3)

A building and loan association's destruction, after demand for their inspection, of papers used in conduct of business, justified seizure of association's property by Building and Loan Commissioner notwithstanding that papers related to obsolete cases or that similar data could be otherwise obtained. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

2. Building and loan associations ⇐42(3)

A difference exists between seizure of property of building and loan association and subsequent liquidation, since seizure is an integral part of process of liquidation, and possession is a prerequisite to liquidation and is the first step in that process. St.1931, p. 539, § 13.11.

3. Building and loan associations ⇐42(16)

The Building and Loan Association Act provision that court may upon the "merits" dismiss building and loan association's application for injunction against commissioner uses quoted word as meaning that matter should be determined on all the issues including liquidation when that becomes an issue. St.1931, p. 540, § 13.12.

See Words and Phrases, Permanent Edition, for all other definitions of "Merits".

4. Building and loan associations ⇐2

The Building and Loan Association Act should be liberally construed to carry out its purpose to protect certificate holders, stockholders, and the public in conduct of business of building and loan associations. St.1931, pp. 483–554.

5. Building and loan associations ⇐42(3)

Under Building and Loan Association Act, Legislature did not intend that building and loan association should be liquidated unless all reasonable efforts had been exhausted to preserve interests of certificate holders. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

6. Building and loan associations ⇐42(3)

The Building and Loan Association Act provision authorizing liquidation if building and loan association is unsafe or "its assets are impaired" refers to approximate date of seizure by Building and Loan Commissioner so that acts existing long prior to seizure could not justify liquidation. St.1931, p. 539, § 13.11.

7. Building and loan associations ⇐42(3, 6)

The power of Building and Loan Commissioner is largely discretionary, and Building and Loan Association Act should be construed liberally to uphold his actions but a succeeding commissioner may not liquidate an association merely because he believes his predecessor has abused his discretion. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

8. Building and loan associations ⇐42(3)

Former Building and Loan Commissioner's approval of building and loan association's transactions amounted to a ratification and estopped succeeding commissioner from seizing association's property for such transactions. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

9. Estoppel ⇐114

Ordinarily, estoppel must be pleaded except where a party has no opportunity to plead it under a system of pleading which permits no replication or reply to the answer.

10. Building and loan associations ⇐42(3)

Where building and loan association's practice of accepting its own investment certificates in payment of rentals due from tenants had been discontinued at time of seizure of its property by Building and Loan Commissioner, such practice could not justify liquidation unless practice caused, or tended to cause, impairment of association's assets. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

11. Building and loan associations ⇐42(3)

The refusal of officers of a private company holding stock in building and loan association to submit company's records and files to Building and Loan Commissioner did not justify seizure of association's property. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

12. Building and loan associations ⇐42(3)

A building and loan association's improper accounting practices which, standing alone, did not authorize seizure of association's property, did not justify liquidation unless accounts showed impairment of assets. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

13. Building and loan associations ⇐42(16)

Evidence failed to show that building and loan association intended to freeze out its own investors or that it intended to become a real estate company dealing in large holdings so as to warrant association's liquidation. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

14. Building and loan associations ⇐42(3)

Building and Loan Commissioner could not liquidate building and loan association for failure to set up reserve against possible claims of persons to whom interest had been paid at a lesser amount than that specified in certificates, where during emergency period payment of amount of interest specified in certificate was prohibited by statute. St.1931, p. 483, as amended by St.1933, pp. 4, 309, 313, 315, 1098, 1101, and St.1935, pp. 800, 806, 1504, 1508.

15. Building and loan associations ⇐42(3)

Building and Loan Commissioner could not liquidate building and loan association for failure to set up reserve to meet additional income taxes found to be due, where government's claim in that respect was not called to attention of association until after date of seizure of its property by commissioner. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

16. Building and loan associations ⇐42(3)

Building and Loan Commissioner could not liquidate building and loan association on ground that it had been conducting its business under fictitious names, where association organized several companies to manage properties owned by association and such operation resulted in large saving to the association. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

17. Officers ⇐103

Ordinarily, when a question of fact has been presented for determination of a board or commission, courts will not interfere in absence of abuse of discretion.

18. Building and loan associations ⇐42(3)

The liquidation of a building and loan association will not be countenanced by court merely because of failure to produce records, particularly if the data or major part thereof is otherwise available, unless in conjunction therewith an impairment of assets appeared. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

19. Building and loan associations ⇐42(3)

Where no single act of building and loan association justified liquidation, liquidation was not justified when acts were taken together unless assets were impaired. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

20. Building and loan associations ⇐42(3)

An impairment of building and loan association's capital as basis of liquidation should be judged by its relationship to the whole. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

21. Building and loan associations ⇐42(7)

If building and loan association's assets are not impaired, retention by Building and Loan Commissioner of association's property is not authorized because he acted properly in first instance in taking possession upon his finding or belief of impairment. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

22. Building and loan associations ⇐42(1)

Building and loan associations are "insolvent" when they cannot pay back the contributions of their members or shareholders dollar for dollar, since such associations are unlikely to be insolvent in sense of insufficiency of assets to discharge their obligations other than to their investors.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvent".

23. Building and loan associations ⇐8(1), 40

Building and loan associations may provide for issue of investment certificates to nonmembers, as well as for membership shares, and for guarantee stock which is not withdrawable.

24. Building and loan associations ⇐42(1)

A determination of solvency or impairment of assets of building and loan association as basis of liquidation involves the valuation of assets. St. 1931, pp. 539, 540, §§ 13.11 to 13.13.

25. Building and loan associations ⇐42(1)

In determining value of assets of building and loan association for purpose of ascertaining whether liquidation is warranted for impairment of assets, rules for deter-

mining value differ according to purpose of valuation, and standard of valuation must be the one which is best suited to purpose for which it is made. St. 1931, pp. 539, 540, §§ 13.11 to 13.13.

26. Building and loan associations ⇐42(1)

Under Building and Loan Association Act section authorizing liquidation of building and loan association for impairment of assets, which prescribes no basis for valuation, going concern values as well as liquidation values should be considered in appraising assets. St. 1931, p. 539, § 13.11.

"Going concern value" sometimes is said to be the amount by which the value of the assets as a whole, assembled together for use in conduct of a business, exceeds the aggregate of the value of the separate items of property, and sometimes it is defined as the value which the business has as a going concern for purposes of enabling the owner to clear his debts within a reasonable time.

See Words and Phrases, Permanent Edition, for all other definitions of "Going Concern Value".

27. Building and loan associations ⇐42(1)

Under Building and Loan Association Act section authorizing liquidation for impairment of assets, building and loan association may continue in business, provided prospect is that it can discharge its liabilities through continued operation notwithstanding the amount for which its assets could be sold is less than its liabilities, since in such circumstances there is no "impairment of assets". St.1931, p. 539, § 13.11.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairment of Assets".

28. Building and loan associations ⇐42(1)

In proceeding involving Building and Loan Commissioner's right to liquidate building and loan association for impairment of assets, instructions given to experts for determination of value were erroneous for confining their considerations to liquidation values and excluding going concern values. St.1931, p. 539, § 13.11.

29. Building and loan associations ⇐42(1)

In determining "going concern value" of building and loan association in ascertaining whether liquidation is warranted for impairment of assets, ordinarily any element that tends reasonably to enhance value of property rights based upon existence of business in which they are involved may be taken into consideration in ascertaining full value of those rights, and reasonable discretion should be used in determining meaning of quoted phrase. St.1931, p. 539, § 13.11.

30. Building and loan associations ⇐42(3)

The liquidation of building and loan association was not justified on theory that association was the alter ego of other corporations and that alleged improprieties taken as a whole constituted a fraud, where there was no proof that any certificate holder claimed to have been defrauded. St. 1931, p. 539, § 13.11.

31. Building and loan associations ⇐42(1)

While Building and Loan Commissioner's duty in proceeding to liquidate building and loan association is to offer proof of value as of date of seizure, if at time of hearing appraised value has been shown to be equal to or in excess of value of outstanding certificates, etc., liquidation is not justified. St.1931, p. 539, § 13.11.

32. Building and loan associations ⇐42(17)

A motion to direct Building and Loan Commissioner to pay to association's attorneys, from the association's assets, for services to be rendered in resisting seizure of association's property by the commissioner, is addressed to discretion of court, and if made upon reasonable ground and in good faith should be allowed. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

33. Appeal and error ⇐1011(1)

Where interested building and loan associations were deprived of opportunity of presenting evidence in refutation of charged fraud, and of presenting appraisals in accordance with correct definition of value for purpose of liquidation so that associations could not proceed with their side of the case, court's findings would not receive the appellate approval usually accorded findings based upon conflicting evidence.

34. Building and loan associations ⇐42(17)

An order denying application for attorneys' fees for services to be rendered in resisting seizure by Building and Loan Commissioner of building and loan association's assets was an abuse of discretion, where court had given erroneous instructions as to value, and denial of application precluded association from presenting material evidence. St.1931, pp. 539, 540, §§ 13.11 to 13.13.

35. Building and loan associations ⇐42(17)

A parent company was not entitled to attorneys' fees, witnesses' fees, and costs in defending action for liquidation of subsidiary building and loan association. St. 1931, pp. 539, 540, §§ 13.11 to 13.13.

PETERS, P. J., dissenting.

Appeal from Superior Court, San Francisco County; James G. Conlon, Judge.

Action for injunction by the Pacific States Savings & Loan Company against Harley Hise, as Building and Loan Commissioner of State of California, who had seized the property of the plaintiff under the Building and Loan Act, wherein State Guaranty Corporation intervened. From a judgment and from order, the plaintiff and intervener appeal.

Judgment reversed, and orders affirmed in part and reversed in part.

Hanna & Morton and John L. Mace, both of Los Angeles, John L. McNab, of San Francisco, and Leon B. Brown, of Los Angeles, for appellants.

Robert W. Kenny, Atty Gen., and John J. Dailey, Deputy Atty Gen., for respondent.

WARD, Justice.

The appeals herein involve questions of the justification of a seizure by the Building and Loan Commissioner of the State of California of the property of Pacific States Savings and Loan Company, a corporation, Building and Loan Act, sec. 13.11; Stats. 1931, pp. 483–539, and the judgment of dismissal which in effect means liquidation.

The main appeals are by State Guaranty Corporation, intervenor, and Pacific States Savings and Loan Company from a judgment made and entered on December 29, 1941. Several changes occurred in the office of Building and Loan Commissioner and substitutions have been duly noted and filed. Ralph W. Evans, the commissioner in charge at the time of the seizure, consented to a substitution on or about May 8, 1942.

The names of several other corporations closely allied with Pacific States Savings and Loan Company, hereinafter referred to as Pacific States, appear throughout the proceedings. Pacific States was incorporated as a building and loan association in 1889 and from that time until the date of its seizure continued to do business as such. State Guaranty Corporation, hereinafter referred to as State Guaranty was incorporated in 1927 and shortly thereafter acquired all of the guarantee capital stock of Pacific States. A majority of the stock of the State Guaranty appears to be owned by the general public. State Guaranty Auxiliary Corporation, referred to hereinafter as Guaranty Auxiliary, at the time of the seizure owned a large block of the stock of the State Guaranty. All of the outstanding stock of another allied corporation, the Pacific States Auxiliary Corporation, referred to herein as States Auxiliary, has since the date of its incorporation been held by State Guaranty. Robert S. Odell, whom we will refer to as Odell, became president of Pacific States in 1928, subsequent to the incorporation of the other companies, and has been its president ever since. It is respondent's contention that so far as voting is concerned, the "Odell group" directly or through proxies controls all of the corporations.

Pacific States and States Auxiliary are operating companies. State Guaranty and Guaranty Auxiliary are holding companies. The theory of the commissioner seems to be that Pacific States, with the connivance of Pacific Auxiliary, intended to freeze out its own investing certificate holders, and hoped to form a large real estate holding company. Whatever may be the purpose of the holding and operating corporations, respondent states, and it is borne out by the evidence, that "The record does not contain any evidence showing that Odell or any other officer or director of any of the allied corporations profited directly from the transactions referred to." It is, however, suggested that there was the "hope of very substantial profits." The record shows that whatever profit might accrue would be to the advantage of the stockholders. The majority of the stock of State Guaranty was held by the public so that as far as stock is concerned the general public stockholders would have benefitted to a greater extent than Odell or his associates. While the Pacific Auxiliary was incorporated in 1927, no capital stock was issued until 1929 when the corporation became active. It was organized to purchase real estate, foreclosed by Pacific States, on a ten per cent down payment and monthly installments, and to dispose of the same. It also acted as trustee in Pacific States foreclosures and as transfer and escrow agent. Appellants contend that at that time it was good prac-

tice to have a separate corporation which could deal with such properties as a private company.

While Pacific States was incorporated in 1889 and has continued in business since that date, the other corporations were organized some thirty-five or forty years thereafter. The trial court adopted the alter ego theory as to at least three of the corporations. Since the operating companies are Pacific States and States Auxiliary, it is their transactions which are the particular subject of examination herein.

At the end of the year 1929 Pacific States was in good financial condition. It had assets in excess of $53,000,000, of which nearly $7,000,000 were in cash and government bonds and $46,000,000 in mortgage loans on real estate. It had a large capital surplus and undivided profits, substantial holdings in real estate, and there were no unpaid withdrawal notices on file and no indebtedness due banks. The depression which followed caused real estate holdings in large numbers to be forced upon the company through surrender and foreclosure. There was little or no call for properties for sale or rental, and the combined expense of maintenance of 3,870 pieces of vacant and widely scattered small properties which had been so taken over by Pacific States up to December, 1933, and loss through vandalism, was very heavy. Further, by reason of the severity of the depression borrowers failed to pay loans, investors were unable or unwilling to invest in building and loan associations and many of the old investors demanded withdrawal.

In the meantime, in 1931 Fidelity Savings and Loan Association of Los Angeles, referred to herein as Fidelity, having become involved in financial difficulties and being unable to meet its withdrawals, the then building and loan commissioner served notice that he would take over the company unless it consolidated with some other building and loan association. Banking institutions and the commissioner persuaded Pacific States to take over Fidelity, and thereafter its obligations became quite a drain on Pacific States. On the deal, Pacific States took over assets (no cash or liquid assets) of the value of about $40,000,000, issued definite term certificates in excess of $24,000,000 and assumed liabilities in excess of $13,000,000.

In 1931 the outstanding investment certificate liability of Pacific States was approximately $91,000,000, which through careful management was reduced over a period of years to $46,000,000.

Pacific States was faced with the problem of disposing of the large volume of realty it had taken in on foreclosure. The market was such that the real estate for the most part could not be sold for the amount due upon the loans plus foreclosure expenses. If a parcel was sold for less than the amount owing, the books of Pacific States would reflect a loss. But if such property could be transferred at its cost to Pacific States in exchange for its investment certificates at their face value, and the certificates then be cancelled, there would be no such loss, and if certificates of a face value of $5,500 were received for a piece of property carried at a value of $5,000 there would be a profit of $500.

Due in part to the "depression," States Auxiliary became unable to pay the taxes, monthly payments, etc., on properties it had taken over from Pacific States, whereupon it re-transferred such holdings of realty to Pacific States, and thereafter, as escrow and transfer agent, it participated in investment certificate transactions whereby a market for certificates held by those in immediate need of cash was created at prices varying according to the demands and certificates available, which certificates were turned over by it to Pacific States at face value in exchange for property purchased by investors in many instances at substantial discount. Throughout the transactions, States Auxiliary, originally financed by State Guaranty, made no profit, and the transactions worked to the ultimate advantage of certificate holders who desired to continue with the company and protect their investments.

On March 4, 1939 the commissioner, purporting to act under section 13.11 of the Building and Loan Association Act, suddenly took possession of the property, business and assets of Pacific States, excluded its executive officers from its operation and premises and placed a custodian in charge. Sec. 13.13. On the first day available, Pacific States, as an alleged aggrieved party, challenged the right of seizure, and prayed the superior court to enjoin the commissioner from further proceedings and that the business, assets, etc. be surrendered to the company. Sec. 13.12. Section 13.11 provides: "If the commissioner as the result of any examination or from any report

made to him or to any association doing business in this state or its investors or any thereof, shall find that such association is violating the provisions of its articles of incorporation or charter or by-laws or any law of this state, or is conducting its business in an unsafe or injurious manner, he may by an order addressed to such association direct a discontinuance of such violations or unsafe or injurious practices and a conformity with all the requirements of law; and if such association shall not comply with such order within the time specified therein, or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him."

Except for short continuances and a longer one to permit certain exhibits to be introduced in a criminal proceeding involving the same subject matter in another county, the trial of the case lasted for a period of over two years. Judgment was rendered in favor of the commissioner. The transcript of evidence comprises in excess of 26,000 pages. An opening brief of over five hundred pages was followed by respondent's brief and a supplement thereto of more than four hundred fifty pages, which was followed by appellants' closing brief of two hundred seventy-eight pages exclusive of an appendix.

[1] The commissioner presents numerous facts and assigns many reasons for the seizure, in justification whereof it is not necessary to pass upon all of the alleged grounds if any one is technically sufficient. Among the grounds relied upon appears the fact that certain papers, which appellant claims were not a part of the records of the company, were not delivered upon demand of the commissioner. It appears in fact that such records had been destroyed after demand for their inspection. It is not a defense on the part of the company to say that the papers contained in great part data relative to obsolete cases, or that the same or similar data could be obtained from oher records. If the papers were actually used in the conduct of the business, as they were, the commissioner had a right upon refusal of inspection to make the seizure. In view of this determination, it will not be necessary to discuss the merits of any other alleged ground for the seizure and we expressly do not at this time pass upon justification thereof upon other stated grounds. Some of them will be mentioned as connected with other points on appeal.

[2] There is a great deal of difference between the right of seizure and the subsequent right of liquidation. Seizure is an integral part of the process of liquidation. Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; Yager v. Superior Court, 139 Cal.App. 84, 33 P.2d 451. In Evans v. Superior Court, 20 Cal.2d 186, 189, 124 P.2d 820, 822, the court said: "True, it may develop that liquidation will not follow, but that consequences does not alter the obvious fact that under the act possession is a prerequisite to liquidation and must be deemed to be the first step in that process. Since it is such a prerequisite it should be considered as part of the process of liquidation in a case when an injunction proceeding has been commenced."

The complaint charges that the commissioner intended to liquidate the association. The commissioner answered by general denial and this was the main issue on the trial. The order of dismissal was a determination of the issue of liquidation after the commissioner filed a notice of intention to liquidate. If the only issue had been the right of seizure this proceeding could have been concluded in two days instead of two years. The notice of intention to liquidate was given approximately a year and a half before judgment. The commissioner has never renounced his intention to liquidate.

The evidence introduced was primarily for the purpose of showing grounds for liquidation. The Supreme Court of this

state has recognized that liquidation is in process in this case. In Trede v. Superior Court, 21 Cal.2d 630, at pages 634 and 632, respectively, 134 P.2d 745, at pages 747, 746, referring to the present proceedings the court said: "In the Building and Loan Association Act, supra, the state has not authorized the commissioner to liquidate the assets of an association without an opportunity to review his determination concerning the institution's solvency [of] or its failure to comply with particular statutory requirements. * * * As an incident of such a suit, the right of the commissioner to liquidate the association's assets is delayed until there has been a determination of the issues concerning solvency or compliance with statutory requirements." "No order restricting the commissioner's action pending appeal has been made by the superior court, and he is proceeding to liquidate the Pacific States' assets."

In Hise v. Superior Court, 21 Cal.2d 614, 630, 134 P.2d 748, 756, referring to the same commissioner, the same court and the same proceeding, the Supreme Court, recognizing that the trial court was taking part in the liquidation, said: "It must be expected that the commissioner will perform his duties and that the court which is supervising the liquidation will be quick to protect the rights of all concerned in the event there is any deviation from statutory requirements."

[3] If respondent's position that the only issue before the court is "seizure" is correct, and that if that issue is determined in favor of the commissioner liquidation is a matter entirely within his discretion and outside of the jurisdiction of the court, then we are faced factually with the following problem: The commissioner in the present case is liquidating under the supervision of the court. If the court finds from the bids submitted for various parcels of property that values have increased to such an extent that there is no impairment, may the commissioner persist in liquidation? "The merits," as used in the act, means that in justice to both sides the matter should be determined on all of the issues, including liquidation when that becomes an issue, as in this case upon the filing by the commissioner of a notice of intention to liquidate. "Upon taking possession of the business," sec. 13.13, and retaining "such possession," sec. 13.11, the commissioner may permit a resumption of business upon conditions outlined by him, but after injunction proceedings heard upon "the merits," sec. 13.12, there is no provision for resumption of business. Irrespective of the findings and conclusions with reference to a resumption of business, the judgment, which denied all injunctive relief prayed for, directs a dismissal. The only course the commissioner may pursue is liquidation, which in fact is proceeding.

Under the terms of the act wide latitude is given the commissioner falling short, however, of authority to finally determine the judgment in a court proceeding under section 13.12. It is necessary before articles of incorporation of a proposed building and loan association are filed with the secretary of state that approval be obtained from the commissioner. Sec. 2.04. After incorporation, but prior to transacting business, the issuance of a license rests with the commissioner, sec. 12.02, and, except in the case of delinquent stock no such association shall sell or issue any of its stock without a permit from him.

[4] In carrying out its purpose, namely, the protection of the certificate holders, stockholders and the public generally, in the conduct of the business of building and loan associations, the act should be liberally construed. Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107; Evans v. Superior Court, 20 Cal.2d 186, 124 P.2d 820. In the Evans case, 14 Cal.2d 563, 573, 574, 96 P.2d 107, 113, the court said: "As was said in Richardson v. Superior Court, 138 Cal.App. 389, at page 394, 32 P.2d 405, at page 407, 'While it thus appears that the authority of the commissioner over the property and business affairs of the association when in his custody is subject to certain prescribed judicial review and control, the principal characteristics of his position as administrator are those of a public officer charged with a statutory duty which, for reasons of public policy, has been made to include a trust in private property.' * * * and in Re Union Building & Loan Association, 16 Cal.App.2d 301, 60 P.2d 562, his status was compared to that of a guardian. * * * but it is equally clear that he does acquire a new status and that his powers and duties must be considered in the light of such status as the trustee of such private trust. Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761."

[5] It was not the intent of the legislature that a company should be liquidated unless all reasonable efforts had been ex-

hausted to preserve the interests of the certificate holders, for such liquidation generally means a loss to them. The acts of the commissioner should be carefully scrutinized. This is demonstrated by the added powers granted the commissioner for the purpose of safeguarding the interests of the company, authorizing him, upon discovery of impairment of assets or neglect to conform to the provisions of the articles of incorporation, charter or by-laws or the law of the state or the rules promulgated by him for the conduct of business, to issue a "cease and desist" order, to put an end to the practices and questionable methods. Sec. 13.11. In the event of a deficiency of assets the commissioner may require that such deficiency be made good within sixty days. Sec. 7.06. During such period the company may levy an assessment against its stockholders. In the event of neglect or refusal to pay the assessment the stock may, after notice, be sold at public auction. The commissioner or a receiver "appointed by any court" may take possession of the property of the association for the purpose of carrying into effect the provisions of the section 7.06. In addition "The commissioner is authorized and empowered after due notice and hearing to revoke, or to suspend for such period as he shall determine, the license of any association the solvency whereof shall have become imperiled by losses or irregularities or which shall have wilfully violated any of the provisions of this act." Sec. 12.02. The commissioner without resort to the provisions of the above sections may seize and liquidate unless the company asserts its rights under section 13.12. From the above it is apparent that the advisability of liquidation and the steps leading thereto should be carefully considered, always with a view to protecting primarily the investors.

The evidence may be considered in connection with the findings, which contain over a hundred paragraphs. The majority are attacked by appellants. On appeal respondent dismisses the attacks with the statement that most of the criticized findings "are proper findings of ultimate fact" and "such findings find ample support in the record." Respondent's theory is that no particular action pursued by the company authorized the seizure, but that the company was unsafe and impaired, and that this condition resulted from a series of improper actions. Under the circumstances we feel justified in considering a few designated findings, and the rest generally or in group form.

[6] One of the vital questions in determining the sufficiency of the evidence and the findings is whether the taking of possession and subsequent liquidation must be based upon facts and conditions existing at the time of the seizure or whether prior alleged violations of the law, diversion of assets and funds, failure to maintain necessary reserves and inability to pay debts—all of which respondent claims to have existed for some eight years or more—may be made the basis for upholding the findings and a judgment resulting in possible liquidation. The answer is that under the provisions of the statute, if the company is "unsafe" to the extent of rendering "further proceeding hazardous to the public or to any or all of its investors" or "its assets are impaired," sec. 13.11—note that this is all in the present tense and refers to the approximate date of seizure—the commissioner is given authority to act.

The factual matters may be divided into specific periods; the emergency period, from 1933 to 1937, and that from 1937 to the date of the seizure. The last transaction in which certificates were accepted in payments of loans was in 1937; the last transaction in which bonds were exchanged for certificates in the same year; the last transaction in which real estate was exchanged for certificates was in 1936. As a matter of fact some of the evidence pertains to, and some of the findings in whole or in part refer to, direct or indirect actions by the company specifically permitted from 1933 to 1937 as "emergency" measures. Stats.1933, p. 313; Stats.1935, p. 1504. Amendments clarifying and assisting in interpretation, and in defining applicability of the act, appear in Stats.1933, pp. 4, 309, 1098, 1101, 315; Stats.1935, pp. 800, 806, 1508. The emergency period extended from March 10, 1933, to February 1, 1937. Findings or parts thereof based upon such facts may not be approved, though some of the evidence may have been admissible as introductory or explanatory of the subsequent actions of the company, but not as the basis of a finding tending to prove violations of the law. In the interest of brevity and in view of the final order herein, it seems inadvisable to discuss in detail this phase of the evidence, introduced during the hearings from time to time over a period of two years,

except to say that if any technical violations of definite statutes occurred, but had ceased, and no impairment existed, it would hardly be in consonance with present day thought to inflict such drastic punishment as the taking away of property, particularly if the violations had outlawed or ceased.

Respondent contends that Pacific States stepped outside of the statutory provisions during the emergency period and adopted means and methods, which in fact were used as a subterfuge, in the accomplishment of ends which the law did not contemplate. Appellant argues rather persuasively that the practices redounded to the financial benefit of the company and the majority of certificate holders, and justifies such actions upon the ground that the commissioner was aware of the methods used and approved them; in some instances by writing; in others, by acquiescence. Respondent claims that when Pacific States through its officers informed the commissioner verbally of actions past or contemplated, all necessary information was not in each instance given. This contention is not substantiated by reference to the transcript. In that regard it would have been a comparatively easy matter during the two year period of trial to have presented the testimony of former commissioners.

Referring to the 1933 amendment, St. 1933, p. 314, sec. 6.07, which permitted an association, whether or not it had paid its withdrawal claims, to accept its own investment certificates in payment of property sold or in payment of loans, the approval of the commissioner was required to such transactions. Shortly after the amendment went into effect the commissioner, by a circular letter to all building and loan associations, stated his views in part as follows:

"One of the most important things in the new emergency law (Assembly Bill 556) is the permission given building and loan associations to exchange real estate for certificates. A very few associations are putting on campaigns to make such exchanges, and they are proving not only successful, but profitable. I would *urge* upon every association the importance of trading its non-income bearing real estate for certificates, as fast as possible. In every case such exchange should be made *at a profit to the association,* and this will not only help the financial structure of the association, but will be of benefit to the remaining certificate holders.

"The indications are that people are rapidly coming to the conclusion that the safest and best investment is real estate, and if associations will take advantage of this opportunity and make exchanges at a profit, it will prove beneficial in every way. Those who trade their certificates for real estate will feel more satisfied, and will have a chance of gaining if the real estate should enhance in value.

"The law particularly says that all such exchanges of real estate for certificates can be made only with the prior approval of the commissioner, and I am enclosing a blank form which I wish you would use in all such cases. You may have these forms either printed or mimeographed, conforming to the wording thereof.

"Accepting certificates in payment of loans:

"The law provides that with the prior approval of the commissioner certificates may be accepted, at the option of the association, in partial or full payment of loans. These exchanges should be considered with great caution, as, clearly, an association can not give up its good income bearing loans without sacrificing its financial position, but in cases where loans are doubtful or are too high, then it would seem to me to be the part of wisdom for the association *to accept a certain percentage of payment in certificates,* to the amount of say 20 or 25 per cent. Another blank is enclosed to cover cases of this kind.

"Of course, it is understood that in cases where borrowers, as of March 10, 1933, held certificates prior to that date, they may make offsets of certificates on their loans, at their own option, and without the approval either of the association or of this office.

"May I suggest that if you will go at this matter vigorously, you will be able to put your association in good order and dispose of real estate which is bringing little, if any, income and is a burden on account of taxes and other expenses." (Italics added.)

That the method adopted was known to the commissioner is demonstrated by a report made by one of his examiners on January 24, 1935. He described the certificate transactions as follows:

"Investment Certificates of the Pacific States Savings and Loan Company are acquired by the Pacific States Auxiliary Corporation to be used primarily in real es-

tate transactions of the Pacific States Saving and Loan Company, and in the repayment of its loans. To a limited extent bonds are received from the Pacific States Savings and Loan Company by the Auxiliary Corporation who sells them converting the cash to Investment Certificates which are turned over to the Pacific States Savings and Loan Company. Also for purchases by investors of the Pacific States Savings and Loan Company for credit to their certificate account.

"The Pacific States Auxiliary Corporation has purchased Investment Certificates of a face value of approximately $9,800,000 at an average cost of 53.3% during the period January 1, 1934 to November 30, 1934. This includes Fidelity Definite Term Certificates of approximately $2,700,000.00. Since August 1, 1934, purchases have been at a rate in excess of $1,000,000.00 per month.

* * * * * * *

"In handling real estate transactions, three way escrows are arranged. The Pacific States Savings and Loan Company delivers title to the real estate; the purchaser the cash; and the Pacific States Auxiliary Corporation the certificates. The cost of the certificates to the Pacific States Auxiliary Corporation, determines the face value of certificates which they will deliver to the escrow in return for the cash therein. In arriving at this figure, the cost of the certificates on hand and the commitments made by the Pacific States Auxiliary Corporation are considered. Through this method no profit will accrue to the Pacific States Auxiliary Corporation."

Other exhibits appearing later in the record evidence the commissioner's knowledge of the existence of the corporations heretofore mentioned, their structure and method of procedure.

There is ample evidence that while Pacific States fixed the amount of discount on certificates, it so advised the certificate holders; on many occasions by circular letter. The following dated January 31, 1934, September 3, 1935, and November 9, 1935, respectively, are samples: "No investor is urged to part with his certificate at today's market, but if he does it is not unreasonable that he must expect to take the discount today's values have imposed upon investments generally. It is apparent every time an investor sells his certificate today he is strengthening the margin of security for the investor who holds his certificate." "This" (tender) "plan is presented without thought of suggesting to any certificate holder that he dispose of his certificates. This institution has shown notable progress in meeting its depression problems and we have kept investors fully informed of our improving conditions. Our confidence in brighter prospects was clearly revealed in our letter to all investors in June and at this time we have the pleasure of reporting still further improvement." "We desire to emphasize that no investor is obliged to tender his certificates. This arrangement calls for an entirely voluntary offer of certificates and is not designed to force truly distressed certificate holders to part with their certificates at a discount."

As above stated all of the transactions involving the certificate investment exchanges and the conversion of the smaller, widely scattered, non-income properties into larger income properties, including hotels, apartment houses, ranches, etc., were consummated long before the seizure, and in each instance the transaction was consummated with the full knowledge and approval of the commissioner. It is self-evident, therefore, that the commissioner, in the exercise of the broad discretionary power conferred upon him as the administrator of the Building and Loan Association Act, believed that the method adopted by Pacific States in handling the certificate investment exchanges and in the acquisition of the larger properties was well within the scope of the emergency act and operated to the financial gain of Pacific States. In fact no contention is made by respondent that the acquisition of the larger and more valuable income properties resulted in any financial disadvantage to the company. One of the earlier commissioners called as a witness testified that he knew about the exchange of properties for investors' certificates; that with respect to an attempt to foster exchanges of that character, "we had a system that, whenever an association wanted to make an exchange like that, they had to submit it to us and we examined it; and, if satisfactory, approved it"; that "there were several associations that were so weak that I advocated" reducing their holdings by acquiring investors' certificates, which reduced their indebtedness; that after the adoption of the emergency legislation, applications were made from time to time by Pacific

States to approve exchanges of property owned by it for certificates issued by it and also issued by Fidelity; that "the main thing we were interested in was that the deal was made at a profit to the association"; that he thought the exchange of properties for certificates tended to hold up the price of the certificates; that it did make a market for them; that the extent to which certificates were received by the association in exchange for property determined the outstanding obligations of the association; that it was his recollection that "Pacific States endeavored upon a number of occasions to exchange residential property and other holdings for larger properties"; that he gave those transactions consideration before they were concluded; that he "even considered ahead of time; every one which was presented was looked into carefully"; that he thought the exchanges made by Pacific States of parcels of smaller properties for larger holdings "were advantageous and I think the experience of time has shown that they were very advantageous"; that he recalled the acquisition by Pacific States of the Clift Hotel, also the acquisition of the Plaza Hotel; that he recalled both of those transactions because of their magnitude; that there was an investigation made as to each transaction before his approval was given; that he "was convinced, after investigation, that both the Clift and Plaza deals were beneficial to the Association, and hence, beneficial to the certificate holders of the Association."

Appellants contend that in the final order, which in effect means liquidation, the court was not justified in passing upon the activities of the company during the 1933–37 period. Certainly the findings and conclusions upon which the judgment is based are not in accord with the views expressed in recent decisions in this state.

[7] The power of the commissioner is largely discretionary. The act should be construed liberally to uphold his actions. Evans v. Superior Court, 20 Cal.2d 186, 124 P.2d 820. This does not mean that a second commissioner may liquidate the property of an association merely because he believes his predecessor abused his discretion. A third commissioner might hold still another view. Conducted in such a way the business of the association could not be carried on with safety. The officers of the association, compelled under the provisions of the act to obey a commissioner's direction, would live in fear and dread of a seizure and liquidation by his successor. Under such circumstances of conflict of discretionary power, liberality of construction of the act might well be extended to the orders, directions and conduct of the first commissioner unless it should appear that he had conspired with the officers of the association to practice a fraud upon the certificate holders, the stockholders or the public, or at least had acquiesced therein. No evidence of fraud on the part of the commissioners appears in this case, and respondent does not so contend.

A recently filed majority opinion by this court (the order therein has not become final) expressed the thought, relative to a change of personnel of a board and a change of judgment on the part of its members, that "If a school board could thus change the service status rating of those already in the department every time the personnel of the Board happened to change, or every time the members of the Board determined to change policy, the teachers would have no security at all in their employment and in their seniority rights." Aebli v. Board of Education, Cal. App., 145 P.2d 601, 627.

[8] Appellants took the position before the trial court and it is their contention here that none of the transactions which had terminated prior to the seizure could serve as legal justification for the seizure, nor as the basis of findings of fraud, particularly since the commissioner had authorized and approved the same, and that therefore all evidence relating thereto was and is neither material, competent nor relevant. Assuming that the evidence was admissible, under respondent's theory that it was entitled to show an intention to continue the policy which respondent considered hazardous, we are convinced that since those transactions were not illegal, and were fully consummated under the authority and with the approval of the commissioner, they could not, several years thereafter, be used as grounds for liquidation or as the basis of findings of fraud on the part of the association. Stated another way, the authorization and approval by the commissioner of such transactions and conduct amounted to a ratification by the officer within whose discretionary powers it was to grant such authorization and give such approval, and therefore operated as an estoppel in favor of the association. The decision rendered in the recent case

of Farrell v. County of Placer, Cal.Sup., 145 P.2d 570, and the authorities enumerated therein support this view.

[9] It is true that ordinarily estoppel must be pleaded, but such is not the absolute rule. One of the well recognized exceptions thereto is where a party has no opportunity to plead estoppel. In those circumstances he may rely upon estoppel with the same conclusive effect as if it had been pleaded; and no opportunity is given a plaintiff to plead estoppel of the defendant to assert defenses in jurisdictions such as ours, which have a system of pleading under which no replication or reply can be made to the answer. See 19 Am.Jur. p. 836. Furthermore, as said at page 838 of the same volume: "Another circumstance under which a party has no opportunity to plead is where he has no knowledge of the facts constituting the matter until they appear in the evidence at the trial; under this circumstance he may rely on the estoppel in pais." Here the proceeding pursuant to which the trial was had is purely statutory. Thereunder no court proceeding is necessary to authorize a seizure by the commissioner, but upon seizure, if the association deems itself aggrieved thereby, it may within 30 days apply to the superior court to enjoin further proceedings by the commissioner; thereupon an order to show cause is issued, directed to the commissioner, and the court afterwards proceeds to hear the allegations and proofs of the commissioner in response to the order to show cause. In that situation an association has no way of knowing the particular acts or conduct upon which the commissioner intends to rely as justification for the seizure until he has introduced his evidence; and in the present case it consumed approximately two years for the commissioner to produce such evidence. It is apparent, therefore, that neither under the statutory procedure prescribed by the act, nor as a practical matter, did the association have any opportunity to plead estoppel; nevertheless under the rules above referred to it was and is entitled to the benefit of the application of such doctrine.

The second period, subsequent to the emergency, including the date of seizure, may now be considered. In 1938 the commissioner wrote a letter to Pacific States in which he advised the conservation of cash, but whatever prompted the writing of the letter it evidences a knowledge of the customs and practices of Pacific States in that respect. After conferences and communications the commissioner evidently did not deem that any departure from correct practice existed to warrant it in issuing a "cease and desist" order as provided in the statute.

[10] During this period Pacific States accepted its own investment certificates in payment of rentals due from tenants. In February 1939 Pacific States received a "discontinuance" order from the commissioner, which order was complied with promptly. The practice had been discontinued at the time of seizure and therefore, standing alone, may not be considered unless it caused or tended to cause an impairment. This subject will be later considered.

[11] Some matters noted by respondent are without the semblance of merit and need not be discussed. Others are somewhat frivolous, as for example the refusal of the officers of a private company holding stock directly or indirectly in Pacific States to submit its records and files to the commissioner prior to the seizure. Such records may be used if voluntarily submitted, but our attention has not been called to any authority given the commissioner to seize the records of a private corporation not engaged in the building and loan business. The proper method was the institution of court proceedings.

[12] The alleged diversion of funds, and the charge of keeping fictitious and false book accounts, are matters that may be ascertained from the record. Respondent severely criticizes the method adopted by the accounting department of Pacific States stating that it is a violation of the uniform classification of accounts established and prescribed by the commissioner. Appellants argue, in justification of the method, that it had the approval of the accounting department in the commissioner's office. In addition, the accounts were sent to the commissioner and at various times he inspected and reported on them. At any rate in his brief respondent states: "We do not claim these improper accounting practices standing alone constitute the grounds for seizure." If this is admitted, then, standing alone, the practice was not good ground for liquidation unless the accounts showed an impairment of assets.

[13] With regard to the theory of respondent, stressed in his brief—that Pacific States intended to freeze out its own in-

vestors and hoped subsequently to become a real estate company dealing in large holdings—our attention has not been called to evidence that certificate holders who sold at a discount or paid rental with certificates on a discount basis were dissatisfied.

The contention of respondent that appellants hoped to turn the building and loan association into a huge holding company is a mere surmise and conjecture not based upon evidence called to our attention. However, if the commissioner before the seizure believed that such was the case and that by reason thereof the company's further retention of its properties would be in violation of the terms of the act he could, using sound discretion, have followed a procedure less precipitate and one that would not suddenly have jeopardized the assets of the company. He could have resorted to the courts for assistance and a determination of the legality of its retention.

If it had been the intention of the association to cast off its functions as a building and loan association, it would have been necessary to obtain the approval of the commissioner. Incidentally, it would be necessary to satisfy 40,000 certificate holders by the payment of over $46,000,000. Odell testified in effect that if the company had been given an opportunity to clean up its large holdings, which had been of material advantage in staving off impairment, it was the intention to discontinue the policy which the company had by reason of circumstances been compelled to follow.

In all of these transactions, referred to by respondent as "racketeering in the certificate business", there is not one word of evidence that, in taking over large pieces of property, Odell or any of his associates personally benefited financially, whereas, on the other hand, the record shows that as the result of these transactions, the net income from real estate increased $600,000 a year, and the average monthly operating expenses decreased from $109,150 in 1933 to $51,774 in 1938.

[14, 15] Among additional matters charged by respondent is failure to maintain necessary and proper reserves. If a reserve was in fact set up, then it is claimed it was insufficient. The "reserve" includes such sums as the directors transfer from surplus or undivided profits. Pacific States declared no dividends subsequent to 1931 but as a matter of fact set up a loan reserve which amounted just prior to the seizure to the sum of $600,000. In addition to the loan reserves, other reserve accounts were set up, the largest, according to the commissioner's examination, amounting in 1934 to $6,668,679.78. But respondent contends that additional reserve accounts should have been maintained. As an instance—that a reserve should have been set up against possible claims of persons to whom interest had been paid at a lesser amount than that specified in the certificates. During the emergency period the payment of the amount of interest specified in the certificate was prohibited by statute. Paul v. Craemer, D.C., 24 F.Supp. 353. In one instance the claim is made that a reserve fund should have been set up to meet additional income taxes found to be due. It appears that the particular claim by the government in this respect was not called to the attention of Pacific States until after the date of the seizure. There are many other similar contentions, the grounds for which, if correct, could have been eliminated by an order by the commissioner.

[16] Respondent contends that "The Pacific States was at the time of its seizure by the Commissioner and had been for a long time conducting its business under numerous fictitious names." This appears to be a serious charge, but the facts show that certain hotels, the property of Pacific States, were operated under their own names, which were familiar to patrons and the public. In view of the fact that, although it made large purchases of furnishings, not being in the furniture business, it could not buy wholesale, the Pacific States deemed it advisable to organize the Granada Furniture Company, which in fact was a furniture purchasing department of Pacific States. Likewise a storage company was organized, an Allied Properties Company to manage certain properties, and an insurance company. Respondent fails to point out any resulting liability, except contingent, that could injure Pacific States. Appellant points out savings of many hundreds of thousands of dollars a year. The incorporation of the insurance company appears to have been a distinct advantage. Again, in all of these matters it is not claimed that Odell or any of his associates received any personal or financial benefit, either legitimately or illegitimately.

The court found fraud on the part of the company. The basis of the finding of fraud

appears in finding 26, which is followed by fifteen others to the same effect. Finding 2 places responsibility for the alleged gathering of the various corporations into one entity upon Odell as the dominating and controlling figure. It may be assumed that the court was justified in concluding that whatever policy was thus adopted was conceived in the mind of Odell and put into operation by him. These various claims of respondent, upon which the findings of fraud were based, were denied or explained by Odell, or at least his version was given when he was called as a witness by respondent or when he appeared as a witness in support of a motion for witnesses' and attorneys' fees.

Respondent does not justify the particular findings except in a general way. Appellants minutely attack each and argue that the evidence does not justify the conclusion reached by the court. Appellants' contention is based in great part upon the testimony of Odell and the exhibits in the case. Respondent's only reply is that Odell's testimony is not corroborated. We purposely refrain from discussing this matter until we reach the question of the refusal of the court to grant attorneys' and witnesses' fees.

[17, 18] Respondent contends: "The determination of the facts under section 13.11 of the act is within the discretion of the commissioner and in the absence of an abuse of that discretion his determination cannot be disturbed by the court." It is true that ordinarily when a question of fact has been presented for the determination of a board or commission, courts will not interfere unless there is an abuse of discretion. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; North American Building & Loan Ass'n v. Richardson, 6 Cal.2d 90, 56 P.2d 1221. This does not mean that if a building and loan commissioner seizes a company because it refuses to submit its records for examination, or because the commissioner believes the assets to be impaired, that courts must accept his determination if the records show that the company was precluded from presenting evidence upon vital issues. It may be assumed that no court would countenance liquidation merely because of failure to produce records, particularly if the data or the major part thereof is otherwise available, unless in conjunction therewith an impairment appeared. It is true that Pacific States urged brokers doing business with States Auxiliary to become active in the purchase of certificates, but this was in consonance with the "urge" sent out by the commissioner as a protective measure for certificate holders who needed ready cash and were being pressed by private investors who desired to purchase the certificates at distress prices and resell to States Auxiliary at a profit.

[19] In view of respondent's admission that none of the foregoing facts which the court found to be true would justify liquidation, we hold that neither do they justify it taken together unless there was an impairment, although they might furnish sufficient ground for seizure. In view of the fact that the primary purpose of the act is the protection of certificate holders, liquidation should be adopted only as a last resort. This brings us to the crux of the case—was there sufficient evidence to justify a finding of impairment?

[20] Prior to a discussion of impairment it may be well to consider the subject of appraisement. Appraisement is the result of opinion and is subject to all the infirmities of opinion evidence. Under the court's definition of market value, hereinafter considered, the court found impairment of capital to the extent of $10,234,422.22, based upon an audit and appraisal by an expert appointed by the court. In this day and age accumulation of assets of large financial corporations or associations run into hundreds of millions of dollars. An impairment should be judged by its relationship to the whole. In the present case the impairment is approximately twenty per cent. In view of the rule of market value adopted by the court and the wide diversion in the appraisals, this is not necessarily a large amount. The evidence shows that the properties carried by Pacific States at a book value of $37,842,826 had been appraised prior to the trial of the criminal case at a maximum of $42,812,176 and a minimum of $41,236,898.

Among the appraisals presented during the trial was one by a witness for the commissioner who appraised one of the larger pieces of improved property at $920,000. In 1930 he had placed its value at $1,403,500; in 1933 he appraised the land only without regard to the improvements thereon at $1,050,000. In 1937–38, notwithstanding the expenditure of $500,000 on the property in additions and remodeling, he fixed its value as stated, as of March 4,

1939 (when the worst of the depression years were over), at only $920,000. Some of the appraisers were unfamiliar with real estate in the part of the state wherein the properties in question were located. Some of the appraisals were based upon the witnesses' general knowledge of real estate business; some were made without knowledge of cost; others without inquiry as to sales recently made in the district, or whether there had been any. Each appraiser who testified accepted the definition presented by the court. There was also testimony of witnesses that the appraisals would be the same under either the court's definition or a modified form as presented by counsel for appellants. The appraisals were fixed approximately as of the date of seizure.

[21] The building and loan commissioner took possession of Pacific States on March 4, 1939. Under section 13.11 of the Building and Loan Association Act the seizure was authorized if on that date its assets were impaired to such an extent that, after deducting all liabilities other than to its investors, its assets did not equal the sum of the value of its outstanding stock. In a proceeding under section 13.12 where the commissioner relies on impairment of assets to support his seizure the question is whether the assets were in fact impaired at the time of seizure, which is to be determined by the court on the basis of the evidence presented. That is, if in fact assets were not impaired, retention by the commissioner is not authorized simply because he acted properly in the first instance in taking possession upon his finding or belief of impairment.

[22] Traditionally investors in building and loan associations became members or shareholders, whose interests were withdrawable unless insolvency intervened. "Insolvency" as applied to such associations acquired a distinctive meaning. As to corporations generally, no allowance is made for liability to stockholders in computing solvency. 19 C.J.S., Corporations, § 1372, p. 1086, citing cases. But building and loan associations in the nature of things are unlikely to be insolvent in the sense of insufficiency of assets to discharge their obligations other than to their investors. They are held to be insolvent when they cannot pay back the contributions of their members or shareholders dollar for dollar. Rummens v. Home Sav. & Loan Ass'n, 182 Wash. 539, 47 P.2d 845, 100 A.L.R. 570; Mott v. Western Savings & Loan Ass'n, 142 Or. 344, 20 P.2d 236; People ex rel. Barrett v. Logan County Bldg. & Loan Ass'n, 369 Ill. 518, 17 N.E.2d 4; State ex rel. McCormack v. American Bldg. & Loan Ass'n, 177 Tenn. 385, 150 S.W.2d 1048; McPherson v. Railway Sav. & Bldg. Ass'n, 93 Colo. 155, 25 P.2d 388; In re Home Sav. & Loan Ass'n, 189 Wash. 442, 65 P.2d 1249, 1250; 12 C.J.S., Building and Loan Associations, p. 528, § 110; 98 A.L.R. 111, note. The Federal Bankruptcy Act is expressly made inapplicable to building and loan associations. 11 U.S.C.A. § 22.

[23, 24] In this state building and loan associations are authorized to provide for issue of investment certificates to nonmembers, as well as for membership shares, and to provide also for guarantee stock, which is not withdrawable. See discussion, In re Pacific Coast Bldg.-Loan Ass'n, 15 Cal.2d 134, 99 P.2d 251. Section 13.11 is adapted to such structure, without using the word insolvency. A determination of solvency or impairment of assets involves a valuation of assets.

In the case herein the court prepared written definitions of value for the experts to use in appraising the assets of Pacific States. The court was of the view that market value was the standard to be applied. The first instruction submitted to the experts is as follows:

"Market value is the amount this property would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used and make the sale."

The second direction, in form a question, is as follows: "In considering the value of property 'Blank' as of March 4, 1939, and without giving any consideration to what this property was worth to the plaintiff for speculation, or merely possible uses, nor what the plaintiff claims or may claim it was worth to it, nor what it may be worth to the plaintiff for purposes other than the highest and best use to which this property was adapted, nor what this property would bring at a forced sale, nor what this property would sell for under special or extraordinary circumstances, but considering only the highest and best use for which

this property was adapted and its fair market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale, and considering market value to be the amount this property would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser, buying with knowledge of all the uses and purposes to which it is best adapted and for which it is capable of being used, what, in your opinion, was the fair market value of this property on March 4, 1939?" By this direction the experts were told what they were not to consider as well as what they were to consider.

Subsequently, during examination of some of the experts by respondent, the court permitted the following definition of market value: "The highest price, estimated in terms of money, which the property would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser buying with full knowledge of all the uses and purposes to which the property was adapted and for which it was capable."

The definitions given in the directions to the experts were based on the decision in Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979, an eminent domain case in which the plaintiff railroad sought to condemn a strip of land. The court said (page 409 of 156 Cal., page 980 of 104 P.): "* * * the rule is of universal acceptance that the measure of this damage is the market value; that is to say, the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable."

This language, practically verbatim, is embodied in the third definition presented by respondent on examination of witnesses. The court's first instruction does not mention highest price, but generally is in line with this statement in the Heilbron case, adding the element of a cash sale, in accordance with an instruction given in the Heilbron case. The court's second instruction to the experts herein plainly is modeled after instruction VI to the jury in the Heilbron case, although not identical. The standard of value as prescribed by the Heilbron case has been followed in later condemnation cases. City of Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 399, 153 P. 705; Joint Highway Dist. No. 9 v. Railroad Co., 128 Cal.App. 743, 755, 18 P.2d 413; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193, 59 P.2d 177. Upon the cases—condemnation proceedings—respondent seeks to justify the definitions of value, but no California case has been cited in which the court has been called upon to decide the standard of valuation for a determination of solvency or impairment of assets.

Pacific States contends that the definitions embodied in the instructions to the experts herein, based as they were on standards laid down for condemnation suits, are incorrect as applied to valuation for the purposes of determining an impairment of assets under section 13.11 of the Building and Loan Association Act. Pacific States further contends that even if the same general standard of market value is applicable, the definitions given herein are an erroneous and incomplete statement of that standard.

Specifically, appellants contend "that the rulings of the Court in adopting these formulas and in limiting cross-examination accomplished the following: (1) The rule of fair market value, as interpreted by the Court, was adopted as the controlling rule of value. (2) No allowance was made for 'going concern value.' (3) The element relating to value of the amount a prudent owner willing, but not forced to sell, would accept, was excluded. (4) The element of an existing fair market was excluded. (5) The element of a cash price was required, to the exclusion of sales on terms." It is interesting to note that in Wilson v. Superior Court, 2 Cal.2d 632, 637, 43 P.2d 286, 288, a building and loan act case, the court used the following language: "The act is designed to accomplish an important and beneficial public service, the liquidation of insolvent associations in the interest of creditors and claimants. The 'liquidation' of a business is the winding up or settling with creditors and debtors (see Lafayette Trust Co. v. Beggs, 213 N.Y. 280, 283, 107 N.E. 644; Ex parte Amos, 94 Fla. 1023, 1035, 114 So. 760), and the term does not have the restricted meaning urged by petitioner, namely, the sale of the assets for cash. The successful achievement of the object of the statute requires broad rather

than limited powers, and justifies a liberal rather than a strict construction. Not only is this sound policy, but it is in accordance with the unmistakable language of the act itself." If any of the contentions presented by appellants herein relative to value are sound, the definition adopted in this case is erroneous. For the reasons hereinafter stated it will not be necessary therefore to consider each specific objection raised by appellants.

[25] The rules for determining value differ according to the purpose of the valuation. "The basic principle of judicial appraisals is clear: The standard of the valuation must be the one which is best suited to the purpose for which it is made." In re Warren Bros. Co., D.C., 39 F.Supp. 381, 385, quoting from Finletter, The Law of Bankruptcy, p. 558; 1 Bonbright, Valuation of Property (1937) p. 5. It is apparent that the problem of value which arises in determining whether there is an impairment of assets under section 13.11 is more akin to the problem of determining solvency under the Federal Bankruptcy Act, or under other statutes in which solvency is a factor, than to eminent domain valuation. The Bankruptcy Act does not define value except to prescribe that the appraisal of the debtor's property shall be at a "fair valuation." 11 U.S.C.A. § 1 (19), formerly sec. 1(15).

The problem of valuation under the Bankruptcy Act "depends largely on the fundamental question whether the definition of insolvency [there given] refers to an insufficiency of assets to cover all the debts in the event of *liquidation,* or whether it refers to the inability of the debtor to clear himself from his debts in a reasonable period of time by continuing in his business. This distinction between the two possible interpretations of insolvency under the Bankruptcy Act is vital, for on the choice between them depends the whole theory, not merely as to what property should be included in 'the aggregate of the debtor's property,' but also as to what principles of valuation should be applied to this property." 2 Bonbright, Valuation of Property (1937) p. 755. At page 759 the following appears:

"Bearing in mind the peculiar function of a valuation in the cases under discussion—to determine, namely, whether or not the debtor is in such a position that he may be expected to pay off his debts in full—one might assume at first that the test of liquidation value is the only valid one; for the most obvious way in which assets can be used for paying a debt is by their sale and by the application of the proceeds to the payment of the obligations. On further consideration, however, the assumption that liquidation value is the only significant value for measuring debt-paying ability may well be challenged. The ground for criticism is that a normal business pays its debts out of its regular earnings and not out of the sale of its entire assets, fixed as well as current. Under these circumstances, the value of the fixed assets for purposes of paying the debts by a continuation of the business may well be far greater than the price which these assets would bring if offered for sale. Many a businessman whose assets, if left in the business, would be quite sufficient to enable him to clear off his debts in a reasonable time, would be 'insolvent' under a liquidation-value test.

"The second suggested basis of valuation calls for an appraisal of the assets on the assumption that the business will be continued by the debtor and that the fixed assets will be available for debt payment not directly, through their liquidation, but indirectly, through their contribution to the earnings of the business. To be sure, the debtor's stock in trade and accounts receivable might still be valued at realization prices, for they are designed for sale rather than for use in the business."

A standard of "market" value, such as was given to the experts herein, implies adherence to the liquidation theory of valuation. The liquidation assumed is generally held not to be liquidation by a trustee in bankruptcy, a type of sale calculated to depress price, but, rather, a liquidation by the owner with a reasonable time allowed to dispose of the property. In re Studebaker Corp., D.C., 9 F.Supp. 426; Knowles v. Crow, 289 Ill.App. 108, 6 N.E.2d 892; Pruett v. Midkiff, 273 Ill.App. 142, 147; 2 Bonbright, Valuation of Property, p. 762.

Appellants' fundamental objection as we see it is that the definitions as submitted to the experts failed to make any allowance for "going concern" value. Going concern value is variously defined. Sometimes it is said to be the amount by which the value of the assets as a whole, assembled together for use in conduct of a business, exceeds the aggregate of the value of the separate items of property. Again, going concern value is defined as the value which

the business has as a going concern for purposes of enabling the owner to clear his debts within a reasonable time. See 2 Bonbright, Valuation of Property, p. 760. If liquidation values govern in determining impairment of assets under section 13.11, then the nature of the test excludes going concern values in the sense of value to the owner for debt paying purposes.

As we have heretofore said, the value of assets for purposes of paying debts by a continuation of the business may well be far greater than the price which these assets would bring if offered for sale. Many a businessman whose assets, if left in the business, would be quite sufficient to enable him to clear his debts in a reasonable time, would be insolvent under a liquidation-value test.

In a period of depression, real estate sales values may sink so low that owners, except those in necessitous circumstances, are unwilling to sell at prices which can be obtained, with the result that property may be virtually unsalable. Yet the earnings from the property may be such as to indicate that the owner if he continues to employ the property in the conduct of his business will be able to discharge his debts in full, while not himself suffering the loss of his business incident to liquidation. On the other hand, if he is thrown into bankruptcy, and his assets subjected to sale by the trustee in bankruptcy, or other official liquidator, they will likely bring even less than the values estimated in determining solvency on the basis of liquidation by the owner himself. It is obvious that in such a situation regard for creditors, as well as the debtor, favors permitting him to continue in business.

If notwithstanding liquidation or realization values of the debtor's property are less than his total indebtedness, the reasonable prospect is that use of such property in the conduct of his business will yield income sufficient to discharge the owner's indebtedness within a reasonable time, then the value of the property in use to the debtor for the purpose of enabling him to pay his creditors is greater than the present salable value of the property, and, likewise, such value in use for the purpose of determining solvency or impairment of assets may be said to be in excess of liabilities.

[26] Does section 13.11 demand that there be applied in all cases, to the exclusion of other tests of value, a rigid standard under which assets must be appraised on a liquidation basis according to their present salable value? We are of the view that it does not. Section 13.11 does not prescribe the basis of valuation to be followed. Section 16.04 of the Building and Loan Association Act provided: "For the purpose of this article, real property, contracts for the sale of real property, loans, and all other assets (whether like or unlike the foregoing) shall be valued at what may reasonably be expected to be realized therefrom in the orderly and proper conduct of a going business." That section was part of Article XVI, entitled "Rehabilitation, Readjustment, Consolidation, Merger or Reorganization of Associations," which was adopted as part of the emergency legislation and did not continue in effect beyond February 1, 1937. Stats. 1935, p. 816. We are of the view that under section 13.11, which prescribes no basis for valuation, such going concern values as well as liquidation values should be considered in appraising assets. Since the theory is that the sales or realization values of the assets are a measure of the owner's debt paying ability, where, in the particular circumstances, such value is not a true index of that ability, evidence of the value of the property in use to the owner, that is, its going concern value, should be admitted. The Bankruptcy Act prescribes a "fair valuation" and such a valuation is implied, though not expressly called for, by section 13.11 of the Building and Loan Association Act. A valuation based solely on the liquidation standard may in some circumstances not be fair either to creditors or the debtor.

Decisions involving insolvency under the Bankruptcy Act reveal that while the courts in general subscribe to the test of liquidation values, they do not apply that test without exception. Thus it has been held that bonds which were not in default should be valued at par notwithstanding their market value on an exchange is below par. In re Cleveland Discount Co., D.C., 9 F.2d 97; Hutchinson v. Fidelity Inv. Ass'n, 4 Cir., 106 F.2d 431, 133 A.L.R. 1061; In re Warren Bros. Co., supra.

Recognition of the propriety of considering going concern values in the sense of value in use to the owner, is found in cases arising under section 77B of the Bankruptcy Act (now 11 U.S.C.A., § 501 et seq., formerly sec. 207). In re Reading Hotel Corp., D.C., 10 F.Supp. 470; In re Warren Bros. Co., supra; In re Gibson Hotels, D.C., 24 F.Supp. 859, 863; In re

Reb Holding Co., D.C., 35 F.Supp. 716; In re Geiser Mfg. Co., D.C., 18 F.Supp. 506, 508; In re Wickwire Spencer Steel Co., D.C., 12 F.Supp. 528, 533; 2 Bonbright, Valuation of Property, p. 885. A determination of solvency in reorganization proceedings under the above provisions may be required for several purposes. The definition of insolvency contained in section 1 of the act, heretofore quoted, which simply calls for a "fair valuation," is applicable to such proceedings as to others under the act. In re Reading Hotel Corp., supra.

Indicative of the judicial attitude in possible reorganization proceedings is the following from In re Warren Bros. Co., supra, 39 F.Supp. page 384: "It is well settled that the words 'fair value' need not mean liquidating value, nor need they be regarded in law as equivalent to present realizable value. Duncan v. Landis, 3 Cir., 106 F. 839, 858; In re Geiser Mfg. Co., D.C., 18 F.Supp. 506, 508; In re Gibson Hotels, Inc., D.C., 24 F.Supp. 859, 863. And especially is this true when we consider that the purpose of 77B [11 U.S.C.A. § 207] is to enable corporations in financial difficulty to readjust their indebtedness and continue in business without a forced liquidation of their assets. In re Geiser Mfg. Co., supra; In re Reb Holding Co., D.C., 35 F.Supp. 716, 717."

"In Gerdes on Corporate Reorganizations, § 93, p. 245, it is stated: 'In a number of decisions it has been held that the going concern value of an active business must be considered in determining the fair value of its property. Fair value is not the value of the property after its going concern value has been reduced or destroyed by the intervention of bankruptcy proceedings, or by a levy and execution on the property of the debtor.'" In re Geiser Mfg. Co., supra, 18 F.Supp. page 508.

In In re Gibson Hotels, Inc., supra, 24 F.Supp. page 863, considering insolvency under the Bankruptcy Act, the court said: "The 'fair valuation' contemplated by the statute is not the value at which such assets could be converted into cash on a distressed market or at forced sale, but is the value of the assets taken in their relationship to the business of the hotel as a going concern. In re Bucyrus Road Machinery Co., 6 Cir., 10 F.2d 333; In re Nathanson Bros. Co., 6 Cir., 64 F.2d 912. To apply this test of value to a hotel property, it is necessary to take into consideration all of the elements entering into the intrinsic, as well as the selling value of the real estate, and also the earning power of the property."

In Duncan v. Landis, 3 Cir., 106 F. 839, 859, the court said: "Again, the act expressly says that a man shall be deemed insolvent only when the aggregate of his property, at a fair valuation, shall not be sufficient to pay his debts; but the court below gives an unwarranted construction to this definition, by adding to the plain meaning of a 'fair valuation' the requirement that the debtor must be able to realize from his property a sufficient amount to pay his debts. This seems to us to clearly depart from the plain requirements of the statute, by adding a condition not therein set forth. A man's property, at a fair valuation, may amount to sufficient to pay his debts, although he might not be able to realize at once the amount of that valuation."

In re Crystal Ice & Fuel Co., D.C. 283 F. 1007, 1009, contains the following: "Salable value and fair valuation are not synonymous and the conclusion 'wholly insolvent' because of the fact that the 'salable value' of the company's property was less than its debts may be and is proven to be not at all the insolvency of the Bankruptcy Act, viz. insufficiency of its property at fair valuation to pay its debts. * * * That is, although his property be not presently salable for enough to pay his debts, its fair valuation may be more than enough; and if so, he is not insolvent nor subject to bankruptcy for insolvency."

Two more recent statements are of interest: "Section 1 of the Bankruptcy Act, 11 U.S.C.A., § 1, provides that a person shall be deemed insolvent within the provisions of this title 'whenever the aggregate of his property * * * shall not, at a fair valuation, be sufficient in amount to pay his debts.' This court has held that in arriving at such fair valuation the property of the alleged bankrupt must be considered as the property of a going concern, that is, as property adapted to and used for the purpose of carrying on the business in question." In re Nathanson Bros. Co., 6 Cir., 64 F.2d 912, 913.

"It follows, therefore, that the question of insolvency at the time of the appointment of the receiver must be determined by the valuation of the property at that time as that of a going concern. As the special master and the trial judge adopted a differ-

ent basis, and as it is certainly not clear on this record that they would have found insolvency on the basis of a going concern valuation, the decree of adjudication must be reversed." In re Bucyrus Road Machinery Co., 6 Cir., 10 F.2d 333, 334.

[27, 28] Where the question is whether, under section 13.11 of the Building and Loan Act, an association should be permitted to continue in business, the answer should be that it may, provided the prospect is that it can discharge its liabilities through continued operation notwithstanding the amount for which its assets could be sold is less than its liabilities; that in such circumstances its assets are not impaired. The instructions given to the experts herein confined their consideration to liquidation values, excluding going concern values, and are, therefore, erroneous.

That cash value was the only value considered by the court is demonstrated by the record. After the leading and supervising experts testified, they were recalled and questioned specifically relative to the two definitions given by the court and that framed by the attorneys for the commissioner, and the evidence shows that the appraisals were based upon the court's definition.

That the trial court adhered to the test of cash value is shown by the fact that prior to the denial of appellants' motion for attorneys' fees, the court, in an endeavor to determine whether appellants could proceed, specifically interrogated Odell on the question of the possibility of the production of evidence under the rule of the cash value test. Odell frankly admitted that under the court's definition of cash value no such evidence was available. The court thereupon asked Odell whether evidence could be produced under the definition adopted by the attorneys for the commissioner. Odell replied in effect that there was such a possibility. The purpose of the examination was to determine whether attorneys' fees would be allowed, so that appraisals could be introduced on behalf of appellants.

If bad faith as set forth in the findings, based upon alleged fraudulent transactions, was the sole reason for the denial of the motion for attorneys' fees, then no purpose was served in the investigation of further evidence on "valuation." If impossibility of production of evidence of value which would be admitted in evidence was in part the basis for the denial of the motion, then the court must have eliminated the commissioner's value test, as appellants, though not approving, indicated a willingness to proceed under that test. In view of these facts we must conclude that the court in fixing the valuation of the assets adhered to the "cash" value, which eliminated going concern value.

[29] "Going concern" may not be strictly defined to fit all cases. It is sufficient to say that ordinarily any element that tends reasonably and legitimately to enhance the value of property rights based upon the existence of the business in which they are involved, may be taken into consideration in ascertaining the full value of those rights. Reasonable discretion should be used in determining the meaning of this term as in the case of determining any market value; fair market, cash, actual cash, full cash, true cash, intrinsic, normal or other designated values not defined by the governing statute.

The difference between "going concern" and "cash" value is of paramount importance in this case. It is the difference between a business operating in an orderly manner, whether under good or difficult conditions, and with the chance of working out in case of the latter, and one suddenly arrested, the immediate result of which is to eliminate the element of going concern, and to place assets at the mercy of speculators regardless of the interests of certificate holders who are vitally concerned in whether their investment shall be given a chance to survive.

The question of impairment, depending on value, is the crux of the case. The definitions submitted by the court to the appraisers placed a false basis of evaluation and permitted the appraisers to fix minimum figures. Objections to questions regarding going concern value were sustained. The findings were based on estimates under the terms of the definitions. Pacific States was not permitted to introduce evidence tending to show the true going concern value. The definitions and the findings thereon are not only erroneous, but prejudicially erroneous. The judgment herein will necessarily be reversed.

[30] It has been suggested that, irrespective of the erroneous definition of value, and the admission by respondent that any of the various other alleged improprieties if standing alone would not justify seizure or subsequent liquidation, still the court found that Pacific States was the alter ego

of the other interested corporations and that the alleged improprieties taken as a whole constituted a fraud. The only persons who could derive benefit from the certificate exchanges were the certificate holders who held on to their certificates. The only ones who could be injured were the holders who sold their certificates at a discount. The present record, so far as our attention has been called thereto, is devoid of proof that any Pacific States certificate holder claimed to have been defrauded. Even in the case of Eggert v. Pacific States S. & L. Co., 57 Cal.App.2d 239, 242, 136 P.2d 822, the question was not one of fraud, but merely the construction of the terms of a document.

It has been suggested that there is a case pending involving the rights of the certificate holders who sold at a discount. The pendency of that case, if it may be here considered, is in fact an argument that their rights may be determined without resort to liquidation. That proceeding is an independent one and should play no part in the determination of this appeal. Respondent commissioner recognizes this fact and accordingly makes no reference thereto, but in view of the suggestion that such a case is pending it seems proper to say that neither the complaint therein, nor the findings, nor the judgment in favor of the Pacific States, indicate that fraud was an issue therein, and the commissioner on appeal does not recognize fraud as an issue. The judgment therein is primarily based upon the doctrine of estoppel.

At this point it is not inappropriate to mention that it appears from the record herein that Odell and some of his associates were indicted and tried in the federal court on charges of fraud based upon the exchange transactions herein involved, and that they were exonerated by a directed verdict, from which no appeal was taken.

If the certificate holders who sold at a discount believed they had been defrauded they could have had recourse in an action to remedy the wrong without damaging the interests of their fellow certificate holders through liquidation on the present cash appraisal basis, necessitating their acceptance of a part of a dollar for the whole, and that "part" necessarily materially decreased by the payment of expenses attending seizure, trial and liquidation. The liquidator, under the provisions of the Building and Loan Association Act occupies a position analogous to that of a receiver. This court once expressed the following thought: "Receivers are often legal luxuries, frequently representing an extravagant cost to a losing litigant. When it appears that no reasonably certain benefit will result to one litigant, and a distinct disadvantage will result to another, courts should weigh carefully the propriety of appointing a receiver." Elson v. Nyhan, 45 Cal.App.2d 1, 5, 113 P.2d 474, 476.

Notwithstanding the present appraisal, if through liquidation the properties should be sold for cash, and on account of a possible material increase in the value of real estate, etc., sell for an amount equal to or in excess "of the value of its outstanding shares and investment certificates", etc., sec. 13.11, then what justification could there be for the liquidation?

[31] The above prompts us to say that while the commissioner's duty is to offer proof of value as of the date of seizure, if in fact at the time of this hearing the appraised value had been shown to be equal to or in excess of the value of the outstanding certificates, etc., any order resulting in liquidation would not have been factually or legally justifiable. We repeat that the purpose of the act is not the protection of officers or of stockholders of building and loan associations, but primarily the conservation of assets for the certificate holders.

[32] Pacific States also filed separate appeals from an order denying an application for attorneys' fees for services thereafter to be rendered in the action resisting the seizure by the commissioner. The prayer was that the court direct the commissioner to pay to Pacific States' attorneys for services to be rendered thereafter in the action from the assets of Pacific States a reasonable sum, on a periodic basis, to be fixed by the court. Such a motion, addressed to the discretion of the court, if made upon reasonable ground and in good faith should be allowed. Anderson v. Great Republic L. Ins. Co., 41 Cal.App. 2d 181, 106 P.2d 75; Arakelian v. Sears, 53 Cal.App. 646, 200 P. 757; Simonton v. Los Angeles T. & S. Bank, 205 Cal. 252, 270 P. 672; O'Malley v. Continental Life Ins. Co., 343 Mo. 382, 121 S.W.2d 834; Flynn & Emrich Co. v. Federal Trade Comm., 4 Cir., 52 F.2d 836; Pratt v. Robert S. Odell & Co., 49 Cal.App.2d 550, 122 P.2d 684; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107.

It is interesting to note that during the progress of the trial there were many changes of attorneys on each side—in some instances without explanation appearing in the record. It may be assumed that the attorneys for the commissioner were paid in whole or in part. The present record does not show the full amounts paid each attorney or the appraiser. The commissioner paid one attorney $3,500 a month; another $4,000 a month. One appraiser, for at least a time, was paid $200 a day by the commissioner. Some of the attorneys for the Pacific States refused to continue without compensation. One seems to have refrained from taking an active part in the hearing after the court defined "value." Apparently no order has ever been made allowing fees to the attorneys who represented the Pacific States. The conduct of the case, as it appears from the transcript was a demonstration of legal efficiency by the representatives of the respective parties. The trial court denied the motion and specifically found that Pacific States did not commence or prosecute this action in good faith or upon reasonable grounds, but on the contrary that the company acted in bad faith.

Inferences might have been drawn the other way. While its determination was not binding upon the trial court herein another tribunal, as shown by the present record, had found that there was no bad faith but that the acts and conduct of the officers of Pacific States were legally justifiable.

The transactions that occurred during the emergency period were permitted by statute. Even though it be deemed that Pacific States did not operate strictly in accordance with statutory provisions, it operated with the consent or acquiescence of the commissioner. The latter statement is practically true of the time from the close of the statutory emergency period until the date of seizure except as regards the payment of rentals with certificates and matters akin thereto, discontinued upon the order of the commissioner shortly before the seizure.

Throughout the record there is not one particle of evidence—or at least attention has not been called to any—that reflects upon the integrity or honesty of purpose of the prior commissioners who were at all times aware of the procedure adopted by Pacific States. It is not claimed that there was a conspiracy among any of the commissioners and the officers of Pacific States or its allied corporations. It may be repeated here that no one gained an advantage in the various transactions except the holders who retained their certificates. Of course the holders of preferred stock of the allied corporations would benefit before the holders of common stock, in which latter classification are found Odell and his wife.

The findings of fraud and the determination that Pacific States acted in bad faith are questions of fact. If it be assumed for the purpose of discussion that some fact or an inference drawn therefrom justified the finding that the practices of the company resulted in loss and detriment to certificate holders, and that this condition was brought about through the bad faith of the officers of Pacific States, even under such circumstances we are forced to the conclusion that there was an abuse of discretion for the following reason: The primary purpose of the provisions of the Building and Loan Association Act is to protect the certificate holders, if possible without seizure as seizure generally tends to destroy confidence on the part of the public, which in itself is a species of impairment of assets. In the present case the record shows 40,000 certificate holders at the time of seizure. Even if it be assumed that seizure is justifiable, still the terms of the act indicate that liquidation should not be resorted to except under the compulsion of necessity.

If an association deems that it is aggrieved, it may apply for relief to the superior court. The court will hear the matter upon the merits and may direct the commissioner "to surrender such business, property and assets to such association" or it may dismiss the proceedings. Under any circumstances, when the act is read in its entirety, its purpose is plain, namely, the conservation of the assets of an association for the benefit of the certificate holders.

Others than Odell owned the controlling stock in the parent companies, one of which —the State Guaranty—respondent delights in referring to as the "foster parent." Here was a distinct interest, in addition to that of the Pacific States certificate holders, entitled to have the Pacific States' side of the story presented.

Whether the trial court concluded that the alleged fraud was attributable to one or to all of the officers, it was still incumbent upon that court, if financially and rea-

sonably possible, to permit those accused of fraud or bad faith to defend against such serious charges. A glance at the record of payment of attorneys' fees by the commissioner to his legal staff, employed to act in this particular case, does not indicate that there was such financial embarrassment as to preclude the payment of reasonable fees to the attorneys representing Pacific States.

In view of the incorrect definition of value adopted by the trial court, the association should have been permitted to continue with the case and present appraisals in conformity with the views expressed herein and, under all the circumstances, the evidence should have been presented by counsel compensated therefor.

We cannot agree with respondent that the attorneys for appellants having proceeded for a period of two years without compensation could have remained for a while longer. There must be an end to everything, even the patience of lawyers contributing time and talent to a lost cause. The legal battle was practically finished when the court adhered to the definitions of value presented to the appraisers. One of the attorneys for appellants frankly admitted that if the court's definition was correct, it would be impossible for them to prove that there was not an impairment of capital. Odell on the witness stand made the following statement: "What we actually feel, your Honor, is this, that you should permit us to put in what we think are the normal values of the properties, the intrinsic value of the properties, the fair market value of the properties, as we understand fair market value, and let your Honor consider all of those elements in determining what you think these properties are worth, and more than that, to determine whether or not this company should be liquidated at this time."

If it appeared that there was a reasonable possibility that Pacific States could produce evidence of its financial soundness, the motion for attorneys' fees should have been granted. It should be mentioned that the court indicated its willingness to grant fees to witnesses. This seems rather inconsistent with the finding of bad faith. However, the proper presentation of the evidence required the aid and assistance of trained men of the law.

One of the reasons for the denial of the motion was that Pacific States could not produce evidence that its assets were of an amount equal to the "fair market value as defined by the two questions prepared by the court."

[33, 34] The denial of the motion precluded appellants from presenting evidence in explanation of accounting practices as to the alleged diversion of funds, the acquisition of large holdings, the discounting of certificates, reserve fund accounts, etc. If it be claimed that there is evidence of such matters appearing in the testimony of Odell, then in view of respondent's contention that there is no corroboration, such corroborative testimony should have been permitted. If it be claimed that the court had a right to disbelieve Odell, then Pacific States was materially interested in presenting other evidence which might convince the court that the facts related by him were true. Appellants were denied both the opportunity of presenting evidence in refutation of the charged fraud and the right to present appraisals in accordance with a correct definition of value for the purpose of liquidation. The findings are based upon the evidence presented by respondent plus the evidence given by Odell. Appellants could not proceed with their side of the case. Under the circumstances the findings may not receive the appellate approval usually accorded findings based upon conflicting evidence. We are forced to hold that there was an abuse of discretion. Appellant Pacific States' position on this point should be sustained, and reasonable attorneys' fees, with due regard to the protection of the financial interests of the certificate holders, should be granted.

[35] State Guaranty, intervenor and appellant, also filed an application for attorneys' fees, witnesses' fees and costs. The motion was denied. No authority holding that a parent company is entitled to attorneys' fees, etc., has been submitted, and no convincing argument presented. It has been held that under certain circumstances a holding company may expend its own money to defend a company in which it is vitally interested and holds the controlling stock (Pratt v. Odell, supra), but it may not be awarded fees from funds in the hands of a commissioner, such as the building and loan commissioner under the circumstances of the present case. It is only the company seized that may obtain such assistance. For the reasons stated herein, the orders of denial of attorneys' fees, etc., to State Guaranty should be upheld.

Finally, it may be advisable to state that in reaching the conclusions herein we have eliminated from consideration the allegations in appellants' briefs of corrupt political machinations and purposes, and in the pleadings of the alleged arbitrary method of the commissioner in making the seizure. In the first instance, appellants were not permitted to present evidence in proof thereof, if true, and in the second, were prohibited from offering any evidence to support their allegations. Whatever the basis of these charges on either side, the detriment to the interests of the 40,000 certificate holders in the sale of the company's assets at sacrifice figures are paramount to the determination of a personal or legal feud, if any exists, between Odell and the commissioner. We also may say that the legal rights of 17,000 certificate holders (the number alleged by the commissioner), who sold at a discount, might be jeopardized by an affirmance of the judgment on the main issue.

The orders appealed from in reference to attorneys' fees, etc. by State Guaranty Corporation are affirmed. The orders appealed from by Pacific States Savings and Loan Company in reference to attorneys' fees, etc. are reversed. The judgment is reversed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting).

I dissent.

I am firmly convinced that the majority opinion is based upon a fundamental misconception of the issue involved in this proceeding, and the law applicable thereto. The majority opinion brushes aside carefully drawn findings of the trial court that are amply supported by evidence and the reasonable inferences therefrom; it adopts a definition of impairment of assets that is contrary to the plain intent of the legislature, which definition results in depriving the commissioner of his main regulatory power, and in rendering the main regulatory provisions of the building and loan act of doubtful if of any value for the protection of investment certificate holders and of the public; it assumes that the main purpose of this proceeding and the main issue decided was whether this company should be continued as a going concern or should be liquidated, when such issue, under the plain provisions of the Act, was not involved, and under the findings, conclusions and judgment was not decided; it confers on the superior court, by inferential interpretation, the power to determine whether a company shall be liquidated or continue in business after a lawful seizure, when the Act places that determination within the discretionary power of the commissioner; it holds that the takeover on March 4, 1939, was proper and in conformance with the statute and then reverses the judgment when that was the main issue involved; it assumes that the appellants are entitled to relief in excess of the issues framed by the pleadings and in excess of the relief permitted by the Act; it holds that if a commissioner has authorized or approved the doing of acts in direct contravention of the statutory law, the public, acting through the commissioner, is forever estopped from challenging those acts even if, forsooth, they have resulted in the company now being in an unsafe condition so as to render its further proceeding hazardous to the public or to the investors; it holds that the commissioner has no power to examine the books of another corporation even though that corporation is the agent and alter ego of a building and loan association; it treats the case as if the burden were on respondent to sustain the findings rather than on appellants to attack them; it makes bald statements of fact as if they were sustained by the record without reference to the record, when such statements are not sustained thereby; it reverses the trial court and sends the case back for a retrial because of what is held to be an erroneous definition of value without defining the term for the benefit of the court on the retrial; and it holds that, as a matter of law, it was an abuse of discretion for the trial court to deny attorneys' fees to the seized company to show its good faith, when that fact, under the cases, must be shown before attorneys' fees may be allowed.

This case took over two years to try. The record shows that all during this period both sides were ably represented by counsel of unquestioned ability and integrity. In spite of charges, express and implied, of appellants to the contrary, the record shows that the trial judge exercised extreme patience in consideration of the issues, and, except where rules of law prohibited, permitted counsel a wide latitude in the introduction of evidence. He demonstrated a thorough and complete knowledge of the issues and the law ap-

plicable thereto. He adopted findings that, while clear and concise, are sufficiently detailed to show without ambiguity his theory of the case, and the facts upon which he relied to support that theory. Throughout this long, tedious and exhausting proceeding he was patient and tolerant of counsel and demonstrated time and again his complete impartiality towards, and his lack of prejudice against, either litigant. In my opinion counsel on both sides of this litigation and the trial judge are to be complimented on a difficult job well and ably done.

The fundamental error in the majority opinion is in the assumption, frequently expressed, that the main issue before the trial court was whether this company should be liquidated or returned to its former management. This fundamental misconception of the true issue involved permeates the entire opinion, and is the basic cause of most of the other errors contained in the opinion, some of which have been enumerated above.

The issue as to whether this company should be liquidated or not is not directly or at all involved in this proceeding. In finding No. 96 the trial court expressly found that "a judgment for the Commissioner in this action will not necessarily result in the liquidation of Pacific States. The determination which the Commissioner has made to liquidate Pacific States is subject to his right to make such other disposition of all or any part of its business, affairs and assets as is or may be authorized by law." In the conclusions of law, after setting forth its conclusions as to the validity of the seizure, the trial court in conclusion No. 10 stated: "The Commissioner lawfully demanded and took possession of the property, business and assets of Pacific States on March 4, 1939, and pursuant to the Building and Loan Association Act, and particularly Section 13.11 thereof." In conclusion No. 11 it is stated: "The Commissioner is entitled to retain possession of the property, business and assets of Pacific States until it shall with the consent of the Commissioner resume business or until its affairs be liquidated." It was then provided that neither Pacific States nor State Guaranty was entitled to an injunction and that each of their complaints "should, upon the merits, be dismissed." Judgment of dismissal was entered in accordance with these findings and conclusions. The findings and conclusions are in exact accord with the issues as framed by the pleadings, and in exact accord with the powers conferred upon the trial court by the building and loan act.

The commissioner took summary possession of the company under § 13.11 of the Act on March 4, 1939. The complaint for an injunction was filed by Pacific States on March 6, 1939. By that petition the validity of the seizure and the retention of the assets were the only issues that were or could be involved. On March 20, 1939, the Commissioner filed his answer in which he alleged the facts which in his opinion justified the seizure and retention of assets, and in which those two questions and those two questions alone were put into issue. The trial of the action was commenced on the same day the answer was filed. From then on, and for over two years thereafter, the case was tried on the theory that the validity of the seizure and the right to retain assets were the issues involved. As already pointed out, the case was decided on that theory.

So much for the pleadings and the trial. Now as to what the statute provides. Section 13.11 provides that if the Commissioner shall find that certain facts exist he may issue a cease or desist order, and if the company does not comply, "or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock, or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, *then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.*" (Italics added.) It is obvious from this section

that, contrary to the assumption in the majority opinion, when the commissioner takes possession, liquidation is not inevitable. The section confers power on the commissioner to take summary possession under certain circumstances. Once he has acted, unless he is ordered to return the company under § 13.12, he operates the company. Upon him, and upon him alone, is conferred the power to determine whether it will be in the best interests of the investors and the public to continue to operate the business, and after correcting abuses or building up the impaired assets, if that is necessary, to return the company to its management, or whether the best interests of all concerned will best be served by liquidation. Section 13.12, under the terms of which this proceeding was instituted, does not provide for a court test of this determination. That section provides: "Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby [i.e., by the taking of possession] it may * * * apply to the superior court * * * to enjoin further proceedings * * *." The provision obviously permits the aggrieved association to test the correctness of the commissioner's findings upon which he took the company over. There is no provision in this or any other section of the Act permitting the association to test the validity of the commissioner's determination, subsequently made, as to whether the company shall continue to operate under his control or shall be liquidated. Once he has validly taken over, the determination of that question is left to his discretion.

This conclusion is fortified, if indeed it needs fortification, by other provisions of the Act. Section 13.13 provides for the powers of the commissioner upon taking possession. It provides that he shall have certain specified powers and unless he "shall be enjoined from further proceedings and directed to surrender such business, property and assets *or unless such association shall with the consent of the commissioner resume business,* then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided." (Italics added.) Section 13.16 provides for the powers of the commissioner once he has determined to liquidate. Among other things that section provides that: "The determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court," etc. No provision for a court test of that determination is to be found in the Act, and certainly is not found in § 13.12.

It is too plain to require further comment that the Act provides that the commissioner shall have power to take over an association if certain facts exist; that an aggrieved association may, under § 13.12, test the validity of that takeover; that the jurisdiction of the superior court under § 13.12 is limited to determining the validity of that takeover; that if the commissioner validly takes possession for any of the reasons set forth in § 13.11, then he, and he alone, has discretion to determine whether to continue the business of the company after correcting abuses, or whether the best interests of all will be served by liquidation. There is no provision of the Act, and certainly § 13.12 under which this proceeding was instituted does not so provide, that this last determination is subject to court review. The majority opinion in this case from beginning to end is predicated on the erroneous assumption that this court is reviewing the determination of the commissioner to liquidate.

It is true that on October 20, 1939, the commissioner, acting under § 13.16 of the Act, filed a notice of intention to liquidate. It is true that because of conditions found to exist in this proceeding the commissioner may decide on complete liquidation of the company. It is also true that some steps towards liquidation have been taken by the commissioner pending this appeal. But in this proceeding the court did not and could not pass on that question. The result of this proceeding is not to make liquidation inevitable. Even at this date, if the commissioner should decide because of the unprecedented rise of real estate values in recent years, or for other reasons, that it would be to the best interests of all concerned to reorganize and ultimately to return this company to its old or a new management, there is nothing in the decision of this case that would prevent him. Liquidation is an entirely false issue in this case.

The reasons why the legislature failed to provide in § 13.12 for a court test of the determination of the commissioner to liquidate, made after he has taken possession under § 13.11, are obvious. The legislature determined that if a company committed any of the very serious acts that justify a

summary takeover under § 13.11, the rights of all concerned would best be protected by the commissioner taking over and operating the company. The legislature then felt the commissioner could decide whether to operate the company so as ultimately to return it to its management or to liquidate. It determined that the aggrieved association could challenge the validity of the seizure and the discretion of the commissioner in retaining the assets, but not that it could challenge, at least under § 13.12, the determination of whether liquidation or continued operation was in the best interests of all concerned. These conclusions are amply supported not only by the language of the statute, but by the cases interpreting this or similar statutes. In North American Building, etc., Ass'n v. Richardson, 6 Cal. 2d 90, 56 P.2d 1221, it was contended that at most a mere technical impairment existed and that while that might have justified the commissioner in taking possession, when the facts appeared at the hearing, the trial court had power "to determine whether or not the financial condition of the association was sufficiently sound to warrant a disaffirmance of the action of the commissioner." Page 97 of 6 Cal.2d, page 1224 of 56 P.2d. The Supreme Court held that the obvious answer to this contention was to be found in the provisions of § 13.11; that if any impairment, technical or otherwise, existed the commissioner "might in his discretion take over the business, property, and assets of the association showing such impairment. * * * The statute plainly sets out the conditions upon which the commissioner was entitled to take over the assets, and we do not believe that the power and authority of the superior court was so enlarged by the use of the words in the statute, 'upon its merits' that it could determine that the action of the commissioner was not justified when the evidence before it showed the existence of such conditions." Page 98 of 6 Cal.2d, page 1224 of 56 P.2d. The court then held that § 13.12 protected the association from any arbitrary or unjust seizure. The appellant association then contended that the superior court had power in a proceeding under § 13.12 to determine, even if the seizure was proper, that the retention of possession was unjustified. At page 100 of 6 Cal.2d, at page 1225 of 56 P.2d, the court stated: "We find no merit in appellant association's further contention that the *retention* of the business, property, and assets of the association by the commissioner was not justified. The statute * * * provides that the commissioner shall retain possession 'until such association shall with the consent of the commissioner, resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.' It appears from this language that the commissioner having once rightfully taken possession of the assets of an association, it lies in his sound discretion whether he will retain possession of them or return them upon an approval of some plan of reorganization."

It is the law that where a question of fact has been committed to a particular officer, his determination will not ordinarily be reviewed by the courts, except as provided by statute, except for gross abuse of power. In Bank of Italy v. Johnson, 200 Cal. 1, 34, 251 P. 784, 797, in referring to prior decisions, the court stated the rule as follows: "* * * this court held that, when subordinate boards or commissioners were by statute invested with discretion with respect to the exercise of their powers, courts would not interfere with such discretion in the absence of grave reasons tending to show that fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law had entered into or characterized the determination of such bodies; and that, in the absence of such showing of an abuse of discretion, the determination of such board or commission would not be interfered with or overthrown." See, also, McGinty v. Gormley, 181 Ga. 644, 183 S.E. 804; Fidelity & Casualty Co. of New York v. Brightman, 8 Cir., 53 F.2d 161; In re Dade County Security Co., 112 Fla. 444, 153 So. 505; Deatsch v. Fairfield, 27 Ariz. 387, 233 P. 887, 38 A.L.R. 651, applying this rule to state commissioners in taking possession of financial institutions; see, also, United States Sav. Bank v. Morgenthau, 66 App. D.C. 234, 85 F.2d 811; North American Building, etc., Ass'n v. Richardson, 6 Cal. 2d 90, 56 P.2d 1221; Evans v. Superior Court, 20 Cal.2d 186, 124 P.2d 820.

How do these principles apply to the instant case? On pages 6 and 7 of the majority opinion [146 P.2d 432] it is held that the commissioner was legally justified in the seizure because the association refused to permit certain papers to be examined, and in fact, destroyed them after de-

mand. Under § 13.11 it is made a ground of summary seizure "if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants * * *." The majority opinion does not disclose the facts surrounding this occurrence. The facts are summarized by the trial court in finding No. 15, which reads as follows: "Shortly prior to February 20, 1939, the Commissioner determined to make an extra examination of and to devote extraordinary attention to the affairs of Pacific States, and he authorized his Chief Examiner, Milton O. Shaw, to make such examination, with such assistants as he might choose. On February 17, 1939, pursuant to such authority, Shaw appeared at the office of Pacific States and demanded that he be permitted to make such examination without any restrictions on his activities by Pacific States in so doing. Pacific States refused to permit him to make such examination but on February 20, 1939, Pacific States stated that it would permit such an examination and thereupon the examination commenced. Shortly thereafter Shaw found on the books and records of Pacific States certain figures which were designated 'S.T.P.' and 'S.C.P.' He was informed by its employees that these symbols respectively designated 'sacrifice Term price' and 'sacrifice cash price', that they were related to the assets of Pacific States and that they were supported by appraisals in its files. The figures designated as 'sacrifice term price' were in truth and in fact figures representing the fair market value of the assets of Pacific States as determined from time to time by appraisers employed by it. Shaw thereupon, on or about February 21, 1939, asked Pacific States to show him such appraisals. He was informed by employees of Pacific States that they could not be located. Immediately after Shaw's demand, and after Odell had been informed thereof, Odell directed the officers and employees of Pacific States to remove all of such appraisals from its files and destroy the same, and on February 23rd and February 24th, 1939, such officers and employees did secretly remove substantially all of such appraisals from the files of Pacific States, caused them to be taken to the Central Tower Building in San Francisco and to the Hermoyne Apartments in Los Angeles, and there burned them. Odell, prior to the destruction of such records, and prior to ordering their destruction, was advised by one of the attorneys for Pacific States that the Building and Loan Act required it to permit Shaw to inspect such documents. Those documents were destroyed by Pacific States for the purpose of preventing the Commissioner and his examiners and assistants from inspecting them and their destruction constituted a refusal by it to submit them to the inspection of the Commissioner and his examiners and assistants. Those appraisals showed that the fair market value of the assets of Pacific States on March 4, 1939, was many millions of dollars less than the valuations at which such assets were carried on the books of Pacific States. The destruction of these appraisals was a violation, among other things, of the Uniform Classification of Accounts established and prescribed by the Building and Loan Commissioner of California." The finding is supported by ovewhelming evidence. It should be pointed out that under § 10.02 of the Act it is provided that: "A director, officer, agent or employee of any association shall be guilty of a felony who * * * Having the custody or control of its books, wilfully refuses or neglects * * * to exhibit or allow the same to be inspected and extracts to be taken therefrom by the commissioner, or any of his deputies or examiners."

These facts, according to the majority opinion, justified the commissioner in the seizure of March 4, 1939. In other words, the majority opinion holds that the seizure on that date was lawful. But, says that opinion (p. 7 [146 P.2d 432]), "There is a great deal of difference between the right of seizure and the subsequent right of liquidation." The opinion then goes on to hold that because, according to the concept of value adopted by the majority, a certain element was omitted by the trial court in its definition of value, there was no proper evidence of impairment of assets, and therefore the commissioner was not justified in liquidating the company. Thus the majority opinion falls into the fallacy of assuming that there were two separate issues before the trial court—the validity of the seizure, and the validity of the commissioner's determination to liquidate. As already demonstrated, that last issue was not and could not be involved in this proceeding. Once it is determined that the seizure was valid, the only other question involved is whether the commissioner abused his discretion in retaining the assets of the company after the seizure.

That is an entirely different question from whether or not he abused his discretion in determining to liquidate. Certainly it is reasonable to believe that where a company or its officers have committed any of the serious offenses warranting a summary seizure under § 13.11, the commissioner, in the exercise of his legislatively conferred discretion, might determine to retain the assets and operate the company even if it were solvent. To hold that after a lawful seizure the only question involved is whether or not the company shall be liquidated or returned to the management is to disregard completely the provisions of the Act conferring the power on the commissioner to operate the business and to reorganize. The majority opinion necessarily stands for the proposition that where there has been a lawful seizure, unless the company must be liquidated, it must be returned to its management, even where that management may have been guilty of very serious acts, including the possibility of being guilty of a felony. That is not what the Act provides.

As already pointed out, once it has been determined that the seizure was valid for any reason, the only other possible issue involved in a proceeding under § 13.12 is whether the commissioner abused his discretion in retaining the assets. Certainly it is not to be seriously contended in the instant case, and certainly the majority opinion does not hold, that there was "fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law" (Bank of Italy v. Johnson, 200 Cal. 1, 34, 251 P. 784, 797) on the part of the commissioner in determining to retain control of this company after he had lawfully seized the company.

The majority opinion converts this proceeding under § 13.12 from one to test the validity of the seizure and the retention of assets, into a proceeding to determine whether or not this company should be liquidated. I can find no statutory or other legal authority, and certainly the majority opinion refers to none, that directly or indirectly permits such issue to be tried in a proceeding authorized by § 13.12.

The following conclusions seem to me inevitable. Once it is determined, on competent evidence, that the seizure was valid for any of the reasons set forth in § 13.11, and once it is found, on competent evidence, that the commissioner did not abuse his discretion in retaining control of the company, the jurisdiction of the trial court invoked under § 13.12 is at an end. The trial court must then dismiss the proceeding, as it did in this case. It follows that, if the only facts found related to the refusal to produce the books and the wilful and deliberate and unlawful destruction of the records, this court would have to affirm the judgment dismissing the action brought under § 13.12.

But, of course, these were not the only facts found. The trial court found many other reasons why the commissioner was justified in making the seizure and retaining the assets. The chief theory running through these findings is that, after the association began to get into difficulties at the commencement of the late depression, Odell conceived the idea of converting this building and loan association into a real estate holding and operating company dominated by State Guaranty, which in turn was controlled by Odell, and in which he and his family had a large stock ownership. Pursuant to that general plan a number of corporations were organized by Odell which were, in fact, the alter ego of Pacific States and Odell. Thereafter, many transactions were entered into by which Odell prevented cash from coming to Pacific States, which cash would have been available to the many investment certificate holders who had filed notices of withdrawal, and used to purchase large holdings in the nature of hotels, ranches, office buildings, etc. This necessarily resulted in certificate holders who needed cash being forced to sell their certificates at a discount. Large sums were diverted by Pacific States to the purchase of such certificates at a discount. Campaigns were indulged in and high pressure tactics used to induce certificate holders to sell or exchange their certificates. The main indebtedness of the company was to its investment certificate holders. By this means the outstanding certificate liability which in 1931 was about ninety-one million dollars was reduced so that in 1939 it was forty-six million dollars. The majority opinion says that this was accomplished through "careful management." p. 4 (146 P.2d 432). According to the findings of the trial court, which findings are amply supported by the evidence, it was accomplished through various unlawful means aimed at freezing out these certificate holders. The majority opinion several times

emphasizes that there is no evidence in the record that any certificate holder objected to these tactics. While this may be technically correct, this court may take judicial notice of its own records. There is now pending on appeal in this court the case of King v. Pacific States, Civ.No.12,386, in which some certificate holders who were forced to sell at a discount are challenging very vigorously the validity of the activities above mentioned.

These transactions are far too numerous and complicated to describe in detail in this opinion. They are described in careful detail in the findings. They may be grouped generally as follows:

1. For a number of years prior to the date of the seizure the association engaged in numerous transactions which were called "exchanges" of real property owned by it for large holdings owned by others. In fact such transactions were not exchanges. Many parcels of property owned by the association were sold through Auxiliary or other agencies of the association to third parties for cash, and the cash was used by Auxiliary or the other agencies to buy for plaintiff these large holdings. The same result was accomplished by Auxiliary selling Pacific States holdings for cash and using the funds to purchase bonds long in default for the sole purpose of foreclosing such bonds and acquiring the large properties which were pledged as security for the bonds. These transactions continued right up to March 4, 1939, the evidence showing that on that date many such transactions were pending. These purchases were in direct violation of the Act. § 9.02.

2. Through Auxiliary the Pacific States would sell parcels of its real estate for cash, and then Auxiliary would use this cash to purchase investment certificates at a discount. These certificates were then turned over to Pacific States and canceled. From 1932 down to the time of seizure Pacific States carried on an aggressive and sometimes high pressure campaign through its own employees and through its alter ego Auxiliary to purchase its investment certificates at a discount, and for the exchange of such certificates for a less desirable type. It furnished various brokers lists of its certificate holders for this purpose. These transactions continued until the time of seizure, and resulted in investment certificate holders who owned certificates in the value of in excess of twenty-six million dollars receiving but seventeen million dollars therefor.

3. Rather than accept cash from its tenants in many of its properties, the association through Auxiliary offered such tenants a discount if they would pay the rent in investment certificates which were sold to such tenants by Auxiliary. This clear violation of the law continued until February 16, 1939, when the commissioner discovered what was being done. On that date the commissioner issued a cease and desist order. The association thereafter discontinued this practice, except for a few transactions. The trial court found, however, that (finding No. 36): "On or about February 17, 1939, however, Pacific States, with the intention of continuing its plan, policy and practice of purchasing and acquiring its investment certificates at a discount, devised a new method of doing so, by which Auxiliary would borrow money from Pacific States on investment certificates and use such money to purchase additional certificates, and by which it was contemplated that Auxiliary would never pay off the loans so made by Pacific States, but that Pacific States, in settlement of such loans, would take over its investment certificates held as collateral therefor, and would thus acquire its own certificates at a discount. Pacific States intended to put that new method into practice and if defendant Commissioner had not taken possession of Pacific States on March 4, 1939, would have done so."

4. Through various accounting practices, described in detail in the findings, these practices were hidden from the commissioner and from the investment certificate holders. These accounting practices not only were in violation of the accounting practices ordered by the commissioner, but resulted in the books of the company failing to disclose that the liabilities of the company exceeded its assets by more than ten million dollars.

These findings describing the methods used by the company, are admittedly supported by the evidence. There is a dispute as to whether such methods were legal.

The court found, and the finding is amply supported, that the effect of these transactions was to convert this building and loan company into a huge real estate holding and operating company—that in truth and in fact it was no longer a building and loan association as contemplated

by the Act. The court concluded that this justified the commissioner in seizing the company because these transactions demonstrated that the company was "conducting its business in an unsafe or injurious manner * * * such as to render its further proceeding hazardous to the public or to any or all of its investors." § 13.11 of the Act.

Evidence relating to these transactions was clearly admissible. If these transactions demonstrated, as the trial court found, that the management of Pacific States had so distorted the corporate functions and purposes of the company that it was no longer a building and loan association in fact, and such change in purpose was injurious to the investors, and if in fact, on March 4, 1939, the company was then in an unsafe condition, evidence of how that company arrived in that condition was clearly admissible. The evidence was admissible not to charge the company with derelictions occurring prior to 1937, but to explain its condition on March 4, 1939. The evidence was also admissible to show that the various corporations involved were, in fact, controlled by Odell and were the alter ego of Pacific States.

The majority opinion condones these practices on several grounds. It suggests, without argument, that many of these practices were expressly permitted by the emergency legislation of 1933–1937. The suggestion is unwarranted. While the main provisions of the Act still in effect permit an association to "exchange" its properties for other properties, and while the emergency provisions of the Act permitted the exchange of properties for certificates, there was no provision of the Act that ever permitted an association to sell its properties for cash, and to use that cash, directly or indirectly for the purchase of other properties, except for office purposes. There was no provision of the Act that ever permitted an association to use its cash for the purchase of its own certificates at a discount, cash that otherwise would be available to pay certificate holders who had withdrawal notices on file. While the emergency legislation permitted debtors of the association to pay off loans in certificates, that legislation did not permit the associations to refuse cash for such loans, and did not authorize an association to offer inducements to borrowers not to pay in cash but to pay in certificates which were sold to such borrowers by the association through a dummy corporation. Such transactions were direct violations of the duties owed the investment certificate owners, particularly those who had withdrawal notices on file.

In apparent recognition that its argument that these transactions were authorized by law is questionable, the majority opinion offers three arguments which it contends make these transactions unavailable as grounds of seizure. These arguments are: (1) That in fact such transactions benefited the association, and benefited the certificate holders still remaining in the company; (2) that Odell did not personally profit therefrom; (3) that former commissioners approved all such transactions, and the commissioner in office on March 4, 1939, and the state, are estopped from now challenging such transactions.

The first two arguments have no relevancy to the problem involved. If the transactions were unlawful, as they were, the facts that they benefited the association, or that Odell and his associates did not make a personal profit therefrom are totally irrelevant. The argument that the end justifies the means is a strange argument for a court to advance in support of illegal transactions. It is true that by the illegal means used the certificate liability of the company was materially reduced. It is true that as to the certificate holders remaining in the company, owning some forty-six million dollars of certificates, their position was benefited by such transactions. But what about those certificate holders who owned some twenty-six million dollars of certificates who were forced to sell their certificates at a discount? The management of the association was trustee for those certificate holders. It violated that trust. Some of the certificate holders, as the case of King v. Pacific States, Civ. No. 12,386, referred to above, illustrates, are vigorously protesting this violation of trust. The fact that Odell and his associates made no personal gains from these transactions is a false issue. It should be mentioned, however, that Odell and his family have a large stock holding in State Guaranty. State Guaranty owns all the guarantee capital stock of Pacific States. Every reduction in value of the certificate indebtedness of Pacific States added just that much to the possibility of value attaching to the State Guaranty stock, both common and preferred. If the entire cer-

tificate indebtedness of Pacific States could have been paid, the assets of that company would then belong to State Guaranty.

The argument that former commissioners approved all of these transactions states only a half truth. It is true that former commissioners approved most of the so-called "exchanges." But the record shows that these approvals were not based on full knowledge of the facts. There is no evidence that the commissioners knew that Auxiliary and State Guaranty, and Guaranty Auxiliary were agents and the alter ego of Pacific States. Findings Nos. 1 to 3 of the trial court disclose the factual situation upon which the conclusion that they were all the alter ego of Pacific States is based. The facts as to the stock ownership and the interrelations of these companies are not disputed. Part of finding No. 2 reads as follows:

"Ever since 1929 Pacific States, State Guaranty, Auxiliary and Guaranty Auxiliary, and their respective officers and directors, have been and they were on March 4, 1939, dominated and controlled by and on behalf of Odell, and at all of those times Pacific States, Auxiliary and State Guaranty have been practically one organization, and for business purposes and in the transactions of business of Pacific States Auxiliary and State Guaranty have at all times been so closely identified as to be one legal entity.

"At least a majority of the directors of these three corporations has been dominated and controlled by and subordinate to and the instrumentality of Odell. Pacific States, Auxiliary and State Guaranty have at all times since about the year 1929 been the alter ego of each of the other two of such three corporations. At all of these times Pacific States, Auxiliary and State Guaranty have maintained their offices at the same place except that Auxiliary and State Guaranty moved their offices from the offices of Pacific States on or about February 25, 1939, and each of them has used the same equipment, paraphernalia and other properties in the conduct of its business which has been used by each of the other two. Each has been carrying on and conducting portions of the same business conducted by each of the other two. State Guaranty and Auxiliary have, during the times mentioned, operated with Pacific States as part of a plan and program and have followed that plan and program. There is such a unity of interest and ownership between and among Pacific States, Auxiliary and State Guaranty that the separate identities of such corporations have ceased and adherence to the fiction of separate corporate existence of such corporations would, in the circumstances, sanction a fraud and promote injustice and place a premium upon the improper and unlawful conduct of these corporations which is more fully described elsewhere in these findings. The directing personnel and operations of the three corporations are and have been inextricably interwoven and they were never considered by Odell, who continuously dominated and controlled them, as being separate and distinct but were at all times viewed by him as incident to and instruments for the furthering of such improper and unlawful conduct."

There is no evidence that the commissioners knew all these facts. Moreover, no commissioner ever sanctioned the diversion of cash that would otherwise be available for investment certificate holders for the purchase of certificates at a discount. The commissioners did not know, when they approved the exchange transactions, that many of the parcels "exchanged" by Pacific States were or could be sold for cash. In finding No. 89 the trial court found that: "On June 3, 1936, the Building and Loan Commissioner of California ordered that every purported exchange transaction whereby Pacific States disposed of real estate and acquired other real estate, must be a bona fide exchange of properties and that properties disposed of must be properties for which there was no ready or immediate sale either for cash or upon terms advantageous to Pacific States. He further ordered that Pacific States must not, directly or indirectly, divert the sale of any of its property to the party with whom it was purporting to make an exchange. Thereafter and continuously down to March, 1939, Pacific States engaged in transactions which purported to be, but which in fact were not, bona fide exchanges of properties, and disposed of hundreds of properties in such transactions for which there were ready and immediate sales, but for cash and upon terms advantageous to Pacific States, and Pacific States, frequently, both directly and indirectly, diverted the cash which it was to receive from any sales of property, which could be sold for cash or upon good terms, to purchase properties acquired by it from the parties with whom it purported to be making exchanges. Since June 3, 1936,

Pacific States has consummated at least 83 such purported exchanges in violation of the order of the Building and Loan Commissioner."

This finding is amply supported. Defendant's Exhibit 181 is a letter from commissioner Drapeau to Odell dated June 3, 1936, containing the purported approval of the Taylor Ranch transaction. The letter states that the commissioner does not oppose the principle of exchanging many small parcels which are "difficult properties to service and handle, for one large parcel of property." The letter continues: "As I understand the principle of these exchanges, your association finds it difficult to handle a dwelling house or small apartment house in a town or city more or less remote from San Francisco or Los Angeles. In addition to this type of property, you have a large number of urban properties consisting of dwelling houses, small apartments, and duplex apartments, which do not (and probably never will) pay to hold for sale, in the normal course of servicing and disposing of real estate * * *

"However, there is one matter in connection with this exchange which I want to have very definitely understood at all times. It is to be, and must be, a *bona fide* exchange of properties, and the properties which you trade must be properties *for which there is no ready or immediate sale,* either for cash or upon terms advantageous to the association. In other words, if any of the properties of the Pacific States Savings and Loan Company on the market *are capable of being sold for cash or upon good terms, and if in fact such a sale can or would be made, and if in fact the Pacific States Savings and Loan Company directly or indirectly holds up such a sale or knowingly diverts the sale to the party with whom the main exchange is made, then I feel that the whole principle upon which the main transaction is based must fail.* In our conference of a month or two ago * * * I quite definitely expressed this thought to you. I am committing it in writing so that there may be no misunderstanding of my position." (Italics, except as to the word *"bona fide"*, added.) Yet in this very transaction many parcels were "exchanged" by selling them, in the escrow, for cash, and as to many of the parcels cash offers had been received and refused. This is the type of approval relied upon.

The majority opinion then argues that the assumed prior approval of the commissioners constituted a ratification of such acts, and that the state is now estopped to challenge such acts. As already pointed out, there was no real approval by the prior commissioners because the true facts were hidden from them just as they were hidden from the investors. But even if there had been approval of these acts by prior commissioners such approval could not constitute a "ratification," nor create an "estoppel." The majority opinion cites Farrell v. County of Placer, Cal.Sup., 145 P.2d 570, in support of this startling doctrine. These transactions were illegal. It needs no citation of authority to support the rule that ratification and estoppel have no application to such illegal acts. As I read this portion of the opinion, the majority of this court is holding that if a commissioner once approves an illegal transaction, subsequent commissioners are forever estopped from challenging such transaction, even though it has resulted in the company being placed in an unsafe and unsound condition so far as its investment certificate holders are concerned. This is an astounding use of the doctrine of estoppel. Neither the Farrell case, nor any authority cited therein, supports such a conclusion. It is one thing to hold that the state or its agencies are estopped in dealing with an individual, but an entirely different thing to hold that a commissioner, representing the state, is estopped in dealing with an association, which in turn owes a fiduciary duty to its investment certificate holders. It is not a question of "right" or "justice" between the commissioner and the corporation, but a question of the "right" or "justice" to the investment certificate holders. If this company, on March 4, 1939, was in an unsafe condition so far as investment certificate holders are concerned, as found by the trial court, no approval of a prior commissioner could estop the then commissioner from doing his duty as imposed upon him by the Act. If authorities are necessary for such a fundamental concept they may be found in Magruder v. City of Redwood, 203 Cal. 665, 265 P. 806; Wood v. Imperial Irrigation District, 216 Cal. 748, 17 P.2d 128; Lukens v. Nye, 156 Cal. 498, 105 P. 593, 36 L.R.A.,N.S., 244, 20 Ann.Cas. 158; Connally v. Continental-Southland Savings & Loan Ass'n, 121 Tex. 565, 51 S.W.2d 293; State v. Northwestern Inv. Co., 70 Wash. 381, 126 P. 895; Southwestern Distilled Products v. State, 199 Ark. 761, 136 S.W. 2d 166; City of Hutchinson v. White, 117

Kan. 622, 233 P. 508; Federation Bank & Trust Co. v. Hammons, 176 Misc. 447, 26 N.Y.S.2d 56; McKay v. Public Utilities Commission, 104 Colo. 402, 91 P.2d 965; Department of Insurance v. Church Members R. Ass'n, 217 Ind. 58, 26 N.E.2d 51, 128 A.L.R. 635.

From what has been said it is clear that the trial court was justified in approving the seizure either because of the refusal to produce and the destruction of the records, or, because of a series of illegal transactions starting in 1932 and some of them continuing right up to March 4, 1939, the corporate purposes and functions of this association had been so distorted and changed that it was no longer a building and loan association, and such association was "in an unsafe condition" or was "conducting its business in an unsafe or injurious manner * * * such as to render its further proceeding hazardous to the public or to any or all of its investors" within the meaning of § 13.11. For either of these reasons the judgment should be affirmed.

The trial court also found that the assets of the company were impaired, in an amount exceeding ten millions of dollars. This finding is predicated on two different sets of facts.

In the first place, the books of this company were submitted to competent and experienced accountants. Using those books, but applying to them the uniform classification of accounting system established and prescribed by the commissioner for all associations, and applying to them proper accounting practices as defined by the experts, it was discovered that if the books had been kept properly they would show an impairment of assets of over ten millions of dollars.

The trial court also undertook to appraise the assets of this company, to ascertain whether or not its assets were impaired within the meaning of § 13.11. To this end it appointed certain experts and gave them certain definitions of "value" to be used by them in appraising these assets. These experts, using those standards of value, found that the assets were impaired in excess of ten millions of dollars. The majority opinion holds that these definitions unduly restricted the experts because they did not include what the opinion refers to as a "going concern" value, and that for that reason such evidence does not support the findings relating to impairment. With these conclusions I must respectfully but vigorously disagree. In my opinion, the trial court's definitions included every element that should be included for the purposes of ascertaining whether the assets of this company were impaired sufficiently to permit the commissioner to seize and operate the company.

In its discussion of impairment of assets the majority opinion carries to a logical conclusion the basic error upon which the entire opinion is predicated—namely, that the issue before the trial court was whether the assets of this company were so impaired that the company should be liquidated. The whole discussion of impairment of assets in the majority opinion is colored by the thought that the trial court decided, or that the effect of its decision was, that the assets of this company were so impaired that it should be liquidated—that the purpose of determining whether assets are impaired within the meaning of § 13.11 of the Act is to ascertain whether the company should be liquidated. The fallacy of this conclusion has been fully discussed in the first part of this dissent. Section 13.11 provides that if the commissioner shall find that an association's "*assets are impaired* to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock * * * then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated." The purpose of determining whether assets are impaired within the meaning of this section is not to determine whether the company shall be liquidated, but to determine whether the commissioner shall take over. Once he takes over he may operate, rehabilitate, or liquidate. The factors that will be considered by the commissioner in determining whether to liquidate may be entirely different from those that control his action in determining to take over a company. Conceivably, in determining whether to liquidate or to continue to operate, he will consider whether the company has a reasonable chance to pay off all its debts—the so-called "going concern" value that is discussed in the majority opinion. But that question is an

entirely false issue when it comes to the question as to whether he shall take over the company and operate it. The legislature determined that when a company's assets are impaired, the commissioner could take over for the protection of the investment certificate holders and the public. The legislature determined that it was in the best interests of all concerned that when the assets were impaired the commissioner and not the management that had brought the company to that condition should have the right to attempt to work such a company out of its financial difficulties. Then after the commissioner has taken over, the commissioner determines whether to operate the company or to liquidate. The propriety of this determination is not involved in this proceeding. As already pointed out, while it is true that the commissioner has filed a notice of intention to liquidate, that determination is even not yet final. In spite of the fact that the assets may have been impaired on March 4, 1939, to the extent of ten millions of dollars, it might be that because of the present abnormally high real estate values, this company might, as of today, have some reasonable prospect of working out its troubles. If the commissioner should so decide, he could, as of the present, stop liquidation, and operate this company until its financial condition was such that it could safely resume business. Any discussion of the meaning of impairment of assets within the meaning of § 13.11 must start with the fundamental concept that the purpose of ascertaining that fact is to determine whether the company should be taken over and operated by the commissioner or whether the old management should continue to operate it. The question as to whether the company is so insolvent as to require liquidation is not involved under that section, or under § 13.12.

If the purpose of determining whether assets are impaired within the meaning of § 13.11 be kept in mind, the determination of what the legislature intended by the use of that phrase is a reasonably simple task. It seems clear to me that any time the assets of a company, if sold at other than a forced sale, would not equal the liabilities, so that the creditors, and particularly the investment certificate holders would not be paid in full, the legislature intended that the company, could, in the discretion of the commissioner, be seized and operated by him. The majority opinion, however, is based on the theory that even where a company has reached that dangerous condition, the commissioner must stay his hand—he cannot lawfully take over, even where the company is insolvent according to this test, until he also determines whether or not as a "going concern," the company may have a reasonable possibility of paying off its debts. In other words, he must stay his hand until the company is so hopelessly insolvent that it has no reasonable possibility at all of paying off its debts. If this had been the intent of the legislature it would mean, in every case, that the commissioner could not lawfully take over because of impairment of assets, until the company was hopelessly insolvent. Every association, when seized, under such a test, would be in such a condition that it would have to be liquidated. Then what becomes of the legislatively conferred power to operate the company, and if rehabilitated, to permit it to resume business? Why would the legislature confer such a power, and then render it totally ineffectual by such a definition of impairment of assets? The answer is clear. The legislature intended, and in my opinion has provided, that when a company was in such a financial condition that it could not, if liquidated, pay off its debts, the commissioner and not the management should be entrusted with its operation.

Any other rule would be extremely dangerous for the investment certificate holders. If the commissioner has the power to take over and operate whenever an association is insolvent as measured by a liquidation test, it means that he can then decide whether the investment certificate holders will best benefit by immediate liquidation, in which event the losses will be relatively small, or whether he should attempt to rehabilitate. But if he is prohibited from seizing the company until it is not only insolvent according to a liquidation test, but until all reasonable possibility of rehabilitation is gone—until the company is so hopelessly insolvent that there is no possibility of rehabilitation—then the investment certificate holders, in all cases, will suffer very serious losses.

That the legislature intended that no such element as "going concern" value, as defined in the majority opinion, should be required to be considered by the commissioner in determining whether to seize

a company, and that no such element should be required to be considered by the trial court in passing on the validity of the seizure, is made clear by other provisions of the Act. In 1935 the legislature adopted an article of the building and loan act, as part of the emergency legislation, providing for the rehabilitation and reorganization of building and loan associations under certain circumstances. Art. XVI, Stats. of 1935, at p. 814. That plan required the consent of certain designated types of creditors, including the investment certificate holders, but provided that shareholders' consents were not required "if the value of the assets of such association shall be less than the liabilities of such association, including the value of its investment certificates but not including the value of its shares, or if the business, properties and assets of such association be then in the possession of the commissioner. *For the purpose of this article,* real property, contracts for the sale of real property, loans, and all other assets (whether like or unlike the foregoing) *shall be valued at what may reasonably be expected to be realized therefrom in the orderly and proper conduct of a going business.*" § 16.04. (Italics added.)

Thus, when the legislature wanted to include a "going concern" value in determining whether certain action should be taken, it knew how to use appropriate language. But in so doing, it was careful to limit that definition to the "purpose of this article." Why this careful limitation and careful and appropriate use of language if that definition was the one intended for impairment of assets under § 13.11? Yet the majority opinion quotes this emergency section (opinion p. 30 [146 P.2d 444]) as an indication that "going concern" values must be included in § 13.11. There is no basis for such a conclusion. The legislature knew what it was doing. When it wanted to include a "going concern" value it so provided. When it did not so intend it omitted such provision.

The majority opinion falls into the same fallacy in applying the rule of the cases decided under § 77B of the Bankruptcy Act, 11 U.S.C.A. § 207, to § 13.11. It will be noted that nearly every case cited in the majority opinion that requires a "going concern" value, in the sense of debt paying ability, to be included in a definition of value has to do with reorganizations under the Bankruptcy Act. Of course, in determining whether a company shall be reorganized, which usually requires a scaling down of its debts, the determinative question is whether, if the debts be so scaled down, the company will have a reasonable possibility of working out its financial problems. For that reason the legislature provided in § 16.04 of the State Act, and the federal Congress provided by necessary implication in § 77B of the Bankruptcy Act, that one of the factors to be considered was the "going concern" value—the prospects of it paying its debts—of the company that was proposed to be reorganized. But that is an entirely different proposition from the test to be applied in determining whether the commissioner may lawfully seize and operate the company, before he has determined whether to reorganize, rehabilitate or liquidate.

The phrase "going concern value" is a chameleon-like phrase that changes its meaning dependent upon the purpose for which it is being used. It has various meanings, dependent upon whether the problem involves rate fixing for utilities, reorganizations, or insolvency. The majority opinion is careful to define the meaning with which it uses the term. It holds that in addition to the liquidation value of the assets, the trial court should have permitted evidence of the debt paying ability of this company as a "going concern." In other words, before a commissioner may lawfully seize a company he must not only determine whether the company is insolvent in the sense that, if liquidated, it could not pay its debts, but also must engage in guess, surmise and conjecture by adding to the value of the assets so ascertained some vague, uncertain, cryptic and ambiguous value known as "going concern" value. If this be so, as already pointed out, no commissioner could lawfully seize a company until it was hopelessly insolvent. The protection to the investment certificate holders, and other creditors, intended by the Act would not exist, and the legislative intent would be thus thwarted. It is of some significance that the majority opinion does not attempt to define market value for the benefit of the trial court in the event of a reversal. All that is said is that this vague and uncertain thing known as "going concern" value must be included. How could a trial judge instruct experts, or pass on admissibility of evidence on the issue by what is said in the majority opinion?

Just what is it that the trial court did in this case? It told the experts, in the three directions quoted in the majority opinion, that in valuing the assets of this company they should determine the "market value" of those assets. The liabilities of the company, at least so far as its liabilities based on investment certificates are concerned, were admitted. Thus the trial court determined that if all the assets of this company were valued at their market values, and if such values were less than its indebtedness, that then the company's assets were impaired within the meaning of § 13.11 so as to warrant the seizure. That is the traditional way of ascertaining whether a company is insolvent. The definition of value given is correct, unless "going concern" value must be added thereto. Appellants make some attacks on this definition, but the majority opinion relies upon only one objection—it fails to include the possibility of the company paying out independently of the fact that its assets could not be sold for enough to meet liabilities.

It is also of some significance that appellants do not seriously urge that "going concern" value, in the sense of debt paying possibilities, should have been included. When they refer to "going concern" value they are apparently using the phrase to mean the amount by which the value of the assets as a whole, assembled together for the conduct of a business, exceeds the aggregate of the value of the separate items of property. That concept has received frequent discussion in cases involving the valuation of franchises and public utility properties for rate making. Obviously a dozen separate franchises, making an integrated unit, may be more valuable than the totals of the values of each separate franchise. But such a concept could have application to a situation such as the one here involved only if there had been a possibility of selling all the assets of this association to a single purchaser. No one has ever hinted or claimed that such a prospect ever existed. The majority opinion carefully, and properly, excludes this concept of "going concern" value, and bases its conclusion on a concept that is only incidentally if at all urged by appellants.

The appellants stated their main objections to the definitions given by the trial court during the trial as follows:

"1. It excludes the element relation to the value at which a prudent owner willing, but not forced to sell, would accept, and ignores the rule that market value includes the amount for which a willing seller would sell to a willing buyer with full knowledge of all the facts.

"2. It excludes the element of sales from consideration where made for part cash and mortgage or deed of trust for the balance of the purchase price.

"3. It excludes the element of exchange value, that is, where one property might be exchanged for another as authorized by the Building and Loan Association Act.

"4. It excludes the element of sales under contract, where a party enters into possession of the property and pays for it in installments over a period, then obtaining title after full payment.

"5. It excludes the necessary element of a fair market or normal market existing at or near the time of appraisement. Thus it is made to apply to the value of properties for which no market existed as of the date of the appraisement." Rep.Tr. p. 18367; quoted Op.Br. p. 220.

If the test is to be liquidation value, cash prices control. Liquidation implies a winding up, a closing out of a business, within a reasonable time. Sales allowing time to pay the purchase price, whether by means of a mortgage or installment contract of sale, of such length as substantially to raise the price are not customary where a business is being wound up. For the same reason exchange values are not the test. Where property of a business is being disposed of in liquidation it will rarely be exchanged for other property. Where the matter has been the subject of express reference the statements in the cases are to the effect that it is the amount for which the property can be sold for cash which is to be estimated. People ex rel. Nelson v. First State Bank, 274 Ill.App. 46; Johnson v. Land Title Bank & Trust Co., 329 Pa. 241, 198 A. 23; Mitchell v. Investment Securities Corp., 5 Cir., 67 F.2d 669. For that matter the majority of sales, whether or not made in liquidation, are for cash to the owner. The purchaser customarily borrows from a bank or other financial institution in order to pay cash to the owner.

Appellants also object that the definition as given by the court assumes a willing

buyer, but fails to make clear to the experts that they should also assume a willing seller. Statements to the general effect that market value is the amount for which the property could be sold by a willing seller to a willing buyer have acquired wide judicial currency. The instructions herein given to the experts do not employ these words. There are two types of "unwilling" seller, the one who is forced to sell at a low figure because of necessitous circumstances, and the seller in prosperous circumstances who is without special reason for selling and not interested except at a high figure. In the second of the instructions given by the trial court to the experts, they were told expressly that they were not to consider what the property would bring at a forced sale. Any omission to exclude expressly the unwilling non-necessitous seller is favorable to appellants, since such a seller tends to sell at a high figure.

Insofar as the willing-buyer, willing-seller phraseology is interpreted as having greater meaning than to exclude forced sales and sales at hold-up prices, it has been severely criticized by judges and writers. Whether a seller is willing to sell, or the buyer to buy, depends on the price at which the property can be sold or bought.

In M'Gill v. Commercial Credit Co., D. C., 243 F. 637, 647, the court said of the willing-seller, willing-buyer test:

"The effort is to find out not what a real buyer and a real seller, under the conditions actually surrounding them, do, but what a purely imaginary buyer will pay a make-believe seller, under circumstances which do not exist. You are forced to wonder what would have happened if everything had been different from what it was. It is not easy to guess what will take place in Wonderland, as other people than Lewis Carroll's heroine have found out."

Judge Learned Hand's comment is: "'Willing' adds nothing, for, if the trade goes through at all, both must be willing, and the degree of their reluctance is not a serviceable measure." Helvering v. Walbridge, 2 Cir., 70 F.2d 683, 684.

Bonbright says: "In short, we are convinced that the willing-buyer, willing-seller incantation is a great bar to clear thinking in the law, and that it has no more place in legal opinions than it has in the literature of economic theory." 1 Bonbright, Valuation of Property, p. 61. The author gives point to his remarks by quoting the willing-buyer, willing-seller test as given in Parish & Co. v. Yazoo, etc., R. Co., 103 Miss. 288, 60 So. 322, 323: "The 'market value' of a commodity, in its last analysis, means the price which it will bring in cash from a buyer who is willing to pay its value." The author says of this statement: "But this attempt to give precision to the phrase simply impales the court on the other horn of the dilemma, for it runs into a vicious circle. It makes market value depend on a hypothetical sale, and it makes the price at this sale depend on an assumption of the very figure which is to be found, namely, the value of the property." P. 60.

It seems quite clear that the failure of the court herein to employ this phraseology in its directions to the experts is not erroneous, but, rather, is to be commended.

Appellants also object that the definition submitted to the experts omitted the element of "a fair market or normal market existing at or near the time of appraisement." This seems to be the main objection urged by Odell. It is appellants' contention that if the market is in a depressed state at the time of seizure, as of which date assets must be valued under § 13.11 of the Act to determine whether there is an impairment, it is not the amounts for which they actually could be sold on the market which govern, but, rather, the amounts which could be realized in a more normal market. This is a plea that the realities of the situation be disregarded. Since the purpose of a valuation, made to determine whether assets are impaired, is to determine whether the commissioner was justified in seizing a company as of a particular date, regard must be had for the actualities of the situation. If liquidation values are to be the test, then the question is not whether the liquidation assumed to determine value will result in a "fair" or "normal" price to the *debtor,* but whether the property could in fact be sold for enough to pay *creditors* in full, allowing a reasonable time to complete the sale, but not awaiting the return of a market which is fair or normal to the debtor.

In Johnson v. Land Title Bank & Trust Co., 329 Pa. 241, 198 A. 23, 25, the court said: "The test of insolvency under subdivision (15) of section 1 of the Bankruptcy Act of July 1, 1898, 11 U.S.C.A. § 1 (15), is not what appellant's properties

might have brought in a favorable real estate market under business conditions of a departed era. The test is the amount of cash which these assets would have brought on a fair sale at the time when the alleged act of bankruptcy, namely, the purchase of the annuity, was committed. As the court said in Mitchell v. Investment Securities Corp., 5 Cir., 67 F.2d 669, 671: 'Statutory as well as commercial insolvency arises out of, and consists in, inability to pay debts. One is insolvent under the statute when his assets, if converted into cash, at a fair not forced sale will not pay them. In both cases solvency is tested by ability to pay debts, in the one case promptly, in the other, in time. In testing both kinds of insolvency, the realities of the situation control. In both kinds it is the actual, rather than the theoretical, condition of the debtor which determines it.' See, also, Grandison v. Natl. Bank [of Commerce] of Rochester, 2 Cir., 231 F. 800. It is clear that the financial statements submitted to appellees were of no controlling force on their judgment and they were entirely at liberty to reject them as unreliable. Such statements are fundamentally too unsound, being predicated on the existence of the nonexistent, to wit, a 'normal real estate market,' to support an inference that appellees, in filing this petition complained of, acted without probable cause."

That the amount for which the property could be sold on the existing market, rather than in a theoretical "normal" market, controls is implicit in the following statement in Re Studebaker Corporation, D.C., 9 F.Supp. 426, 427: "A person or corporation is therefore insolvent when he or it is unable to pay debts, and this inability to pay debts is not temporary, through lack of ready funds, but permanent through lack of assets convertible in a reasonable time, not necessarily at forced sale, but nevertheless within a reasonable period. Insolvency under the statute and from a commercial standpoint results from inability to pay. If the assets will not sell on the market within a reasonable time for enough to liquidate the debts, insolvency exists."

It is to be noted that, although the majority opinion refers to appellants' objections to the court's definitions (opinion p. 26 [146 P.2d 442]), it bases the reversal, so far as the questions involved in the consideration of impairment of assets are concerned, on the sole ground that the trial court's definitions were too limited in that they failed to consider "going concern" value in the sense of debt paying possibilities. From this failure to uphold any of the other contentions of appellants on this question it may be reasonably assumed that it is the view of the majority that the definitions given were correct except for that one element.

Just what were the definitions given by the trial court? It gave the definition of market value that has been approved time and time again by the courts of this state. It is the traditional and well settled definition of that term. It is true that the three directions were more or less based upon the instructions approved in Sacramento, etc., R. R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979. That case and the definition there given has been approved in many cases. City of Napa v. Navoni, 56 Cal. App.2d 289, 299, 132 P.2d 566; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 192, 59 P.2d 177; Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 399, 153 P. 705; City of Stockton v. Vote, 76 Cal.App. 369, 401, 244 P. 609; People v. Olsen, 109 Cal.App. 523, 532, 293 P. 645; City of Los Angeles v. Deacon, 119 Cal.App. 491, 493, 7 P.2d 378; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 518, 9 P.2d 335; Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 752, 754, 18 P.2d 413; Estate of Felton, 176 Cal. 663, 668, 169 P. 392; Wild Goose C. Club v. County of Butte, 60 Cal.App. 339, 341, 212 P. 711. It is true that all but the last two of the cases above cited are condemnation cases, the last two being tax cases. But that does not detract from the definition if it is the correct one. The majority opinion, as I read it, concedes that it is the correct definition if the question to be determined is whether the assets, if sold, would or would not pay off the indebtedness—in other words, if the liquidation test is the proper test.

Under the three directions given the experts they were told to ascertain the "fair market value" of the assets. The first direction told the experts that: "Market value is the amount this property would sell for if put upon the open market, and sold in the manner in which property is ordinarily sold for cash in the community in which it is situated, with a reasonable time being given to find a purchaser buying with knowledge of all the uses and pur-

poses to which it is best adapted and for which it is capable of being used and make the sale."

The second direction told the experts not to consider speculative or mere possible uses of the property, and not to consider what it "would bring at a forced sale", but to consider "only the highest and best use for which this property was adapted and its fair market value, if offered in the market under ordinary circumstances for cash, a reasonable time being given to make the sale * * *."

Later the court eliminated the "cash" feature and gave the following definition of market value: "The highest price, estimated in terms of money, which the property would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser buying with full knowledge of all the uses and purposes to which the property was adapted and for which it was capable."

It will be noted that the trial court carefully eliminated any thought of a forced sale. It included a value based upon the highest and best use of the property. The experts were told to ascertain what a seller could get and what a purchaser would pay for each parcel in the open market at a sale other than a forced sale. Thus, every factor that would motivate a purchaser in considering the purchase of the property was properly admissible under these definitions. The evidence shows that the various experts, those called by respondent and those appointed by the court, gave consideration to all such factors. Physical values of the properties, both land and buildings, the income of the properties, assessed valuations, etc., etc., were all considered. In many cases the income of the properties was ascertained and a value reached by capitalizing the income. In many cases the physical values were materially less than values based upon capitalizing the income, and in most such cases the experts adopted the higher figure.

Another factor must be considered. It must be remembered that this association on March 4, 1939, was not doing a building and loan business, as such business is ordinarily carried on. The normal functions of a building and loan association are to accept money for investment, and to make loans on the security of real property. Where foreclosures are necessary, normally a building and loan company expects and tries to sell such properties as soon as possible. Such functions had entirely ceased, so far as this association is concerned, long prior to 1939. Through the methods already described it had become the owner of a group of large properties, each constituting an individual business. Its main function was the operation of these businesses. Thus it owned and operated several large hotels, several large ranches, many large and medium-sized office buildings, apartments, etc. Each one of these businesses was a separate going concern. Each property was valued by the experts as a going concern. In each case the question was what would a purchaser pay for that property in operation. That is the reason that many of the properties were valued by the experts according to a capitalization of the income, the rate of capitalization being dependent upon the age of the buildings, the nature of the business, etc. In this respect the problem of valuation was different from that in an ordinary bankruptcy proceeding. Normally, if a business goes bankrupt that business has ceased as a going concern. Bonbright, and the other authorities relied upon in the majority opinion, object to valuing the assets of that business according to the value of its physical assets—they believe that in determining whether a company is insolvent its debt paying possibilities as a "going concern" should be considered. But in the instant case the main business of this association was the operation of many businesses. Each of the individual businesses was in operation, and none of those individual businesses was bankrupt. Each of the individual businesses was valued accordingly. Stated another way, each of the individual properties was valued by taking into consideration that on such properties there was being operated a going and solvent business. In this sense a "going concern" value was included in the estimates given by each expert.

From what has been said, it is my conclusion that the definitions as given by the trial court were correct, and that the findings, based on these definitions, that the assets of this company were impaired on March 4, 1939, in excess of ten millions of dollars, are amply supported.

The only other points necessary to be discussed are those arising from the appeals from orders denying applications for attorneys' fees. State Guaranty had been permitted to intervene on the representation of its then counsel that the company

does not "expect to come here asking for leave of the court to pay its expenses in defending its rights as a stockholder." At the inception of this proceeding Pacific States made no application for attorneys' fees. Nor has it made any application for attorneys' fees for services rendered prior to the date of the application. For more than two years Pacific States was represented by competent and able counsel. No application for their compensation has ever been made. The application that was denied was for attorneys' fees for services to be rendered after the date of the application. This application was made after the commissioner had rested his case and was for the purpose of compensating counsel during the production of evidence by Pacific States. On the application by Pacific States Odell was called as a witness and was examined and cross examined for many weeks. Odell admitted that the company operated at a loss in 1937 and 1938; that in 1937 the loss shown by the books was $366,995.44, including the profit of $250,044.45 made on certificate deals, and that in 1938 the loss was $184,319.40, in which year $150,912.72 was made on certificate deals. (Tr. 22,863.)

During the examination of Odell a discussion arose as to whether Pacific States could or intended to produce evidence of fair market value. Then counsel for Pacific States fairly and properly admitted that under the definition of value adopted by the trial court they could not produce evidence that there was not an impairment. (Tr. 22,848.) Odell stated that the evidence he expected to produce was values predicated upon "normal" markets—a factor already considered in this dissent. Odell admitted that he could not tell when that "normal market" would occur again. He was then asked directly whether he was in a position to produce testimony of fair market value under the first two definitions given to Forbes and Smith. Odell frankly admitted that under those definitions he could not produce any such evidence and was extremely doubtful if he could produce any evidence under the third definition. (Tr. 23,001.)

Thus, considering the case only from the standpoint of the impairment of assets, it is apparent that the company was unable to produce evidence if the trial court definitions were correct, to show the assets were not impaired. From that standpoint alone, if the trial court's definitions were correct, and I believe they were, it would have been a useless waste of the assets of the association to have permitted the expenditure of company funds for the purpose of continuing a case when the parties involved admitted they had no evidence.

The trial court prepared a lengthy opinion in support of its order denying attorneys' fees. That opinion appears in the Clerk's Transcript starting at page 164. That opinion shows a full and complete understanding on the part of the trial court of the problems presented on an application for attorneys' fees in such an action. According to the many authorities cited therein, an association seized by a state officer, just as is true in cases of receiverships, is not entitled as of right to attorneys' fees and costs in resisting a seizure. Such application is addressed to the sound discretion of the trial court, and is to be granted only upon a showing that the resistance to the seizure is made in good faith based upon reasonable grounds. The burden is upon the applicant to show these facts. Anderson v. Great Republic L. Ins. Co., 41 Cal. App.2d 181, 106 P.2d 75; Barker v. Southern Building & Loan Ass'n, C.C., 181 F. 636; Barnes v. Newcomb, 89 N.Y. 108; Witherspoon v. Hornbein, 70 Colo. 1, 196 P. 865; Commonwealth Finance Corp. v. Missouri Motor Bus Co. et al., Mo.App., 251 S.W. 756; Esarey v. Pierson, 84 Ind. App. 109, 141 N.E. 87; Assets Realization Co. v. DeFrees, Brace & Ritter, 225 Ill. 508, 80 N.E. 263; Watson v. Johnson, 174 Wash. 12, 24 P.2d 592, 89 A.L.R. 1527; O'Malley v. Continental Life Ins. Co., 343 Mo. 382, 121 S.W.2d 834; see annotation 89 A.L.R. 1531.

Pacific States saw fit to make no application for attorneys' fees until the commissioner had rested its case. The application was not for attorneys' fees already incurred, but for attorneys' fees to be incurred in presenting the defense of Pacific States. Neither Odell nor any other officer of the company could object to the refusal insofar as they personally were concerned. The privilege of securing attorneys' fees to resist the seizure is a privilege of the company. When the trial court was asked to allow such attorneys' fees, it had before it the vast mass of evidence briefly referred to in this dissent, which, according to the findings ultimately made, amply justified the seizure. It had before it the several thousands of pages of Odell's testimony produced on the application for

attorneys' fees. The testimony is clear that Odell knew of the many facts testified to by respondent's witnesses. Those facts made out a prima facie case of the propriety of the seizure. The trial court was fully justified in holding that, if Odell knew these facts, including the facts relating to impairment, he, and therefore the company, knew, on March 4, 1939, that it was subject to lawful seizure. The court expressly held that if Pacific States wanted to continue its defense that the matter of attorneys' fees would again be considered in light of any evidence produced. But it held that the evidence produced on the application was insufficient to show applicant's good faith, and was insufficient to overcome the commissioner's evidence of bad faith.

The majority opinion holds that the trial court "abused its discretion" in refusing attorneys' fees. A reading of the discussion in that opinion, however, discloses that it is based on the thought that an absolute right to such attorneys' fees exists. That, of course, as the cases above cited indicate, is not the law. Under the theory of the majority opinion no case can be conceived in which the trial court would be justified in denying attorneys' fees. No matter what evidence is produced by the commissioner, no matter how strong that evidence may be, the trial court cannot know what the rebutting testimony may be until it is produced. Therefore, according to the majority, attorneys' fees must be allowed, and the assets of the association must be dissipated, to allow this assumed rebutting testimony to be introduced. It is for this very reason that practically every court that has ever considered the problem has held that there is no right to attorneys' fees, and that whether such fees shall be allowed rests in the sound discretion of the trial judge, who can grant such fees only upon a showing of good faith.

The majority opinion in several places states that Pacific States was "precluded" from presenting its side of the case, or was not "permitted" to produce evidence on its behalf. These statements are neither factually nor legally correct. In the first place, former commissioner Richardson testified on behalf of Pacific States, and by stipulation the several thousands of pages of Odell's testimony given on the application for attorneys' fees was admitted in the main case. In the second place, most of the witnesses called by the commissioner, except the experts, and upon whose testimony the findings are largely based, were officers or employees of Pacific States and were thoroughly cross-examined by counsel for Pacific States. In the third place, the trial court did not "prohibit" or "preclude" Pacific States from presenting its side of the case. There was no evidence that without the allowance of attorneys' fees attorneys could not be secured. The trial court found (finding No. 98), and the finding is supported, that: "There is no evidence that Pacific States has been unable to secure attorneys of its own selection to act for it." The trial court gave Pacific States every opportunity to present any available testimony, except that it refused to allow attorneys' fees for that purpose until convinced that Pacific States was acting in good faith. Pacific States has had no difficulty in financing this expensive appeal. Were evidence available to rebut the convincing and well nigh conclusive evidence produced by the commissioner, it is inconceivable that Pacific States could not have financed the production of such evidence.

Under all these circumstances it is apparent that under the rule of all the cases on this subject the trial court acted well within its discretion in denying the applications.

In my opinion every material finding is amply supported by competent and convincing evidence. The record demonstrates that the commissioner would have been remiss in his duties owed to the investment certificate holders and the public had he not taken possession of this company on March 4, 1939. The record discloses that, according to the proper tests contemplated by the Act, this company was insolvent on that date. It is my view that the reversal ordered by the majority of this court is based on a fundamental misconception of the true issues involved in this proceeding. I believe that this case was carefully and properly tried, and that no errors were committed. For these reasons I am of the opinion that the judgments and orders appealed from should be affirmed.

Rehearing denied; PETERS, P. J., dissenting.

PEOPLE v. HATCHETT.

Cr. No. 3727.

District Court of Appeal, Second District, Division 3, California.

March 2, 1944.

Rehearing Denied March 13, 1944.

Hearing Denied March 31, 1944.

1. Criminal law ⇐814(17)

In manslaughter prosecution, defendant had right to an instruction on circumstantial evidence based on her own theory of case, which would include the hypothesis that the jury would disbelieve the testimony of the people's witness leaving the people's case purely one of circumstantial evidence.

2. Criminal law ⇐814(17)

In manslaughter prosecution where no living person other than defendant witnessed the shooting, and defendant admitted the shooting but defended on ground of self-defense, refusing requested instruction which laid down specific rule under which circumstantial evidence was required to be analyzed and weighed was error.

3. Criminal law ⇐829(15)

Neither the statement in an instruction that guilt of defendant must be established beyond reasonable doubt nor statement that as between two opposing reasonable inferences one which is consistent with innocence must be preferred to one tending to show guilt satisfies right of defendant to have jury instructed that where circumstantial evidence is relied on by people it must be irreconcilable with theory of innocence to furnish sound basis for conviction.

4. Criminal law ⇐829(5)

In manslaughter prosecution, refusal to give defendant's requested instruction regarding self-defense was error, notwithstanding instructions given at request of people stating law of self-defense negatively and from viewpoint solely of the prosecution.

5. Homicide ⇐116(5)

If defendant, charged with manslaughter, otherwise acted justifiably, her plea of self-defense would not fail merely because jury might have believed that defendant's danger was not as great as she believed it to have been.

6. Homicide ⇐300(4)

Where defendant charged with manslaughter claimed that she shot deceased in self-defense, rule of law relating to self-defense should not have been stated exclusively from viewpoint of the prosecution.

7. Criminal law ⇐807(1)

There should be absolute impartiality as between the people and the defendant in matter of instructions, including the phraseology employed in statement of familiar principles.

8. Criminal law ⇐762(1)

In manslaughter prosecution, instruction which emphasized fact that court was viewing claim of self-defense exclusively from viewpoint of the prosecution was improper in absence of statement of law of self-defense from viewpoint of defendant, since it tended to create impression in minds of jury that judge was of opinion that self-defense had not been established.

9. Homicide ⇐309(6)

In prosecution for voluntary manslaughter, where defendant admitted the shooting but claimed that she acted in self-defense, the giving of instructions defining involuntary manslaughter, heat of passion, legal provocation and malice, which were part of differentiation of manslaughter from murder, was improper as tending to divert mind of jury from sole question whether defendant acted reasonably and in good faith in defending herself.

10. Homicide ⇐300(1)

In prosecution for voluntary manslaughter where defendant admitted the shooting but claimed that she acted in self-defense, and court improperly gave instruction regarding involuntary manslaughter, refusal to give requested instruction to effect that if appearances were such as to justify killing in self-defense defendant was not required to exercise any due care or circumspection in the killing was error.

11. Homicide ⇐119

If appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily harm, and he does so believe, he is not required to exercise any due care or circumspection as to the manner of killing.

12. Homicide ⇐300(10)

In prosecution for voluntary manslaughter where defendant admitted the shooting but claimed that she acted in self-defense, and evidence disclosed that de-

ceased entered defendant's house as an intruder and his appearance caused defendant's guests to leave, instruction that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus to create real or apparent necessity for killing was improperly given.

13. Homicide ⇐300(2, 10)

In prosecution for voluntary manslaughter where defendant admitted the shooting but claimed that she acted in self-defense, and there was evidence that deceased entered defendant's house as an intruder and his appearance caused defendant's guests to leave, instruction requiring assailant or one engaged in "mortal" combat to retreat or to attempt to retreat before taking another's life in self-defense was objectionable because of use of word "mortal" instead of "mutual," and because not authorized by evidence. Pen. Code, § 197.

14. Homicide ⇐114

It is mutual combat or combat entered into voluntarily, and not mortal combat, from which one must endeavor to withdraw before taking the life of his adversary.

15. Criminal law ⇐823(6)

In manslaughter prosecution, error in giving instruction requiring assailant or one engaged in mortal combat to endeavor to withdraw before taking life of adversary was not cured by instruction that defendant when attacked had right to stand her ground and defend herself.

16. Homicide ⇐110

One has a right to defend his person against another who manifestly intends to commit a felony, as well as against one who endeavors by violence or surprise to commit it. Pen.Code, § 197.

17. Homicide ⇐300(2)

Under statute providing that homicide is justifiable when committed in defense of person against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, the giving of an instruction, in manslaughter prosecution, using the words "intends and endeavors" was error. Pen.Code, § 197.

18. Criminal law ⇐814(1)

Instructions on irrelevant matters should not be given, since they are calculated to mislead the jury by diverting their minds from the true issue before them for trial.

19. Homicide ⇐244(1), 348

In prosecution for voluntary manslaughter, where defendant admitted the shooting but claimed that she acted in self-defense, evidence was sufficient to justify defendant's conviction, but was not sufficient to clearly establish her guilt, and therefore errors in instruction required reversal. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Inez Hatchett was convicted of manslaughter, and she appeals.

Reversed.

Crispus A. Wright, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant was convicted of manslaughter committed in the shooting of one Ernest Dempsey. She had originally been charged with murder, had been convicted of manslaughter, and the conviction had been reversed because of the failure of the court to instruct the jury in the law of self-defense. People v. Hatchett, 1942, 56 Cal.App.2d 20, 132 P.2d 51. The information had been amended to charge manslaughter. Upon appeal from the judgment and order denying her motion for new trial defendant contends that the evidence was insufficient to support the verdict and she specifies error in the giving and refusal of instructions. It is necessary that the evidence be stated somewhat fully, not so much for the purpose of demonstrating its sufficiency to justify the verdict as for the purpose of showing that the state of the evidence was such that the failure of the court to fully and fairly instruct the jury operated to the substantial prejudice of defendant's case and resulted in a miscarriage of justice.

Defendant is a Negro woman 33 years of age, married but separated from her husband. She lived alone in a small house and was employed. For several years prior to December, 1941, she and Dempsey, also a Negro, 27 years of age and unmarried had maintained an illicit relationship. Dempsey then married but did not entirely break off his relations with defendant; he continued to force his attentions upon her.

On the day of the shooting, March 31, 1942, defendant was standing on a street corner talking with an acquaintance, a Mr. Welcher, whom she had met there by chance. Dempsey passed by in his car, stopped, parked the car, got out and started across the street toward defendant, who advanced to meet him. What occurred from that time on was narrated by defendant and corroborated in part by others who were in her company until a short time prior to the shooting. Defendant testified that Dempsey had an open knife in his hand as she met him, appeared to have been drinking and was very angry with her because she had been talking with Mr. Welcher; he insisted that she get into the car with him, which she did, and they drove to her home. Arriving there, defendant ran up the steps, followed by Dempsey with the open knife in his hand. Inside the house Dempsey started quarreling with defendant. A telephone call came for defendant from a Mrs. Walters, inviting defendant to take dinner with her and two men. Defendant accepted and when a Mr. Jeeters called for her she went into the bathroom to dress. Dempsey followed her, protesting her going out with Jeeters, slapped her and again exhibited the knife, which defendant took away from him when he took it out of his pocket. He appeared at that time to be intoxicated. Defendant accompanied Mr. Jeeters to the Rossmore Grill, where they met Mrs. Walters and a man named Eddie. During the dinner Dempsey appeared at the grill, parked his car across the street and waited for defendant. The four diners, when they left the cafe, entered a car and went to defendant's home; Dempsey followed them and parked his car near defendant's house. Defendant and her three guests had a drink; Dempsey entered the house and defendant's guests left, Mrs. Walters and Eddie by the rear door and Jeeters by the front door to meet the others in front of the house. Defendant asked Dempsey why he did not leave her alone and threatened to call the police and have him arrested; she took up the telephone and Dempsey picked up a flower vase from a table and threatened her with it and she did not make the call. Defendant testified that she then called Dempsey's wife, told her that he was in her house drunk and threatening to kill her, and asked her to come and get him; that Mrs. Dempsey asked defendant to have her husband come to the phone, which he refused to do. A scuffle took place between defendant and Dempsey and defendant went into the kitchen. According to her testimony, the later events immediately prior to the shooting were the following: When defendant started toward the kitchen Dempsey threatened to kill her and himself because defendant didn't want him any more. In the kitchen defendant washed the glasses that had been used in serving the drinks and came back to get a clean towel from her front bedroom. As she started to leave the bedroom she saw Dempsey standing in the living room with defendant's revolver in his hand; he knew, she testified, where she kept the gun; she stood in the bedroom doorway; Dempsey had a strange look in his eyes, he pointed the gun at defendant and said he was going to shoot her. Defendant ducked and ran into Dempsey, the gun went off and fell to the floor in the direction of the dining room; a tussle took place, defendant picked the gun up from the floor, started toward the rear of the house, remembered that the rear door was locked, turned around, saw Dempsey coming toward her five or six feet away with a metal smoking stand weighing two or three pounds upraised in his hand. Defendant then fired four shots; she did not remember how many shots she fired. Dempsey staggered back and fell against the front door. Defendant ran to him and dropped the gun and it was found by the officers under Dempsey's body. Defendant got Dempsey a drink of water which he asked for and called the police. She was hysterical when the officers arrived and they had difficulty in quieting her; she first told them that Dempsey had shot himself, and upon further questioning testified that she had shot him in self-defense. Defendant testified to several occasions upon which she had been attacked by Dempsey when he was intoxicated. Upon one occasion he came to the home of a Mrs. Glasgow, a friend of defendant, and dragged defendant off the porch; they were separated by Mrs. Glasgow and Dempsey at that time threatened to kill defendant because she did not want him any more. Upon another occasion Dempsey attacked her in his car. He stepped from behind a telephone pole, twisted defendant's arm and forced her into his car where he inflicted further injuries; he was drunk at the time. On another occasion, at the home of a Miss James, Dempsey pulled defendant off the porch and choked her; they were separated by Miss James, who testified that before the attack, when Dempsey was inquir-

ing for defendant, he said he would break her neck when he found her; that he had found out that she was with another man. This occurrence was but a few days before the shooting. Miss James testified that about a month before the shooting she had witnessed another incident which had been testified to by defendant and that on that occasion she found Dempsey in his car with defendant, apparently choking her, and that he told Miss James at that time that he would get Inez (defendant) if it was the last thing he ever did. Miss James took defendant into her car at that time and drove around the block. Defendant testified that upon another occasion after his marriage Dempsey met defendant on the street and persuaded her to get into his car upon the pretense that his uncle wanted to see her. They arrived at the uncle's house and defendant found that Dempsey's representation to her was false. When defendant left the uncle's house Dempsey followed her, knocked her to the ground and beat her, leaving scars upon her hands, some of which she testified were still there at the time of the trial. A Mrs. Leas testified that Dempsey had made threats that he would kill her and also defendant. Numerous witnesses, including one of the officers who arrested defendant, testified that Dempsey's reputation for peace and quiet was bad. Others testified to the good reputation of defendant, but no witness testified that Dempsey had a good reputation or defendant a bad one.

Turning to the evidence of the People, we find the testimony of the wife of deceased that defendant telephoned to her on the evening of the shooting and told her that Dempsey was at her home, cursed her, accused her of going out with other men; that she laid down the phone and refused to listen to defendant and finally hung it up; that she then called the police because she wanted them "to go there and get the both of them" but she could not tell the officers the address. (Upon cross-examination she stated that she knew that the Hatchett house was the only one on Wadsworth between 52nd and 53d Streets and that she had been there.) That she called defendant about five minutes after defendant had called her; that defendant answered the phone and said, "He isn't coming back to you again. I will kill him before he does." She testified that she heard three shots, heard her husband groan and two more shots and heard defendant hang up her receiver. She testified further on cross-examination as follows:

"Q. Incidentally, Mrs. Hatchett had called and asked you to come and get your husband? A. Yes.

"Q. She called you to let you know that your husband was there, and for you to come and get him? A. Yes."

It is unnecessary to point out the improbabilities in Mrs. Dempsey's account of the shooting. If it had occurred as she testified, defendant's conduct would have shown a premeditated purpose to kill Dempsey and she would have been guilty of murder. It must be presumed that the jury in the first case returned a verdict in accordance with the facts found and that in finding defendant guilty of manslaughter when she was charged with murder they determined that Mrs. Dempsey had falsified when she testified that defendant, after telephoning her to come and get her husband, five minutes later shot him because she did not want him to leave. In other words, the first verdict was in effect a declaration on the part of the jury that they rejected Mrs. Dempsey's testimony that the defendant advised her over the telephone that she was going to kill her husband, and that immediately thereafter she heard a series of shots and her husband groaning. This is a fact which should be borne in mind in considering the theories of the shooting which were tenable under the evidence upon the second trial.

We have discussed Mrs. Dempsey's testimony and quoted from it because a careful appraisal of it is necessary in testing the strength of the People's case, and for the additional reason that all of the other evidence upon which the People relied was circumstantial. Its inherent improbabilities and the fact that it was disbelieved upon the first trial are not otherwise important.

The case which had been presented to the jury and to which the instructions of the court were to be applied was, in brief, the following: Deceased was shown by substantial and uncontradicted evidence to have been a violent man when under the influence of liquor; he had previously assaulted defendant upon several occasions and several times had threatened to kill her; his infatuation for her persisted notwithstanding his marriage and his attentions were forced upon her; on the afternoon of the shooting and again in the evening he had intruded himself into her home and his appearance on the latter oc-

casion had caused defendant's guests to take their sudden departure; his conduct then and upon former occasions had been that of an angry, jealous and violent paramour. Defendant, according to her testimony and also that of Dempsey's widow, had called the latter and asked her to come and get her husband and he had refused to leave defendant's house. Defendant was not shown to have been the instigator of any of her difficulties with Dempsey. The reduced charge of manslaughter relied upon in the second trial was, under the facts of the case, an admission on the part of the People that the shooting had occurred in a quarrel or sudden heat of passion, or in other words that it was voluntary manslaughter.

The shooting having been admitted by defendant, the question of guilt depended upon the claim of justification or self-defense. No living person other than defendant witnessed the shooting and, aside from the testimony of Essie Dempsey, which we are assuming for the purposes of this opinion was direct evidence, the People depended wholly upon circumstantial evidence to disprove the claim of self-defense. There was nothing inherently improbable in defendant's account of the shooting and it cannot be said from a reading of the record that the jury could not reasonably have reconciled all of the established circumstances with the theory of defendant's innocence. It is because of this state of the evidence that the instructions of the court should be subjected to a critical examination. We have found it necessary to discuss a good many of the instructions given and some of those refused, and our conclusion is that the errors were such as to require a reversal. It is the cumulative effect of numerous errors which forces this conclusion, and we reiterate that we are considering the probable effect of such errors upon the jury's determination of guilt in a case where guilt was not firmly established. We consider it not improbable that a conviction would not have occurred but for the errors to be hereafter discussed. We find appropriate to our discussion the statement of the Supreme Court in People v. Newcomer, 1897, 118 Cal. 263, at page 267, 50 P. 405, at page 406, "Under these circumstances, if the appellant was justified in killing the deceased, as he might have been, he was in the embarrassing position of one who justly kills another when there is no other witness to the homicide, when he has to admit the homicide, and depend greatly upon his own testimony to justify it. In such a case it is evident that a jury will have difficulty in determining the real facts; and in such a case it is apparent that the instructions of the court are very important, particularly when, as in the case at bar, the court instructs at great length. Under such circumstances, any instruction tending to lead the jury from the real issues in question is material, and, if erroneous, is reversible error."

[1, 2] Defendant requested, and the court refused to give, the following instruction: "You are instructed that in a trial where circumstantial evidence is relied upon to obtain a conviction, the circumstances must be consistent with the hypothesis that the defendant is guilty and at the same time inconsistent with any other rational conclusion and if you find from the evidence in this case that the evidence is not inconsistent with defendant's innocence, then she is entitled to an acquittal at your hands." This instruction was by no means a model statement of the principle of law which the author doubtless had in mind, but it was as good as any of the People's instructions which we shall discuss, and better than most of them. With slight modification it would have correctly stated a principle of law that was not stated satisfactorily, if it was stated at all, in the instructions that were given. The point to which our discussion of this proposed instruction will be directed is that defendant had a right to an instruction on circumstantial evidence based upon her own theory of the case, which would include the hypothesis that the jury would disbelieve the testimony of Essie Dempsey, leaving the People's case purely one of circumstantial evidence. The slight ambiguities in the requested instruction, which could easily have been corrected, did not justify its rejection and the failure of the court to give an adequate instruction. An instruction was given at the request of the People which defined direct and circumstantial evidence and which concluded with the following paragraph: "If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction be-

tween circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

The same situation was presented in People v. McClain, 1931, 115 Cal.App. 505, 1 P.2d 1085. The defendant there had requested an instruction to the effect that a conviction could not be had upon circumstantial evidence unless it was believed by the jury to be irreconcilable with defendant's innocence. In holding that an instruction which was given, which was the same as the one last above quoted, was not the equivalent of the one there requested, and the refusal of which was held to constitute reversible error, the court said (115 Cal.App. at page 511, 1 P.2d at page 1088): "* * * the instruction contains not even a suggestion of the principle of law set forth in the instruction offered by defendant and refused by the trial court. The authorities of this state are unanimous in the declaration of the law that, when the evidence in a case is entirely circumstantial and admits either of a theory of the guilt or of the innocence of the defendant, upon his request therefor, he is entitled to a special instruction embodying the principles set forth in the instruction to which appellant herein has directed attention and of the refusal of which he here complains. People v. Dick, 32 Cal. 213; 8 Cal.Jur. 371, and cases there cited."

The court gave another instruction at the request of the People, the pertinent portions of which are as follows: "If the evidence in this case, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt." This was no more than an amplification of the general rule that doubts are to be resolved in favor of the defendant. The principle of law stated in the quoted instruction which was refused, and the practice of stating it in a separate instruction, are well established. The requested instruction lays down a specific rule under which circumstantial evidence must be analyzed and weighed. It is true that it has been said that it is a principle that is encompassed within the general doctrine of reasonable doubt and it has been held unnecessary to give it in a case where the latter doctrine has been fully covered by other instructions, but we are not persuaded to that view by anything which has been said upon the subject. See opinion of District Court of Appeal, adopted by Supreme Court in People v. Van Cleave, 1929, 208 Cal. 295, 301, 280 P. 983. The opinion in that case does not set out the instructions requested or those given, and we are of the opinion that the fact that the judgment was reversed for other errors would account for the brevity of the attention given to the point and the failure of the court to recognize that the right of a defendant to the specific instruction we are discussing, in a case of circumstantial evidence, has endured for many years and that the courts very generally have regarded it as one which should be given independently of the general doctrine of reasonable doubt.

In People v. Holden, 1910, 13 Cal.App. 354, 359, 109 P. 495, 497, it was said that the rule relating to circumstantial evidence was sufficiently covered by other instructions given, and the court said: "Where the case rests entirely or chiefly upon circumstantial evidence, it is desirable that some direction be given the jury as to the necessity for establishing each fact, beyond a reasonable doubt, which is essential to complete the chain of circumstances tending to establish the crime charged. But we are not prepared to say that a refusal to give such an instruction would necessarily be prejudicial error, for the law makes all competent evidence admissible, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case." While it would appear that the court was of the opinion that instructions on the doctrine of reasonable doubt were sufficient to cover the principle stated in the refused instruction, it would further appear that the consideration which the court gave to the question of error was doubtless materially affected by the state of the record, for the court said (13 Cal.App. at page 359, 109 P. at page 497): "Furthermore, in the present case, substantially all of the evidence of defendant's guilt was direct, and there was no call for an instruction upon circumstantial evidence."

[3] To the legally trained mind the doctrine of reasonable doubt has a scope much broader than would be easily understood by inexperienced jurors. The rule under which circumstantial evidence is to

be weighed is not one which would be suggested to the lay mind by instructions that doubts are to be resolved in favor of the accused. This is sufficiently proved by the fact that through long experience it has become an established practice in the courts to state the rule in distinct and specific form, to serve as an easily understood and safe guide for juries in weighing the sufficiency of circumstantial evidence. Simplicity in the statement of legal principles adds greatly to their efficacy; statements of abstract principles which leave the jury in doubt as to their proper application tend toward confusion. Neither the statement in an instruction that the guilt of the defendant must be established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction.

In denying a hearing in People v. Heuss, 1928, 95 Cal.App. 680, 684, 273 P. 583, the Supreme Court made a statement which is applicable to our present discussion. The court referred to the rule of circumstantial evidence which we are discussing as a "well approved and frequently announced statement of the law" and of a modification of the instruction, which left out the statement that circumstantial evidence, to justify a conviction, must be inconsistent with innocence, said: "As a general proposition trial courts should adopt, where practicable, instructions which have become practically standardized by the long approval of appellate courts. The instruction now before us furnishes an apt example. Deviations are usually unnecessary and are not infrequently productive of evil." The ground for denial of the hearing was that the evidence was such that the error was considered not sufficiently grave to result in a miscarriage of justice. See also People v. Kinowaki, 1940, 39 Cal.App.2d 376, 380, 103 P.2d 203. It is scarcely necessary to add that this long established and approved practice in the instruction of juries in criminal cases should not be departed from without mature deliberation and for sufficient reasons. If it is the better practice to state this rule on circumstantial evidence as a distinct guide for juries, the practice has not been robbed of its virtue by having been disregarded occasionally by the courts.

The court in the instant case refused to give instructions requested by defendant, which read as follows: "Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when confronted with danger, are obliged to judge from appearances and to determine from them as to the actual state of things surrounding them and in such case, if a person acts from honest convictions induced by reasonable evidence, as a reasonable man, he will not be held responsible criminally for the mistake as to the extent of the actual danger.

"You are instructed that for a man to avail himself of his right of self-defense, it is not necessary that he shall be in actual danger of death or of receiving great bodily harm. It is sufficient that appearances on the part of her adversary were such as to arouse in his mind, as a reasonable man, that he was about to suffer death or great bodily harm. He may act upon such appearances with safety, and if without fault or carelessness she is misled concerning them, and defends himself correctly according to what she supposes the facts to be, she is justifiable, though they were in truth otherwise, and though you should further find or believe from the evidence that she was mistaken in her judgment as to such actual necessity at such time and really had no occasion for the use of extreme measures. If you believe from the evidence here that defendant, Inez Hatchett, acted in self-defense from real and honest conviction as to the character of the danger induced by the existence *or* reasonable circumstances, or if you have a reasonable doubt as to whether she did or did not, then it will be your duty to find that her said act was justifiable even though you might further believe from the evidence that she was mistaken as to the extent of the danger, and it would then be your duty to find her not guilty."

The four following instructions were given at the request of the People: "The mere apprehension of danger is insufficient to justify a homicide. The fear, if any, must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground, it must not only appear to the slay-

er, as a reasonable person, that she had reason to believe, and did believe, that she was in danger of her life, or of receiving great bodily harm, but it must also appear to her comprehension, as a reasonable person, that to avoid such danger it was absolutely necessary for her to take the life of the deceased.

"The Court further instructs the jury that to justify the killing of another in self-defense, it must appear to the slayer, as a reasonable person, that the danger, if any, was so urgent and pressing that in order to save her own life or to prevent her receiving great bodily harm, the killing of the other was absolutely necessary. And it must appear that the person killed was the assailant, or, if not the assailant, that the slayer had really and in good faith endeavored to decline further trouble before the fatal shot was fired.

"To justify a homicide committed by one in resisting or repelling an assault or battery committed or attempted to be committed upon his person by another, it must appear to the slayer as a reasonable person that the danger threatened, if any, was immediate and sufficient to excite the fears of a reasonable person that he or she was in danger of receiving death or great bodily harm, and that he or she acted under the influence of such fears and not in a spirit of revenge; and it must further appear that the degree of resistance was not clearly disproportionate to the nature of the injury offered or given—that the force used in repelling or resisting the assault or battery was not clearly greater than was apparently necessary.

"A person may have a lively apprehension that he is in imminent danger, and believe that his apprehension is based on sufficient cause and supported by reasonable grounds; that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only did the person acting on the appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, but would a reasonable person, situated as the defendant was, seeing what she saw, and knowing what she knew, be justified in believing herself in danger."

[4-7] Defendant's two proposed instructions which we have quoted should have been given. The second one called for some revision, but as a whole they correctly stated the law. People v. Miles, 1880, 55 Cal. 207. If defendant otherwise acted justifiably, her plea of self-defense would not fail merely because the jury may have believed that defendant's danger was not as great as she believed it to have been. It is true that the four instructions given at the request of the People do not incorrectly state the law of self-defense, but they state the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply that actual or positive danger need not exist in order to justify self-defense, but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. The rules of law relating to self-defense should not have been stated exclusively from the viewpoint of the prosecution. There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles. Of instructions that had been given by the court, and which we find upon examination of the original record were identical with the four we have last quoted, the court said in People v. Estrada, 1923, 60 Cal.App. 477, 483, 213 P. 67, 70: "The instructions of the court, taken as a whole, must be said to correctly state the law. While conceding this, it may be added that in their tenor the instructions of the court were critical of the self-defense claim. The court might well have given more comprehensive instructions on the right of self-defense, as viewed from the standpoint of the accused." It would seem that the criticism of the instructions in the Estrada case, which came up from Los Angeles County, called for their revision and the use of instructions on self-defense which stated the law with complete impartiality.

[8] In addition to the foregoing instructions on justification, the court gave another reading as follows: "The Court instructs the jury that if from the evidence you believe that, without any overt act or physical demonstration upon the part of the deceased sufficient to warrant the defendant, as a reasonable person, in believing that she was in great bodily danger, she, the defendant, fired

the fatal shot at deceased and killed him, such killing under such circumstances was not justifiable." This instruction was wholly unnecessary and it emphasized the fact that the court was viewing the claim of self-defense exclusively from the viewpoint of the prosecution. If we were considering any one of these instructions separately, even including the last one, the harm would not be so serious, but the five instructions together, we think, in the absence of a statement of the law of self-defense from the viewpoint of the defendant, tended to create the impression in the minds of the jury that the judge was of the opinion that self-defense had not been established.

The jury were not instructed that defendant was accused of manslaughter and not murder, an omission which is pertinent to our discussion of the next point.

An instruction, given at the request of the People, reads as follows: "You are instructed that manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

"1. Voluntary—upon a sudden quarrel or heat of passion.

"2. Involuntary—in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

"The words 'malice' and 'maliciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act established either by proof or by presumption of law.

"Manslaughter is principally distinguishable from murder in this: That though the act which occasioned the death be unlawful or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction for it is proportionately lenient.

"And when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder.

"Heat of passion is defined as such a passion as would naturally be aroused in the mind of an ordinary, reasonable person under the given facts and circumstances, and consequently no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinary reasonable man.

"While no particular cause for such heat of passion is expressly prescribed by law, there must be provocation of such character as is naturally calculated to arouse passion, and it must appear that the defendant acted under the smart thereof.

"There must be considerable provocation, sufficient at least as would stir the resentment of a reasonable man. A provocation of slight and trifling character, such as words of reproach, however *a*probrious or g*re*v*i*ous they may be, or gestures without an assault upon the person, nor any trespass against lands or goods, are not recognized as sufficient to arouse in a reasonable man such passion as has heretofore been defined to you."

[9-11] Defendant could not have been convicted of a higher crime than manslaughter, and when that crime was charged by the amended information it constituted an admission by the People in view of their theory of the case that the killing had been done upon a sudden quarrel or in the heat of passion. There was no necessity for a definition of "heat of passion" or of "legal provocation" or for the definition of "malice" which were all a part of the differentiation of manslaughter from murder. If the jury had found adversely to defendant under these definitions there could not have been a conviction of a crime greater than manslaughter. All of this extraneous matter could only have tended to confuse the jury. Furthermore, by this definition of involuntary manslaughter the jury were told in so many words that the commission of a lawful act which might produce death, in an unlawful manner, or *without due caution and circumspection,* would amount to manslaughter or, in other words, that the act of shooting, if believed lawful, might constitute the offense of manslaughter if it was done in an unlawful manner or without due caution and circumspection. Any such theory of guilt would have been entirely unsupported by the evidence or any

legitimate inferences to be drawn therefrom. The instruction clearly tended to divert the minds of the jury from the sole question whether defendant acted reasonably and in good faith in defending herself from a felonious attack and may well have operated to her prejudice. It must be assumed that the jurors endeavored to the best of their ability to apply to the facts of the case the principles of law stated in the instructions. It may not be assumed that they undertook to decide for themselves that any legal principle stated by the court had nothing to do with the case. The giving of the definition of involuntary manslaughter could be said to have been harmless only upon the assumption that the jury understood its irrelevancy and disregarded it. Of course the matter cannot be put aside upon the theory that the jury understood better than the judge and the district attorney that the case involved none of the elements of involuntary manslaughter. Defendant requested, and the court declined to give, an instruction to the effect that if the appearances were such as to justify the killing in self-defense, defendant was not required to exercise any due care or circumspection in the killing. No definition of involuntary manslaughter should have been given at all, but since one was given and defendant requested an instruction for the purpose of curing the error, the latter instruction should have been given. Its refusal suggests that the case was one in which there could be a conviction of involuntary manslaughter, which belief has no support in the record. The belief that the jury could easily have been misled by the instruction is not farfetched. We note that in 1905 a superior court judge instructed a jury to the effect that the defendant could be acquitted of manslaughter by shooting, upon the ground of self-defense, where there was in fact no actual danger, only in the event that the killing was done with due caution and circumspection and not in a sudden quarrel or heat of passion. In reversing the conviction the Supreme Court said: "If the appearances are such as to justify a reasonable man in believing that it is necessary to instantly kill another in order to save himself from death or great bodily injury, and he does so believe, he is not required to exercise any 'due care' or 'circumspection' as to the manner of killing." People v. Thomson, 1905, 145 Cal. 717, at page 721, 79 P. 435, at page 436.

Another instruction was given in this case which read as follows: "The acts which a defendant may do and justify under a plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men, and measures for the jury's determination of their deportment.

"Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for killing."

[12] The first two sentences of the instruction, by themselves, state no legal principle and as used were meaningless, although they aptly introduced the discussion of the principles of self-defense on page 462 et seq., in People v. Hecker, 1895, 109 Cal. 451, 42 P. 307, on page 311, 30 L.R.A. 403. We find nothing in the evidence, direct or circumstantial, suggestive of the situation described in the concluding sentence of the instruction. Deceased entered defendant's house as an intruder and his appearance caused her guests to leave. No one but defendant knew or testified as to the circumstances of the shooting. If the jury believed her she should have been acquitted upon the ground that she acted in self-defense. But this instruction invited speculation as to whether defendant had sought a quarrel with deceased in order to create a real or apparent necessity for killing him. Such a conclusion would have been unjustified under any possible construction of the evidence. The facts of the case bore no resemblance to those in People v. Robertson, 1885, 67 Cal. 646, 8 P. 600, or People v. Glover, 1903, 141 Cal. 233, 74 P. 745, where there was occasion for the application of the principle stated in the instruction. The suggestion of this untenable theory of guilt was error.

[13-15] The court gave an instruction on justification for homicide which purported to be a copy of section 197 of the Penal Code, much of which was irrelevant, but which included the following: "Homocide is justifiable * * * when committed in the lawful defense of such person * * * but such person, or the person in whose behalf the defense was made, if he was the assailant or engaged in *mor-*

tal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed." The Code section specifies *mutual* combat, not *mortal* combat. In the original Code section the word "mortal" was used, but, as stated in People v. Fowler, 1918, 178 Cal. 657, 671, 174 P. 892, the word "mutual" was no doubt intended, since it is *mutual* combat or combat entered into voluntarily, and not *mortal* combat, from which one must endeavor to withdraw before taking the life of his adversary. The section was amended in 1931 to state the true rule. In People v. Fowler, supra, the giving of the same instruction was excused upon the ground that it was in the words of the statute, and it was held that defendant could not complain where he had not requested a corrective instruction. But no such excuse appears here for the use of the words "mortal combat" in the instruction, for which the correct words "mutual combat" were substituted by the legislature more than 12 years ago. Defendant might have been engaged in "mortal" combat even though she were not the aggressor. According to her own testimony she was so engaged, not as the aggressor or voluntarily, but under circumstances which did not compel her to retreat, and yet by this instruction the jury were told, in effect, and without qualification, that it was her duty to retreat or to attempt to retreat before she shot. Even if the word "mutual" had been used instead of "mortal" there still would have been no evidence to which the instruction could have applied. The jury were instructed separately that defendant, when attacked, had a right to stand her ground and defend herself, but that instruction did not cure the error of the one under discussion and at most only created an irreconcilable conflict and one which constituted serious error.

[16, 17] Section 197 of the Penal Code provides that homicide is justifiable "when committed in defense of * * * person, against one who manifestly intends *or* endeavors, by violence or surprise, to commit a felony. * * *" The instruction as given in the present case used the words "intends *and* endeavors." Under the law one has a right to defend his person against another who manifestly intends to commit a felony, as well as against one who endeavors by violence or surprise to commit it, and, without entering upon a discussion as to the meaning of the word "manifestly" as used in the statute, we have no hesitation in holding that the instruction as given was distinctly in error upon a vital issue in the case. Under the third subdivision of section 197, homicide is justifiable in lawful defense of the person "when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished," etc. Under such circumstances justification exists by reason of appearances which furnish reasonable grounds for apprehending the assailant's design and also imminent danger of its accomplishment. The word "endeavors" is not used, as it is in the preceding paragraph which we have quoted. The substitution of "and" for "or" as above noted created a conflict in the instructions on self-defense which we have hereinbefore quoted, by adding the element that deceased must have endeavored to commit a felony and may have led the jury to believe that his actions short of an actual endeavor to commit a felony or to do great bodily injury would not have justified the shooting. The jury may well have believed that even if deceased pointed the gun at defendant he did not intend or endeavor to shoot her, or they may have believed that even though he came toward her with the upraised smoking stand, he was endeavoring to frighten her rather than to strike her with it. Defendant had testified that on that day deceased had twice exhibited a knife without attempting to use it and had threatened her with a vase without striking her. As we have already pointed out, the issue of justification depended not upon the existence of actual danger but upon appearances. This alteration in the language of section 197 could have been understood as placing the defendant under the necessity of proving that there was actual danger consisting of an endeavor to commit a felony, in addition to the existence of reasonable grounds for apprehending imminent danger. If the instructions that were given on justification had been in proper form it would not have been necessary in this case to instruct as to a situation where the deceased manifestly intended or endeavored to commit a felony, but if the latter definition of justification was to be given at all, it should not have been given

in distorted form and in contradiction of correct statements on the same subject.

[18] Section 197 contains many provisions which could have had no possible application to the case on trial, which we will not undertake to enumerate. Only the pertinent provisions should have been stated to the jury. It is well understood that instructions upon irrelevant matters are "calculated to mislead the jury by diverting their minds from the true issue before them for trial." 8 Cal.Jur. p. 322.

[19] In conclusion we should add that we are not basing a reversal upon any single error among those which we have discussed. We regard all of them as substantial, although some are considerably more serious than others. No conviction by a jury instructed as this one was should be allowed to stand, except upon evidence of guilt so strong as to compel an affirmance under section 4½, Article VI, of the Constitution. The evidence was sufficient to justify defendant's conviction but not sufficient to clearly establish her guilt.

The judgment and the order denying defendant's motion for a new trial are reversed.

DESMOND, P. J., concurs.

BISHOP, Justice pro tem. (concurring).

I concur in the judgment because of errors of commission. In People v. Silver, 1940, 16 Cal.2d 714, 722, 108 P.2d 4, where the defendant had been charged with murder and convicted of manslaughter, the trial court had given instructions on self defense, although the defendant had made no claim that he had acted in defense of self. Our Supreme Court, referring to these instructions, stated (16 Cal.2d at page 722, 108 P.2d at page 8): "We are of the opinion that the instructions were erroneously given. When the charge to the jury, though a correct statement of legal principles, is extended beyond such limitations so as to cover an assumed issue which finds no support in the evidence it constitutes error. People v. Savinovich, 59 Cal.App. 240, 244, 210 P. 526." Later in its opinion (16 Cal.2d at page 723, 108 P.2d at page 9) the Supreme Court stated: "Where errors in instructions occur, the question always arises as to whether or not they are prejudicial. Here it may be said that where the proof of a defendant's guilt is clear, and no extenuating circumstances appear, such errors may not be prejudicial. But where a case, such as the one at bar, is what may be termed a 'close' case, and where the erroneous instructions concern matters vital to the defense of the defendant, and may have resulted in a miscarriage of justice, we are of the opinion that such errors must be regarded as prejudicial and should result in a new trial for the defendant."

As appears clearly from the majority opinion, under the facts of this case it was error to give the lengthy, philosophical, instruction distinguishing manslaughter from murder and dealing so extensively with involuntary manslaughter. It was error to give the instruction applicable only to a defendant who had designedly sought a quarrel. It was error to give the anachronistic instruction involving "mortal" combat. The case against the defendant was a close one, bringing it within the principle expressed in the quotations from the Silver case.

The judgment should be reversed, therefore, because of the errors committed in giving the inappropriate instructions. I find no error to exist, however, in the trial court's failure to give the first of the three instructions referred to in the majority opinion, looked at in the order in which they are discussed, for it is an incorrect statement of a principle of law which was adequately covered by other instructions which were given. Had it been given the jury would have been told: "If you find from the evidence in this case that the evidence is not inconsistent with defendant's innocence, then she is entitled to an acquittal at your hands." The instruction considered in the case of People v. McClain, 1931, 115 Cal.App. 505, 510, 1 P.2d 1085, contained no such erroneous passage. Where a requested instruction contains an erroneous statement it is not error for the trial court to refuse to give it as requested and it is under no duty to correct it and give it as modified (People v. Megladdery, 1940, 40 Cal.App.2d 643, 653, 105 P.2d 385; People v. Housman, 1941, 44 Cal.App.2d 619, 628, 112 P.2d 944), unless, of course, it deals with a subject concerning which it is the court's duty, in the absence of any request, itself to frame and give an instruction.

Of greater importance, the principle which the first half of the rejected instruction indicates was its subject matter, was

adequately covered by other instructions which were given. We note this one which was given: "If the evidence in this case, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

"You will notice that, in this instruction, this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable.

"This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other to you appears to be unreasonable.

"In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable."

It is true that this instruction is not limited to circumstantial evidence, but "the greater includes the less," and has judicial approval. In People v. Holden, 1910, 13 Cal.App. 354, 109 P. 495, an instruction numbered 20 had been requested but not given. It is unnecessary to quote it fully; its theme is discoverable from its concluding sentence: "No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be incompatible with innocence, incapable of explanation upon any other reasonable hypothesis than that of guilt." The appellate court made this comment upon the trial court's refusal to give it (13 Cal.App. at page 359, 109 P. at page 497): "Instruction 20, asked by defendant and refused by the court, correctly stated the law as to circumstantial evidence, but we do not think that the defendant was prejudiced because not given. They were many times and in various forms told that they must be guided wholly by the evidence, and such instructions embraced all the evidence, direct and circumstantial. Where the case rests entirely or chiefly upon circumstantial evidence, it is desirable that some direction be given the jury as to the necessity for establishing each fact, beyond a reasonable doubt, which is essential to complete the chain of circumstances tending to establish the crime charged. But we are not prepared to say that a refusal to give such an instruction would necessarily be prejudicial error, for the law makes all competent evidence admissible, whether direct or circumstantial, and leaves the jury to determine its relative weight in each case. When, therefore, full instructions were given that the jury must be guided entirely by the evidence, and must be convinced by it beyond a reasonable doubt, the instruction goes to both classes of evidence, and it must be assumed that the jury will so apply it."

The trial court, furthermore, gave the instruction on presumption of innocence and reasonable doubt in the language of section 1096, Penal Code. This, our Supreme Court has said, sufficiently covered the subject we are now discussing. In People v. Van Cleave, 1929, 208 Cal. 295, 280 P. 983, this instruction was one of five requested but not given:

"If the evidence relating to any or all the circumstances in this case is, in view of all the evidence, susceptible of two interpretations, one of which would point to the defendant's guilt and the other would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of the defendant's innocence and reject that which would point to his guilt." In its opinion, the Supreme Court stated (208 Cal. at page 301, 280 P. at page 985): "Appellant asked the trial judge to give five instructions each of which he says, was designed to inform the jury 'that conviction on circumstantial evidence must exclude any and every reasonable hypothesis of innocence based on the adduced facts,' and each of them was refused. We think the proffered instructions, although they were differently phrased, related only to the question of reasonable doubt, and the judge instructed the jury amply upon that subject. The requested instructions were therefore unnecessary."

Because it may be of moment on a retrial of this case I think another matter should be spoken of. The actual conflict in the evidence in this case lies between defendant's direct evidence and the mixed direct and indirect evidence of Mrs. Dempsey. If the latter is to be believed the defendant stated, in effect, that she was going to kill Dempsey and then proceeded to do so. This testimony would not prove

manslaughter, but murder; yet it would be evidence upon which a conviction of manslaughter might rest. People v. McFarlane, 1903, 138 Cal. 481, 482–487, 71 P. 568, 72 P. 48, 61 A.L.R. 245; People v. Huntington, 1908, 8 Cal.App. 612, 614–620, 97 P. 760. By filing an amended information charging manslaughter, the People have made no admission which precludes them from proving that the defendant murdered Dempsey, even though it be held that she cannot be convicted of a higher homicide than manslaughter.



63 Cal.App.2d 178

HEFFERNAN v. BENNETT & ARMOUR.

Civ. 12535.

District Court of Appeal, First District, Division 2, California.

March 3, 1944.

Hearing Denied May 1, 1944.

1. Corporations ⇐548(5)

The constitutional provision authorizing suit against corporation in county wherein contract involved was made, not provision requiring commencement of action in equity to recover title to and possession of realty in county wherein realty is located, applies to action in nature of creditor's suit to cancel instrument, conveying and transferring corporation's realty, money and other assets to defendant corporation, as defrauding grantor's creditors. Const. art. 6, § 5; art. 12, § 16.

2. Corporations ⇐548(8)
Creditors' suit ⇐2

The code amendments, abolishing statutory requirements that creditor's bill show plaintiff's exhaustion of all other remedies, including fact that he has reduced his claim to judgment and taken out execution, returned unsatisfied, merely made change in procedure and did not abolish remedy of creditor's bill, so that complaint in nature of such bill to cancel corporation's conveyance and transfer of realty and other assets to defendant corporation as defrauding grantor's creditors was not defective because of failure to allege that execution had been levied. Civ.Code, § 3439.09.

3. Constitutional law ⇐70(1)
Corporations ⇐503(1)

The constitutional provision that corporation may be sued in county wherein contract involved was made draws no distinction between local and transitory actions, and District Court of Appeal may not read such distinction into provision. Const. art. 12, § 16.

4. Corporations ⇐503(1)

Actions designated in constitutional provision that corporation may be sued in county wherein contract involved was made or county wherein its principal place of business is situated, subject to court's power to change place of trial as in other cases, may be brought and must be tried under such provision, unless place of trial is changed as provided by law. Const. art. 12, § 16.

5. Action ⇐53(1)

One suing to set aside alleged fraudulent conveyance may not split cause of action and attack separately conveyances of real estate and personal property.

6. Corporations ⇐548(5)

The constitutional provision, authorizing suit against corporation in county wherein contract involved was made, applies to suits for cancellation of fraudulent conveyances of both real and personal property to corporations. Const. art. 12, § 16.

7. Corporations ⇐548(5)
Pleading ⇐64(2)

A complaint in nature of creditor's bill to cancel corporation's conveyance and transfer of realty and cash to defendant corporation was not "duplicitous" as combining local and transitory causes of action because of allegations regarding transfer of cash and necessity for accounting, but attacked only one transfer of both realty and cash, and hence was properly filed in county wherein contract was made, though defendant had its principal place of business and residence in another county. Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Duplicitous Complaint".

8. Venue ⇐72

The question whether money judgment may be had in action to set aside fraudulent conveyance of realty and transfer of cash does not arise on motion to change place of trial.

9. Corporations ⇐503(1)

The clause, "subject to the power of the court to change the place of trial as in other cases", in constitutional provision authorizing suit against corporation in county wherein contract involved was made or county wherein its principal place of business is situated, does not render applicable statutory provisions for action in county of defendant's residence, but refers to matters other than such residence. Code Civ.Proc. §§ 392, 395; Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Subject to Power of Court to Change Place of Trial".

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by F. M. Heffernan against Bennett & Armour, a corporation, to set aside a conveyance of realty and transfer of money and other assets by Bennett & Layton, Inc., to defendant as defrauding grantor's creditors. From an order denying defendant's motion to transfer the cause to the Superior Court of Lassen county for trial, defendant appeals.

Affirmed.

Hardin Barry, of Susanville, Peter tum Suden and Richard tum Suden, both of San Francisco, for appellant.

Thomas J. Riordan, G. D. Schilling, and Ulysses A. Gribble, all of San Francisco, for respondent.

STURTEVANT, Justice.

As assignee of Challenge Cream & Butter Association, a creditor of Bennett & Layton, Inc., the plaintiff commenced an action to set aside an alleged fraudulent conveyance. In his complaint he alleged that the defendant was a corporation; that its principal place of business was in the city and county of San Francisco; that Challenge Cream & Butter Association was a corporation; that on the 24th day of April, 1939, Bennett & Layton, Inc., was doing business as a dealer in dairy products and poultry and had incurred an indebtedness in the sum of $275,000 and on said date was insolvent; that on said date the principal asset of Bennett & Layton was a plant of the value of $100,000 located at Susanville, county of Lassen, state of California, described as follows (setting forth said description); that on said date in the city and county of San Francisco, Bennett & Layton executed a conveyance and transfer "* * * of said real estate and operating plant together with the sum of $16,000 of the moneys and assets of said Bennett & Layton, Inc., and with the actual intent then and there and thereby to hinder, delay, defeat and defraud the then existing and also the future and subsequent creditors of said Bennett & Layton, Inc.;" that Bennett & Layton on the 18th day of June, 1940, failed and has since ceased to operate its business except to liquidate; that since said date it has been liquidated and there are no funds of said corporation available to pay its creditors "* * * excepting the property fraudulently conveyed as hereinbefore alleged;" that said conveyance was made without consideration; that Bennett & Armour is not a purchaser or encumbrancer for a fair or any consideration; that Bennett & Armour is a corporation which was formed by Bennett & Layton for the purpose of taking over the assets of the latter; that a copy of said conveyance by Bennett & Layton to Bennett & Armour was as follows (pleading the same in haec verba and describing the real estate) and adding, "Together with all the tenements, hereditaments and appurtenances thereunto belonging;" that said conveyance was recorded in Lassen County on April 24, 1939; that within four years prior to the commencement of this action Bennett & Layton became indebted to Challenge Cream & Butter Association in a large sum of which $20,976.01 is now due and unpaid; that on the 20th day of August, 1942, Challenge Cream & Butter Association assigned its claim to this plaintiff; that "This action to cancel, annul and set aside said fraudulent conveyance and transfer is brought and prosecuted by plaintiff for the benefit of all creditors of the said Bennett & Layton, Inc. who may intervene herein and share the expense of the litigation as well as for the benefit of plaintiff;" that said Bennett & Layton, Inc., suppressed and concealed the fact of said transfer from its creditors until the 18th day of June, 1940; that no judgment has been sought upon said assigned claim; that ever since said transfer Bennett & Armour has been in receipt of and has appropriated "* * * to its own use the income and profits from said operating plant and real estate and converted the said income and profits thereof and also the sum of $16,000 to its own use

and benefit * * *;" that a receiver should be appointed; that the liability hereinabove set forth was incurred by said defendant in the city and county of San Francisco and did arise therein. Said allegations are followed by a prayer:

"1. That the said transfer and conveyance are fraudulent and void as against the plaintiff and the other creditors of the said grantor Bennett & Layton, Inc., and that the said transfer and conveyance of said plant and property and of said $16,000 be accordingly cancelled, annulled and set aside for the benefit of the creditors of said Bennett & Layton, Inc., including this plaintiff; that a decree be entered herein requiring the defendant to account for the issues and profits received from said plant and real estate and for the said sum of $16,000 and that plaintiff have judgment for the same against said defendant;

"2. That the plaintiff be granted such other further or different relief as may be just together with costs of suit and a reasonable attorneys fee in said action;

"3. That a receiver of said plant and real estate be appointed in said action; that a pro rata distribution of the funds and property recovered herein be made to the creditors of said Bennett & Layton, Inc., as of right may appear."

Later the defendant served a notice that on the 1st day of February, 1943, it would make a motion that the cause be transferred to the superior court of Lassen County for trial on the following grounds, towit:

"That at the time of the commencement of this action defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Susanville, County of Lassen, State of California, and is a resident of said City of Susanville, County of Lassen, State of California, and that at no time was defendant ever engaged in business in the City and County of San Francisco, State of California, or maintained an office therein, and that the Superior Court of the State of California, in and for the County of Lassen, is the proper court for the trial of the above entitled action;

"And on the further ground that the said cause of action is one in equity and not at law and seeks to recover the title and possession of the real property described in plaintiff's complaint which is situated in the County of Lassen, State of California, which action is required by the terms and provisions of the Constitution of the State of California, Article VI, Section 5, to be commenced in the County where said land is located and situated, and that said provisions of the Constitution are both jurisdictional and mandatory;

"Said motion will be made upon this notice, the papers on file in this case, the affidavit of A. N. Bennett, a copy of which is being served herewith, and such other oral and documentary evidence as may be necessary and essential to support defendant's motion."

Later the trial court denied the motion and the defendant appealed.

[1] The defendant claims the trial court erred, and that section 5, Article VI of the Constitution and sections 392 and 395 Code Civ.Proc. state the rule applicable to the facts. The plaintiff contends they do not. He contends that section 16 of Article XII of the Constitution states the rule that is controlling. In his complaint the plaintiff attempted to set up a cause of action in the nature of a creditor's bill. He addressed his grievance in particular to a certain written instrument made the 15th day of March, 1938, and prayed for judgment cancelling said instrument. In other words, the very gist of his action was an attack on the transfer to the defendant. Section 16 of Article XII of the Constitution provides: "§ 16. Corporations, where to be sued. A corporation * * * may be sued in the county where the contract is made * * * or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." The claim that the provisions of section 5 of Article VI of the Constitution are applicable has been directly ruled to the contrary. Beach v. Hodgdon, 66 Cal. 187, 5 P. 77; Woodbury v. Nevada, etc., Ry. Co., 120 Cal. 463, 52 P. 730; Alpha H. & S. Co. v. Ruby Mines Co., 97 Cal.App. 508, 275 P. 984. On the other hand we think it is equally clear that the provisions of section 16 of Article XII of the Constitution are applicable. Nakata v. Guarantee Mtg. Co., 60 Cal.App. 260, 212 P. 937; Ward v. Great Western Power Co., 135 Cal.App. 687, 27 P.2d 937; Hiett v. Inland Finance Corp., 204 Cal. 195, 267 P. 320; Sanborn v. Pomona Pump Co., 131 Cal.App. 241, 21 P.2d 124; Jacobs v. C. H. Smith Lumber Co., 206 Cal. 128, 273 P. 571.

Each was an action involving a contract of the defendant corporation. Several were attacks on the ground of fraud. We think it is plain, therefore, that the provisions of section 16, Article XII of the Constitution are applicable and that the plaintiff was within his rights in commencing his action in the county where the contract was made.

[2] In Beach v. Hodgdon, 66 Cal. 187, 5 P. 77, the court said: "This is not an action to enforce a lien upon real property, but a bill *in aid of execution to set aside* two certain conveyances made by the execution debtor, upon the ground that they were fraudulently executed." The defendant stresses the language which we have italicized. It then calls attention to the fact that the plaintiff's complaint does not allege that execution in the instant case has been levied. It then claims that the Beach case is not applicable. We find no merit in the point. The complaint in the instant case was drawn after the adoption of the amendments to the Civil Code, Statutes of 1939, page 1667 et seq. Prior to the adoption of said statutes it was settled law that one framing a creditor's bill was bound to show by his pleading that he had exhausted all remedies including the fact that he had reduced his claim to judgment, had taken out execution, and that the writ was returned not satisfied. By the amendments of the code just mentioned those requirements are no longer necessary. Civ.Code, sec. 3439.09. Said amendments merely make a change in procedure. They change to some extent the proof necessary to establish a creditor's bill. But a creditor's bill has been a part of the law of this state from an early date down to and including the present. The amendments do not abolish the remedy and they are pertinent to the present action. Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Norton v. City of Pomona, 5 Cal.2d 54, 66, 53 P.2d 952. The defendants cite and rely on Carter v. Carter, 55 Cal. App.2d 13, 130 P.2d 183. We find nothing in it contrary to anything we have said.

[3-6] The defendant contends that the action was local. It calls attention to the fact that the complaint attacks a transfer of real property, that it also attacks the transfer of $16,000 in cash and that it asks an accounting be had. Continuing, defendant asserts that the action should be tried in Lassen County, its residence. The plaintiff asserts that the action was transitory. Neither party cites authority. If the proceeding was had at common law, the distinction would be of some importance. 67 C.J. "Venue", secs. 12, 29. But as we have shown above the proceeding is governed by the provisions of section 16, Article XII of the Constitution. That instrument draws no distinction between actions local and actions transitory. This court therefore may not read such matters into the constitutional provisions. Furthermore, it is settled law that actions designated in such provisions may be brought thereunder and must be tried thereunder unless the place of trial is changed as provided by law. Cook v. W. S. Ray Manufacturing Co., 159 Cal. 694, 115 P. 318. If and when an attack is made in the complaint on an alleged fraudulent conveyance the plaintiff may not split the cause of action and attack separately the conveyance of real estate and secondly the conveyance of personal property. If the attack is made otherwise the pleader splits his cause of action and must suffer the consequences. Cohn v. Cohn, 7 Cal.2d 1, 59 P.2d 969. Above we have cited many cases holding that said section of the Constitution authorizes the commencement thereunder of actions attacking corporate contracts. Picking up said section and reading it with the utmost care it is patent that it draws no distinction between conveyances of real property and conveyances of personal property. It follows that it includes both classes.

[7] What has just been said regarding actions local and transitory is not modified or altered by reason of the allegations regarding the transfer of $16,000 or the claim that an accounting should be had. Manifestly the plaintiff was attacking the transfer—not in part but in its entirety. His attack was therefore made on the transfer of the cash as well as on the transfer of the real estate and there were not two transfers but one only. Nor was duplicity created by inserting the allegations regarding an accounting. That an accounting might be necessary was but an incident of the cause of action to set aside a fraudulent conveyance. Grocers', etc., Union v. Kern, etc., Co., 150 Cal. 466, 471–472, 89 P. 120. Paraphrasing the language of the Supreme Court: Stripped to its essentials this is simply an action to cancel a fraudulent conveyance. If it be conceded that the right to an accounting is sufficiently pleaded that accounting is but an incident in the transaction. In Kopke v. Carlson,

98 Cal.App. 155, at page 157, 276 P. 606, the court said: "It undoubtedly is the rule that, where the main object of a suit is to recover a money judgment, as where a vendor seeks to recover the purchase price of land, that a defendant is entitled to have the action tried in the county of his residence, notwithstanding that the subject-matter of the action is land. But the instant case presents no such situation. The nature of an action is to be determined from the character of the complaint and from the judgment which might be rendered upon a default thereon. McFarland v. Martin, 144 Cal. 771, 78 P. 239. Here the complaint alleges that plaintiff and defendants entered into an installment contract for the sale and purchase of certain real property. Further allegations show that plaintiff has complied with all the conditions and obligations in the contract to be by him performed, and has tendered the balance due on the purchase price, and demanded a deed free and clear of all incumbrances, but defendants refused to comply with his demand, except upon the payment of certain taxes and street assessments. The prayer of the complaint is that the amount due from plaintiff to defendants be ascertained, less the amount of taxes, incumbrances and assessments and that defendants be directed to execute a deed to plaintiff upon payment by him of the amount found to be due. It thus appears that the suit is one solely for the specific performance of the contract and nothing more. The mere fact that it is prayed that the proper amount due defendants be ascertained does not in any manner make the action twofold, or unite a real or local, and a personal or transitory, action. Robinson v. Williams, 12 Cal.App. 515, 107 P. 705. The action stripped to its essentials is one for the specific performance of a contract for the sale of land, and that portion of the prayer asking that the amount due be determined is a mere incident to the main relief sought, and does not change the nature of the action. Dial v. Homestead Land & Bldg. Co., 39 Cal. App. 479, 179 P. 444; Grocers' Fruit Growing Union v. Kern County Land Co., 150 Cal. 466, 89 P. 120."

[8] The defendant relies on Adler v. Fenton, 24 How. 407, 65 U.S. 407, 16 L.Ed. 696. It points to the transfer of $16,000 and the allegations regarding an accounting and the claim for a money judgment. It then argues that in an action to set aside a fraudulent conveyance a judgment for money may not be had. Without entering into a discussion of this contention it is sufficient to state that the subject matter is premature in the instant case. As shown hereinabove the plaintiff sues primarily to set aside a conveyance of real estate. If he has asked for more than he is entitled to the rights of the defendant can be and no doubt will be protected at the time of the trial. Such matters, however, do not arise on a motion to change the place of trial.

[9] The defendant claims that in any event sections 392 and 395 of the Code of Civil Procedure are applicable. It quotes the last clause in section 16, Article XII: "* * * subject to the power of the court to change the place of trial as in other cases", and claims such words expressly provided that said sections of the Code of Civil Procedure are applicable. We think it is mistaken. 25 Cal.Jur. 873, "Venue", § 18. The clause quoted from section 16, Article XII has no such meaning. It refers to matters other than the residence of the defendant. In Cook v. W. S. Ray Manufacturing Co., 159 Cal. 694, at page 696, 115 P. 318, at page 319, Mr. Chief Justice Beatty copied section 16, Art. XII and then he said: "And this has been held to mean, not merely that an action against a corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment where commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county. (Citing cases.)"

Conceding that the plaintiff attempted at least to plead an action to set aside a fraudulent conveyance, the defendant contends that section 16 of Article XII of the Constitution did not give the trial court jurisdiction to proceed. In that behalf it contends that Beach v. Hodgdon, 66 Cal. 187, 5 P. 77; Woodbury v. Nevada, etc., Ry., 120 Cal. 463, 52 P. 730, and Alpha H. & S. Co. v. Ruby Mines Co., 97 Cal.App. 508, 275 P. 984, are not authority to the contrary. It bases that contention on two propositions. It contends that no one of said cases cites and relies on section 16, Article XII of the Constitution and that all three of said cases were "in aid of execu-

tion". Neither distinction is determinative. As will be noted above we have not rested this opinion solely on said last mentioned cases. The defendant seems to contend that whereas the rule formerly obtained that one in framing a creditor's bill should show he had exhausted all of his remedies and whereas by virtue of the enactment of section 3439.09 of the Civil Code it is no longer necessary to make that showing, therefore an action brought under said section is not a creditor's bill; but on the other hand it is an action involving an interest in real property and is governed by the provisions of section 5 of Article VI of the State Constitution. It is sufficient to state that it is apparent all of said cases were attacks on contracts made by said corporations. Some were attacks made on the contention that the contracts were made in fraud of creditors; some rested on the claim that the contracts were made by fraudulent representations; and some were based on the claim that said contracts were breached. A reference to the cases hereinabove set forth shows that all of such cases rest on the provisions of section 16, Article XII of the State Constitution and that in many of them no claim was made that the plaintiff had exhausted all of his remedies.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

Hearing denied; CURTIS, J., dissenting.



LA PRADE v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 14095.

District Court of Appeal, Second District, Division 3, California.

March 4, 1944.

Rehearing Denied April 3, 1944.

See 147 P.2d 420.

1. Municipal corporations ⇐218(8)

The Civil Service Commissioners of Los Angeles in considering notice of discharge are not required to hold a formal hearing or trial.

2. Municipal corporations ⇐218(8)

A statement in the minutes of Civil Service Commissioners of Los Angeles on whether charges against employee are sustained is sufficient finding in writing.

3. Mandamus ⇐168(4)

Evidence showed that proceedings before Civil Service Commissioners of Los Angeles concerning discharge of employee of water and power department complied with the city charter.

4. Mandamus ⇐172

Where Civil Service Commission of Los Angeles sustains discharge of employee in accordance with city charter, the only question for court in mandamus proceeding for reinstatement is legal sufficiency of cause of discharge.

5. Municipal corporations ⇐216(1)

The minutes of Civil Service Commissioners of Los Angeles are sufficient proof of facts stated therein until overcome by other evidence. Code Civ.Proc. §§ 1920, 1926.

6. Municipal corporations ⇐205, 206

A discharged employee of Los Angeles water and power department was entitled to a specific finding by civil service commissioners of reason why he was not permitted to continue in the position.

7. Municipal corporations ⇐216(1)

Where secretary of Los Angeles Civil Service Commissioners relied on shorthand notes made at meeting in writing up minutes, and the minutes were ambiguous, such notes were admissible to show that minutes were inaccurate. Code Civ.Proc. §§ 1920, 1926.

8. Municipal corporations ⇐218(11)

Where president of the Los Angeles Municipal Civil Service Association, a corporation, which published a newspaper, had nothing to do with article allegedly reflecting on city officials, article could not be considered by civil service commissioners in determining whether president as civil service employee was properly discharged or was fit to be reinstated.

9. Municipal corporations ⇐205, 206

Article by civil service employee stating that department of water and power of Los Angeles was rolling in profit from war industries, that it had referred all wage adjustments to the general managers and then maintained there was no proposal be-

fore it and that mass meeting had been called at request of members of civil service association who were tired of dilatory way requests for blanket wage increase had been treated, furnished no basis for finding that writer was unfit for reinstatement to position from which he had been discharged.

10. Municipal corporations ⇐218(11)

Where grounds alleged in notice of discharge of municipal civil service employee are not found to be sufficient or true as a basis for discharge, such grounds should not be considered sufficient or true as basis for finding of unfitness to be reinstated.

11. Municipal corporations ⇐218(11)

Municipal civil service employee's manner of presenting his case before civil service commissioners was not assignable as evidence of unfitness to be reinstated.

12. Municipal corporations ⇐205, 206

Evidence before civil service commissioners was sufficient to support and require a finding that municipal civil service employee was fit and suitable to be restored to position in water and power department from which he had been wrongfully discharged.

13. Municipal corporations ⇐218(11)

The issue of fitness of civil service employee of Los Angeles to be reinstated is not confined to occupational ability or limited by specifications of notice of discharge.

14. Municipal corporations ⇐218(8)

Municipal civil service employees are entitled to have rules relating to their discharge fairly invoked and applied.

15. Mandamus ⇐172

In mandamus proceedings for reinstatement of municipal civil service employee, court was authorized to determine whether civil service commissioners acted arbitrarily and whether employee was given substantially the benefits he was entitled to under the statutes.

16. Mandamus ⇐172

In mandamus proceeding for reinstatement of municipal civil service employee, court had power to determine whether there was substantial evidence to support order of civil service commissioners.

17. Mandamus ⇐168(4)

Evidence in mandamus proceeding for reinstatement of municipal civil service employee showed that action of civil service commissioners in sustaining discharge was an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Petition by Zerah H. La Prade for a writ of mandate directing the Department of Water and Power of the City of Los Angeles and others to reinstate petitioner as an employee of such department, and to pay accrued salary from date of discharge. From a judgment for petitioner, the respondents appeal.

Judgment affirmed.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for appellants.

David Sokol, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Petitioner, who was discharged from his civil service position in the Department of Water and Power of the City of Los Angeles, sought a writ of mandate directing his reinstatement to the position from which he had been discharged, and directing the payment of accrued salary from the date of his discharge. Judgment was for the petitioner. The respondents named in the petition appeal from the judgment. Said respondents are: the Department of Water and Power, and the individual members of the Board of Commissioners of said department; the Board of Civil Service Commissioners of the City of Los Angeles, and the individual members of said board; Dan O. Hoye, city controller of Los Angeles; and the City of Los Angeles.

Petitioner had been an employee of the department of water and power 21 years and 7 months continuously when he was discharged on August 28, 1942. During a period of approximately 20 years, preceding his discharge, he had occupied the position of junior electrical engineer, grade B, in the classified civil service of the City of Los Angeles.

On August 28, 1942, the board of commissioners of said department of water and

power filed with the board of civil service commissioners of said city, and duly served upon petitioner, a written notice stating that said commissioners of the department of water and power had on that day discharged petitioner, and stating further the alleged cause for the discharge as follows:

"Published and distributed or caused to be published and distributed over his own name and title in the 'Official Organ of the Municipal Civil Service Association' entitled 'The Civil Service Sentry', dated August 15, 1942, distorted and misleading statements concerning the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power.

"Such published statements cause or tend to cause dissatisfaction and dissension among employees of the Department of Water and Power concerning their wages and working conditions, create or tend to create distrust of the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power, and incite or tend to incite employees of the Department to action against the Department of Water and Power.

"As president of such Association he has permitted, participated in, approved, and encouraged the publication and distribution of the issue of 'The Civil Service Sentry' above referred to, which issue contains:

"1. A statement which by innuendo refers to the Board and the General Managers as follows: 'Figures can't lie but liars can figure.'

"2. Statements which further cause or tend to cause dissatisfaction and dissension among employees of the Department of Water and Power concerning their wages and working conditions, create or tend to create distrust of the Board of Water and Power Commissioners and the General Managers of the Department of Water and Power, and incite or tend to incite employees of the department to action against the Department of Water and Power."

Upon the filing of such notice the discharge took effect. Charter of the City of Los Angeles, Art. IX, Sec. 112(a).

The department of water and power will be referred to hereinafter as the department; the board of commissioners of the department of water and power will be referred to as the board; and the board of civil service commissioners will be referred to as the commission.

[1, 2] In considering such a notice of discharge, if the commission finds, in writing, that the grounds stated for such discharge are sustained, the proceedings before the commission concerning the discharge are ended. If the commission finds, in writing, that the grounds stated for such discharge are not sustained, it is required to find, before it can reinstate the employee to his position, that he is a fit and suitable person to fill the position from which he was removed. Charter of the City of Los Angeles, Art. IX, Sec. 112(a). Said section of said charter provides in part as shown in the footnote.[1] The commission is not required to hold a formal hearing or trial; and a statement in the minutes is a sufficient form of the finding

[1] Article IX of the City Charter, Sec. 112(a). "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the Board of Civil Service Commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended * * *. Upon such filing such removal, discharge or suspension shall take effect. Within fifteen days after such statement shall have been filed, the said board, upon its own motion, may, or upon written application of the person so removed, discharged or suspended, filed with said board within five days after service upon him of such statement, shall proceed to investigate the grounds for such removal, discharge or suspension. If after such investigation said board finds, in writing, that the grounds stated for such removal, discharge or suspension were insufficient or were not sustained, and also finds in writing that the person removed, discharged, or suspended is a fit and suitable person to fill the position from which he was removed, discharged, or suspended, said board shall order said person so removed, discharged or suspended, to be reinstated or restored to duty. The order of said board with respect to such removal, discharge or suspension, shall be forthwith

required to be in writing as to whether the charges are sustained. Krohn v. Board of Water & Power Com'rs, 1928, 95 Cal.App. 289, 292, 295, 272 P. 757.

On August 28, 1942, petitioner delivered to said commission a letter from himself stating that petitioner denied "all the causes enumerated in the notice of removal, discharge or suspension dated August 28, 1942, as a basis for proper discharge," and requesting that he "be permitted to make a personal appearance, in order that each member of your Board may have personal knowledge of my deportment and attitude, at the hearing following your investigation of the grounds for my discharge."

On September 1, 1942, petitioner caused to be delivered to said commission another letter from himself stating, in part, "I desire to supplement my communication filed with your Board * * * by specifically requesting herewith that a Civil Service investigation be made of my discharge from the classified civil service * * *."

On September 10, 1942, the commission sent a letter to petitioner stating that "your appeal from discharge as Junior Electrical Engineer 'B,' Department of Water and Power, with report and recommendation for action from the General Manager of this department, will be submitted to the Board of Civil Service Commissioners at its regular meeting scheduled for 2:00 p. m. Tuesday, the 15th." On September 11, 1942, a notice was sent to petitioner stating that the meeting at which his appeal would be considered had been changed to "2:00 p. m. Wednesday the 16th."

At the meeting on September 16th, petitioner was present. The minutes of that meeting state, "Notice was presented of the discharge August 28, 1942, of Z. H. LaPrade as Junior Electrical Engineer B, Department of Water and Power, for the following cause * * * [It was stipulated that the cause stated in the minutes was the same as the charge set forth in the notice of discharge of August 28, 1942, from the Department of Water and Power.] together with communication from Mr. LaPrade of August 28, 1942, categorically denying the charges as a basis for proper discharge, and requesting permission to make a personal appearance at a hearing following investigation by the Board of Civil Service Commissioners, communication dated September 2 from David Sokol, attorney at law, filing a request for the Municipal Civil Service Association that Mr. LaPrade be reinstated, and second communication from Mr. LaPrade dated September 1, 1942, supplementing his first communication of August 28, 1942, by specifically requesting that a Civil Service investigation be made of his discharge. There was present as interested in the case, besides Mr. LaPrade * * *. After the reading by the secretary of the charges, Mr. LaPrade was asked if he had anything to present to the Board and stated that, on advice of counsel, he had nothing to say other than to categorically deny the charges, explaining further that by his second communication, he wished to request only the regular Civil Service investigation under charter provisions without a formal hearing. Commissioner Lazard moved and it was seconded that the Commission take the matter under advisement. The motion was adopted by the following vote * * *."

On September 18, 1942, petitioner sent a letter to the commission stating: "In compliance with Section 112½ of the City Charter of Los Angeles I hereby demand that your Honorable Board reinstate me to my position * * * from which I was illegally discharged on August 28, 1942."

The minutes of a meeting of the commission held on September 22nd state: "The Commission proceeded to the consideration of the discharge August 28, 1942, of Zerah H. LaPrade, junior electrical engineer 'B' Department of Water & Power for cause, as set forth in detail in notice of said discharge and made a part of the Minutes of the regular meeting of September 16, 1942, and by reference thereto made a part hereof as though fully set forth herein, together with staff report of September 1, 1942, covering investigation made at the request of Mr. LaPrade. After discussion, Commissioner Woellner moved that the discharge of Mr. LaPrade be sus-

certified to the appointing board or officer, and shall be final and conclusive * * *. If the Board of Civil Service Commissioners shall order that any person removed, discharged or suspended under the provisions of this section be reinstated or restored as above provided, the person so removed, discharged or suspended shall be entitled to receive compensation from the city the same as if he had not been removed, discharged or suspended by the appointing board or officer."

tained. The motion was seconded and adopted by the following vote * * * [names of 5 commissioners]. Noes, none." (A further statement was added to these minutes at a subsequent meeting held on September 25.)

The minutes of the meeting of the commission held on September 25th state: "President Wadsworth: Before taking up the regular addenda at this meeting, Commissioner Gillette would submit a statement and clarification of the record in connection with the discharge of Zerah H. LaPrade. Commissioner Gillette prepared a form of written statement explanatory of the action taken sustaining the discharge of Mr. LaPrade. He moved, and it was seconded, that the secretary be directed to insert the following statement in the minutes of the meeting of the Board on September 22 in connection with the action of the Board at that meeting sustaining the discharge of Mr. LaPrade: 'In considering the case of Z. H. LaPrade, the Civil Service Commission, as a result of its investigation is of the belief that the employee by reason of participation in the preparation of an article which appeared in the Civil Service Sentry, August 15, 1942, and as President of the organization, must be held constructively responsible for the issue of the publication in question; that the language employed in said publication was abusive, unbecoming a civil servant, and detrimental to Civil Service, and on this basis the Commission sustains the discharge.' The motion was adopted by the following vote: * * * [names of 4 commissioners]. Noes, none."

An additional statement was inserted at the end of the minutes of September 22nd as follows: "At the meeting of the Commission held on September 25, 1942, the secretary was instructed by a motion duly made and adopted to insert in these minutes the following statement * * * [said statement being the one directed by the minutes of September 25th (shown above) to be inserted in the minutes of September 22nd]."

The senior technician of the civil service commission, whose duty was to investigate such charges, made an investigation of said charges at the request of the commission and filed a written report with the commission. That report, which recommended against dismissal, was referred to in the minutes of September 22nd as the "staff report of September 1." The minutes of September 22nd stated, as above shown, that the commission "proceeded to the consideration" of the notice of discharge "together with staff report of September 1." That report was as follows:

"September 1, 1942

"To: General Manager

"From: Classification Division

"For consideration of the Board

"Statement of the case: The Department of Water and Power has discharged Zerah H. LaPrade, from which he has appealed, on the grounds that articles and statements which he 'published and distributed and caused to be printed' created dissension among employees, and distrust of the Board of Water and Power Commissioners.

"The publication to which they refer in their charges is attached to this file, with red underlining of those portions to which the charges specifically refer.

"Attention is called to the fact that the specific reference 'Figures can't lie, but liars can figure', did not appear over Mr. LaPrade's name as alleged.

"Recommendation: That the charges filed by the Board of Water and Power Commissioners do not constitute a proper and sufficient cause for dismissal, and that the Board of Civil Service Commissioners order the restoration of Mr. LaPrade."

On September 28, 1942, the commission sent a letter to petitioner stating that "on the 22nd the Board of Civil Service Commissioners took under consideration the matter of your discharge August 28, 1942 * * * and staff report of September 1st covering investigation made at your request. I am instructed to inform you that * * * [Here the supplemental minutes of September 25th were stated]."

Petitioner was not present at, and had no notice of, any meeting of the commission after September 16th.

Petitioner was president of the Municipal Civil Service Association, a corporation, the members of which were civil service employees of the City of Los Angeles. The purposes of the association were to promote the merits of civil service and improve the working conditions and salaries for civil service employees. A newspaper, "The Civil Service Sentry," was the official publication of that association. The association employed and paid an editor who supervised and published the paper. The editor was also the executive secretary of the association. As editor it was his duty to

attend the executive committee meetings and "to carry on the things that were discussed in the executive committee meeting and publish them," and "that was left to him." The president had nothing to do with the publication of the paper. The published statements referred to in the notice of discharge were two articles which appeared in that newspaper on August 15, 1942.

In a telephone conversation with the editor, the petitioner authorized the publication of one of those articles, which was as follows:

"Notice

"August 15, 1942

"Fellow Workers:

"This issue of The Sentry is dedicated to the wage and salary problems of employees of the Department of Water and Power.

"These problems in this Department are different from those in other City Departments because salaries in most government employment are fixed by elected representatives of the people whose power to negotiate, mediate, and arbitrate salary matters are strictly limited.

"The Department of Water and Power is not hamstrung by such limitations. It is a revenue producing agency. It is rolling in profit from the war industries. If it does not choose to deal with employees in an open, realistic and fair manner on the wage question, there Are remedies.

"For months the Board of Water and Power Commissioners has politely referred all wage adjustments to the General Managers, and then maintained the Board had no proposal before it on which it could act!

"Employees do not have to continue to put up with this kind of treatment. Employees can exercise their rights.

"The mass meeting Thursday night has been called at the request of our members who are tired of the dilatory way in which their requests for a blanket wage increase have been treated.

"Fraternally yours,
"Z. H. La Prade, President"

Petitioner did not authorize the publication of the other article, and had no knowledge of its publication and had not seen it, until he received the newspaper by mail at his home. The headline of the other article was, "Figures Can't Lie But Liars Can Figure," and the article contained about 2500 words. The headline apparently was the basis for the main objection to that article. It is not necessary to set forth the article herein.

[3, 4] It appears from the above-mentioned record evidence of the proceedings before the commission, that there was compliance with the provisions of section 112(a) of the Charter of the City of Los Angeles. It appears, as one interpretation, from the face of the minutes that on September 22nd the commission sustained, in writing, the discharge on the grounds stated in the notice of discharge. If the discharge was so sustained the only question that remained for the trial court was whether the cause of discharge was sufficient legally. The legal sufficiency of the cause of discharge will be discussed hereinafter.

A question arises, by reason of the manner of recording the minutes, whether that which appears from the face of the minutes of September 22nd as the action of the commission, i.e., that the grounds of discharge as stated in the notice were sustained, was in fact the action taken.

Petitioner contended at the trial that the minutes did not show accurately the action of the commission on September 22nd; and contended further that the vote of the commissioners was not, as shown by the minutes, to sustain the discharge on the grounds stated by the board of water and power commissioners.

[5] The minutes are only prima facie evidence of the facts stated therein. Code Civ.Proc. secs. 1920, 1926. The minutes are sufficient proof of a fact until and unless contradicted and overcome by other evidence. In re Estate of Woodson, 1939, 36 Cal.App.2d 77, 80, 96 P.2d 1016.

The secretary of the commission, whose duty was to write the minutes, testified: that she did not make the minutes of the meetings, or take any notes of the proceedings of the commission during the meetings; that, "I don't take minutes on the date"; and that, "I write the minutes of the actions from my memory of the action that was taken"; and, "If it is necessary for me to check on the action, I do refer to the stenographer's notes." She testified further concerning the making of the minutes of September 22nd that: "Why, I did not take any notes. I discussed with Miss Lampton [the stenographer]—discussed it with Miss Lampton and I may have referred to her notes as to what the action really was. I don't attempt to remember or get all of the discussion. My

obligation is to record the action," and, "I think I could truly say that I did" rely on the stenographer's notes.

The minutes of September 22nd, prior to the addition of the minutes of September 25th, stated, as above shown, that: "The commission proceeded to the consideration of the discharge * * * for cause, as set forth in detail in notice of said discharge * * * together with staff report of September 1, 1942, covering investigation made at the request of Mr. LaPrade. After discussion, Commissioner Woellner moved that the discharge of Mr. LaPrade be sustained. The motion was seconded and adopted * * *."

The stenographer for the commission testified that she had "some notes" of the meetings of the commission in the LaPrade matter, and that, "I am not required to take verbatim notes, but only sufficient notes so that the secretary might check back on actions and motions and resolutions in order to record the proceedings of the meetings." As a witness the stenographer read her shorthand notes of the meeting of September 22nd, as follows: "President Wadsworth: Before taking the items from the addenda, I want to make a statement of our position on behalf of the Commission in the LaPrade case, and after which I will entertain a motion in regard to it. The Commission, through its investigation, does not find the charges against Mr. LaPrade fully sustained, although the Commission disapproves of the type of article, the language used, and the abuses intended in his publication. It does not believe it becoming Civil Service or civil servants. We have a certain responsibility under the Charter, however. In matters of this kind, in addition to the determining of whether or not the charges are sustained or not sustained, the question arises as to certification of the individual as a fit and proper person to return to duty, and the Commission is unable to make a finding in that regard that would justify overruling the discharge. The employee involved makes no categorical denial of the charges as such; he merely denies that the charges are a proper cause for discharge—a very different thing.

"Second, he requested a hearing before the Commission so that the Commission could judge something of him through his attitude and deportment, and he appeared before the Commission and didn't tell us anything. On that basis, on the issue of certification that he is a fit and proper person to return to duty, we do not have sufficient evidence to return him to his job. With that preface, I will entertain a motion on that basis.

"Commissioner Woellner: I move, especially since he has shown in his manner of presenting his case—at least it is not the way of the courts—that he refuses to cooperate with the Civil Service Commission.

"Commissioner Lindauer: On the basis of the statement made by the President of the Commission, I second that.

"Commissioner Gillette: Mr. Chairman, before I vote I would like to make a statement: I am voting to sustain the Commission that the discharge be upheld. I think the management in this case, and I'm not saying it exactly 'with my tongue in my cheek,' but I do recognize, I believe, some of the most inconsistent features of management in that department that I have ever had the misfortune to know. While I am perfectly willing to admit that there is a difference in status of public service and private service, there is a method of presenting things in proper form and being consistent in the manner of handling things. I can't approve of the Commission coming over here with the discharge of a person in the lower ranks and not upholding the same principle or having the same desire to improve the condition in the upper ranks. That is what I find we have. While part of the bracket left their jobs, we find a lower part of the bracket, because they felt they had a grievance, did a lot of 'jockeying around' to try to meet an issue, and they discharged persons for it. From my side of the picture the person discharged is being held for a position he was not responsible for, but he did make a bad mistake in the article he wrote, and so forth, but I wish my vote to be registered in approving of the discharge brought over here and disapproving of the inconsistent manner of looking for reasons and the way of presenting them here, and only on that basis I would register my vote to uphold the Commission.

"President Wadsworth: I would add to that, it is the consensus of the Commission that as a contest between the individuals who left their posts of duty and exposed the community to any hazards that might be entailed in that action, and the individual who says something, we see a vast difference, but the consensus of the Civil Service Commission is that we could

deal only with the facts before us, and with the cases that come here, and there is nothing we could say in connection with this case on the part of the Civil Service Commission of the manner in which the strike was handled or the policy of differentiating between talking and actually leaving the job, in terms of discipline. Unless there is something to be added, I will entertain the motion on the discharge.

"Motion was unanimously carried."

It appears therefore that the stenographer's notes upon which the minutes were based do not furnish a basis for the statements in the minutes that "Commissioner Woellner moved that the discharge of Mr. LaPrade be sustained," and, "The motion was seconded and adopted." Those notes show that the president said, in stating "our position on behalf of the Commission in the LaPrade case," that "The Commission, through its investigation, *does not find the charges against Mr. LaPrade fully sustained,*" and that, "In matters of this kind, in *addition* to the determining of whether or not the charges are sustained or not sustained, the question arises *as to certification of the individual as a fit and proper person* to return to duty, and the Commission is unable to make a finding in that regard that would justify overruling the discharge." (Italics added.) He said further, "On *that basis,* on the issue of certification that he is *a fit and proper person* to return to duty, we do not have sufficient evidence to return him to his job. With that preface, I will entertain a motion *on that basis.*" (Italics added.) The matter that was then before the commission was whether a motion should be made on *"that basis"* which had just been stated by the presiding officer. That basis was that the charges were not fully sustained and that the employee was not a fit and proper person to be returned to duty. As above stated herein, and as shown by the president's statement, if the charges were not sustained it was necessary before the employee could be reinstated that the commission find that he was a fit and suitable person to perform the duties of the position from which he had been removed. A motion therefore which would be on the basis stated by the president, and which would be in accordance with the provisions of the charter under the findings of fact as announced by the president, would be a motion that the commission find that the charges were not sustained and that the evidence was not sufficient to justify a finding that the employee was a fit and suitable person to fill the position from which he had been removed.

Immediately after the president said he would entertain a motion on "that basis," Commissioner Woellner said, "I move," but he did not state expressly what action he was proposing by such motion. He did state expressly, however, the especial reason why he made the motion, viz: that the employee had "shown in his manner of presenting his case * * * that he refuses to cooperate with the Civil Service Commission."

Although the motion in itself was indefinite, it could be made definite by reference to the statement of the president immediately preceding it which invited a motion upon the basis stated by the president. The motion by Commissioner Woellner did not include any modification of the basis upon which a motion was invited, with the exception of a statement to the effect that he considered the conduct of the employee before the commission was sufficient evidence of unfitness. Commissioner Lindauer expressly noted in seconding the motion that he seconded it *on the basis stated by the president.* The reason given by Commissioner Woellner for making the motion related to the question of fitness of the employee to be reinstated. The conduct of the employee before the commission, referred to in giving the reason, being subsequent to the notice of discharge, did not relate to the sufficiency of the grounds of discharge, and, of course, was not referred to as evidence upon which the grounds for the discharge should be sustained. It seems that the commissioner was assigning an affirmative act of the employee as sufficient evidence of unfitness, while the president said, "[W]e do not have sufficient evidence as to his fitness."

It is certain that the commission was determining the question of fitness of the employee to be reinstated. The question of fitness to be reinstated would not arise if the grounds of discharge were sustained. It is only when the charges are not sustained that the question of fitness arises. The act of the commission in proceeding to determine the question of fitness corroborates the statement of the president that the position of the commission was that it "does not find the charges against Mr. La Prade fully sustained." It is clear that the motion was made upon the basis

stated by the president which was that the charges were not fully sustained and the evidence was not sufficient to justify a finding that the employee was a fit and proper person to fill the position from which he was removed.

[6, 7] The motion having been adopted, the action of the Commission constituted a determination that the cause or grounds for discharge stated in the notice of discharge were not sustained, and that the evidence was insufficient to justify a finding that the employee was a fit and suitable person to fill the position from which he was removed. The minutes show that a motion "that the discharge be sustained" was adopted. It is to be noted that entry was not specific as to whether "the *grounds stated* for such removal, discharge or suspension were insufficient or were not sustained," as contemplated by section 112(a) of the charter when the question of fitness is to be determined. (Italics added.) The entry as made is susceptible of the interpretation that the grounds for the discharge were sustained. As made, it is also susceptible of the interpretation that the discharge, which took effect when the notice was filed, was sustained, not because the charges were sustained, but for the reason the employee was not fit to be reinstated. Apparently the secretary considered the form of the minutes sufficient inasmuch as the ultimate result was the same whether the grounds were sustained or the employee was not reinstated by reason of unfitness. The employee was entitled, under the circumstances of this case, to a specific finding as to the reason he was not permitted to continue in the position. The minutes of September 22nd do not show accurately the action of the commission on September 22nd. It was proper to receive the testimony as to the shorthand notes made at the time of the meeting on September 22nd for the reasons that the secretary relied upon the notes in making the minutes, and that the minute entry as to the action of the commission was ambiguous.

At a meeting of the commission on September 25th, as above shown by the minutes of that date, the president of the commission said that a commissioner "would submit a statement and clarification of the record in connection with the discharge of Zerah H. LaPrade." The secretary was instructed at that meeting to insert in the minutes of September 22nd a statement in part as follows: "* * * the Civil Service Commission * * * is of the belief that the employee by reason of participation in the preparation of an article which appeared in the * * * Sentry * * * and as President of the organization must be held *constructively* responsible for the issue * * * that the language * * * was abusive, unbecoming a civil servant, and detrimental to Civil Service, and on this basis the Commission sustains the discharge." (Italics added.) This supplement of September 25th to the minutes of September 22nd stated, as it was stated in the minutes of September 22nd, that "the discharge is sustained," but it does not state that the grounds for the discharge are sustained or that the employee is not fit to be reinstated. The commission did not find in that supplement to the minutes or at all that the employee published the article, as averred in the notice of discharge, but it did find that he was constructively responsible for the publication in question. Even if the defendant were constructively responsible for the publication the commission did not find in that supplement or at all, as averred in the notice of discharge, that the published statements were distorted or misleading statements concerning the water and power commissioners or the general managers of that department; or that said statements caused or tended to cause dissension among the employees, or distrust of the water and power commissioners, or to incite the employees to action against that department; or that the paper contained a statement which by innuendo referred to the "Board" and general managers as "Figures can't lie but liars can figure." It did find that the language of the publication was abusive, unbecoming a civil servant and detrimental to civil service. In other words, the special findings of the commission as shown by the supplement to the minutes of September 22nd were different materially from the averments of grounds for discharge in the notice of discharge. The special findings in the supplemental minutes being at such variance with the averments of grounds for discharge in the notice, it cannot properly be concluded that the statement, "the discharge is sustained," meant that the grounds for discharge as stated in the notice were true or sustained. Furthermore, the supplemental minutes show that the commission itself expressly designated its special findings therein as the basis for

sustaining the discharge when it said, in referring to those special findings, that, "on this basis the commission sustains the discharge." Apparently the secretary considered that, if the employee was not reinstated after his discharge, the form of these minutes, in order to show the action of the commission in not reinstating him, should also be that "the discharge is sustained," irrespective of whether the failure to reinstate him was by reason of finding that the charges were *sustained,* or was by reason of finding that the charges were *not sustained* and that he *was not fit.* If the statement, "the discharge is sustained," was used in the sense that the discharge, which took effect when the notice was filed, continued in effect because the employee was unfit to be reinstated, then the findings were deficient in that there was not a finding of unfitness. If said statement was used in the sense that the charges were sustained, then the specific findings, being so materially different from the charges alleged in the notice, would not support such a general finding, but on the contrary would establish that the charges were not sustained.

[8] The undisputed evidence was that the employee had previous knowledge only of the publication of the article entitled "Notice" which appeared over his name. As to that article he was actually responsible therefor. The theory of constructive responsibility related only to the other article which the evidence shows was published without his actual knowledge. That theory was based upon the fact that the employee was president of the corporation which authorized the publication of the newspaper referred to herein. It has been held in contempt cases, to which this case is similar in legal principle, and in libel cases, that the president or other officer of a corporation engaged in publishing a paper is not responsible for articles published therein unless he personally caused or permitted the publication. Otis v. Superior Court, 1905, 148 Cal. 129, 82 P. 853; Sakuma v. Zellerbach Paper Co., 1938, 25 Cal.App.2d 309, 321, 77 P.2d 313. That rule eliminates the theory of constructive responsibility in this case. Therefore, insofar as the special findings in the supplemental minutes related to the article of which the employee had no previous knowledge, those findings should not have been considered by the commission in determining whether the charges were sustained or whether the employee was fit to be reinstated. As to the published article of which the employee had no actual previous knowledge, the commission did not find that said article (or the other one) had or tended to have the effect averred in the notice of discharge. It therefore appears that said supplement was not a finding that the grounds for discharge in the notice of discharge or any of them were true or sustained. The supplement shows that the commission sustained the *discharge* on the basis that the employee was constructively responsible for the publication and that the language of the articles was abusive, unbecoming a civil servant, and detrimental to civil service, while the employer, the department of water and power, discharged him on entirely different grounds as shown in the notice of discharge. The supplemental minutes did not accomplish the intended purpose of clarifying the action of September 22nd.

If such a commission does not find the grounds for a discharge to be true, the only remaining basis for not reinstating an employee would be that he is not a fit and suitable person to be reinstated. It may be that the special findings of the commission that the language was abusive, unbecoming and detrimental, as stated in the supplemental minutes, were intended as a basis for the refusal to reinstate the employee on the ground that he was not fit. The commission did not find, however, that he was unfit. It might be argued that such special findings state facts which show unfitness and under such circumstances it was not necessary to find unfitness in express terms. Section 112(a) of the charter contemplates an express finding on the question of fitness to be reinstated.

[9-12] The special findings as to the character of the language used were based apparently upon the language of both articles, since the theory of constructive responsibility was the basis for holding the employee responsible for the second article. The theory of constructive responsibility having been eliminated, the remaining basis for the special findings as to character of language used is the language of the first article. The language of that one article, and the one publication of it, were not such that it constituted a basis for a finding that petitioner had thereby demonstrated his unfitness or unsuitability for restoration to his position. If the grounds alleged in a notice of discharge

are not found to be sufficient or true as a basis for a discharge, those grounds in themselves should not be considered as sufficient or true as a basis for a finding of unfitness. Other than the one publication of the one article in question, there was no evidence that the petitioner, whose fitness and suitability in his position had been recognized by the board of water and power commissioners for 20 years, had in anywise become unfit or unsuitable for the position. It does appear further, however, in view of the reason given by Commissioner Woellner for his motion and in view of the president's comments, that the commission might have considered petitioner's "manner of presenting his case" by refusing "to tell us [them] anything," at the meeting of September 16th, as evidence of unfitness. That such conduct before the commission might have been regarded as evidence of unfitness is also indicated in appellants' brief by the citation of and comments on the case of Christal v. Police Commission, 1939, 33 Cal.App.2d 564, 92 P.2d 416, which involved the discharge of a police officer for refusal to testify before the grand jury upon the ground that he might incriminate himself. The legal principle announced in that case is not applicable herein. This petitioner did not predicate his refusal to make a statement before the commission upon the possibility of self-incrimination. The petitioner testified at the trial herein that he did say before the commission: that on advice of counsel he had nothing further to say; that he would make a statement in the event of an investigation and he welcomed an investigation; and that he presumed he would hear at that meeting "the verdict of some investigation that had been made," and since he "was apparently being put on trial" he "declined to talk until he knew what they had done." His testimony that he told the commission he would make a statement after an investigation is corroborated by a statement in the minutes of September 16th which purported to recite the substance of his letter of September 28th, which statement was: "* * * Communication from Mr. LaPrade * * * requesting permission to make a personal appearance at a hearing *following investigation* by the Board of Civil Service Commissioners." (Italics added.) At the time petitioner made the statement declining to talk until an investigation had been made, the commission had before it the written report of investigation (above quoted) made by the commission's senior civil service technician, recommending that the charges did not constitute sufficient cause for dismissal and that the commission order restoration. The commission did not advise petitioner that the contingency, upon which he said the making of his statement depended, had occurred, viz: that said investigation of September 1st or any investigation had been made. Although he was not entitled to a hearing before the commission, he had been notified of the meeting on September 16th and he was present. He would have been justified in assuming, after he had said he was awaiting an investigation, that an investigation had not been made at the time of the meeting and that when an investigation had been made he would be notified again of a meeting at which he could appear. The "manner of presenting his case" was not, under those circumstances, assignable as evidence of unfitness, particularly under the circumstance that the commission knew the existing investigation report was wholly favorable to him. Up to the time of petitioner's discharge there had not been any complaint as to his competency. He received increases in pay at various times. His last assignment before the discharge was that of technical adviser and administrative assistant to the director of the Los Angeles Civilian Defense Corps. He was the "dim-out" expert assigned by the department of water and power in the "defense setup," and appointed as such by the Mayor. The evidence before the commission was sufficient to support and require a finding that petitioner was fit and suitable.

[13] It is true as asserted by appellants that the issue of fitness is not confined to occupational ability or limited by the specifications of the notice of discharge. Meyer v. Board of Public Works, 1942, 51 Cal. App.2d 456, 125 P.2d 50. In the Meyer case, cited by appellants, the commission made a finding that the employee was unfit and also made findings of fact showing the unfitness. In the present case there was no finding of unfitness and no finding as to facts within the specifications of the notice, or at all, showing unfitness.

[14-16] Appellants also assert that the trial court did not have before it all of the evidence upon which the commission acted; and that the end of judicial review of an order of the commission is when it is de-

termined there has been substantial compliance with the prescribed procedure. Even though it be conceded that a right to public employment is not a vested property right, nevertheless municipal employees holding employment under civil service rules are entitled as a matter of right to have the rules relative to their discharge from employment fairly invoked and applied. Garvin v. Chambers, 1924, 195 Cal. 212, 225, 232 P. 696. The trial court was authorized to determine whether the commission acted arbitrarily or abused its discretion, and whether the employee was given substantially the benefits to which he was entitled under civil service statutes. In order to determine those issues the inquiry in the trial court properly included whether there was substantial evidence before the commission in support of its order. If the court did not have before it the evidence upon which the commission acted, the commission had the opportunity to present evidence sufficient to show there was substantial evidence that the employee was unfit, if it had such evidence.

[17] The article entitled "Notice" (for which petitioner was actually responsible), and the one publication of that article, did not constitute a legal cause for discharge of petitioner. The second article, referred to herein, the title of which related to "Figures," was shown by undisputed evidence to have been published under such circumstances, without the knowledge of petitioner, that the publication of it did not constitute a legal cause for discharge of petitioner. The grounds stated in the notice of discharge were not sustained by legally sufficient or substantial evidence. These conclusions are in harmony with the decision of the commission's senior technician, and with the motion adopted by the commission that the charges were not fully sustained. The action of the commission in sustaining the discharge was arbitrary and an abuse of discretion.

The case of Hayman v. City of Los Angeles, 1936, 17 Cal.App.2d 674, 62 P.2d 1047, upon which appellants rely, is factually different from the present proceeding. The grounds stated in the notice of discharge in that case were (17 Cal.App.2d at page 678, 62 P.2d at page 1049): *"Continuing* to attempt to cause dissension among employees of the Refuse Collection Division by circulating a handbill protesting against the book of rules adopted by the Board of Public Works for the conduct of employees of said division." (Italics added.) The court said therein on page 678 of 17 Cal.App.2d, on page 1049 of 62 P.2d: "In the notice of discharge the acts of petitioner were characterized as a *continuance of attempts* to create dissension among the employees." (Italics added.) In that case the commission found the charges to be true. The judgment therein was upon the pleadings and the pleadings show (transcript p. 28) that the commission *"sustained the charge* upon which petitioner's discharge was based, and *sustained the discharge."* The minutes of the commission in that case show (transcript p. 22) that the adopted motion was: "* * * inasmuch as the findings of investigation showed the charges against these men *to be true* and *sufficient,* the action * * * in discharging * * * be sustained." (Italics added.) In the present case the charge was not *a continuance* of acts protesting the adopted rules of conduct for employees, but *a single act* of publishing a statement in a paper concerning an increase in wages. Furthermore, the investigation report herein showed that the charges were not proper and sufficient cause for dismissal. Also in the present case the commission did not find the charges to be true, and did not find the employee unfit.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

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TOMAS v. VAUGHN et al.

Civ. 14189.

District Court of Appeal, Second District, Division 1, California.

March 3, 1944.

1. Reformation of Instruments ⇐47

A contract may be revised and then specifically enforced in same action. Civ. Code, § 3402.

2. Specific performance ⇐128(2)

Where specific performance of contract, through no fault of plaintiff in equity, cannot be decreed, the court, having obtained jurisdiction of subject matter, will grant, as alternative, monetary relief, which would be by way of damages in action strictly at law.

3. Action ⇐38(2)

The seeking or award of different kinds of relief does not establish different causes of action.

4. Reformation of Instruments ⇐47

Where award of damages is purely incidental to equitable relief sought, as in suit for reformation of written conditional sale contract, trial court has power to make such award.

5. Reformation of Instruments ⇐20

The remedy of purchaser of automobile under written conditional sale contract, providing for more monthly installment payments than parties agreed to, was not limited to rescission of contract and suit for return of consideration paid or ratification thereof and suit for damages on ground of fraud, but he could sue in equity for reformation of contract on grounds of fraud and mistake.

6. Reformation of Instruments ⇐47

Equity having acquired jurisdiction of action for reformation of written conditional sale contract was justified in retaining jurisdiction until all issues in action, including plaintiff's incidental right to damages for defendant seller's fraud, were determined.

7. Equity ⇐39(1)

As equity does not favor litigation by piecemeal, it will dispose of entire controversy between parties thereto, grant complete relief, and settle and determine all differences between parties in one action, whenever possible.

8. Equity ⇐39(1)

Equity, having once acquired jurisdiction of action, may grant relief as varied and diversified as means employed to produce injury complained of, and is not bound to parties' strict legal rights.

9. Reformation of Instruments ⇐20

A statutory right of action for reformation of written contract arises when such contract does not truly express parties' intention because of fraud or mistake. Civ.Code, § 3399.

10. Appeal and error ⇐880(3)

A codefendant which was not prejudiced by judgment reforming contract cannot complain of such reformation on appeal from judgment.

11. Reformation of Instruments ⇐45(2)

In action to reform written contract, where evidence is sufficient to satisfy court that contract did not express parties' intention and that plaintiff was mistaken in supposing that it did, fact that he read instrument does not prevent court from finding that it was executed under mistake.

12. Reformation of Instruments ⇐25

Where failure of party to written contract to familiarize himself with terms thereof before its execution can be traced solely to negligence, reformation of contract generally should be denied, but if such negligence was caused by other party's fraud, court will reform contract so as to speak parties' true intentions.

13. Appeal and error ⇐1009(3)
Reformation of Instruments ⇐45(2)

While clear, convincing and satisfactory proof of mistake as to provisions of written contract must be offered before court is justified in ordering reformation of contract on such ground, a conflict in testimony on such question does not necessarily require denial of reformation, and trial court's decision on such conflict cannot be disturbed by appellate court.

14. Reformation of Instruments ⇐45(15)

In action to reform written contract for sale of automobile to plaintiff on ground of defendant seller's fraud and plaintiff's mistake, trial court's finding that parties agreed that contract should provide for 24 monthly payments of $20 each,

instead of 18 payments of same amount, as provided in contract, was not erroneous as inserting in reformed contract terms never contemplated by parties nor supported by pleadings and evidence.

15. Appeal and error ⇐882(1)

A party may not complain on appeal because judgment appealed from does not permit him to obtain an advantage as result of his own wrong.

16. Reformation of Instruments ⇐47

In action for reformation of written contract for sale of automobile to plaintiff by defendant on ground of defendant's fraudulent misrepresentations as to contents of instrument and plaintiff's mistake, trial court's award of money judgment to plaintiff for difference between price specified in reformed contract and price plaintiff agreed to pay for automobile was not erroneous, in absence of allegations or evidence of fraudulent misrepresentations as to value of automobile.

17. Appeal and error ⇐994(3)

On appeal from judgment, District Court of Appeal cannot pass on credibility of witnesses who gave conflicting testimony in trial court. Code Civ.Proc. §§ 1847, 2061; Const. art. 6, § 19.

18. Appeal and error ⇐1010(1)

Appellate tribunals are not authorized to review evidence, unless it may justly be held insufficient on its face to support ultimate issue involved, in which case question for review is not one of fact, but purely one of law.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action in equity by Francisco D. Tomas against Richard Vaughn and another to reform a contract for the sale of an automobile. Judgment for plaintiff, and defendants appeal.

Affirmed.

Glenn S. Roberts, of Los Angeles, for appellants.

Edgar A. Nathan, of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment in favor of plaintiff Francisco D. Tomas and from an order denying defendants' motion for a new trial.

An action in equity was brought by plaintiff Tomas to reform a written conditional sales contract for the purchase of an automobile from defendant Vaughn, a used car dealer, on the ground of fraud on the part of defendant Vaughn and mistake on the part of plaintiff Tomas. Defendant Pacific Finance Corporation was assignee of the contract.

The agreement sought to be reformed provided for 24 monthly installment payments of $20 each and a final payment of $95. Plaintiff contends that the agreement, purported to have been incorporated in the written contract, provided for 18 monthly installment payments of $20 each with a final payment of $95, but that defendant Vaughn in presenting the written contract to the plaintiff for signature concealed with his hand that portion of the contract which called for the six additional payments.

The contract was later assigned by defendant Vaughn to the Pacific Finance Corporation under a repurchase agreement whereby the dealer Vaughn agreed to pay the finance company any unpaid balance in the event of default by the purchaser of the automobile. The assignment of the contract signed by plaintiff contained a warranty by defendant Vaughn that it was a bona fide contract and that the amounts stated therein were correct. The contract itself contained the following clause: "Purchaser shall be estopped to deny as to such assignee any of the statements contained in this contract, or to allege that there were any representations made by Seller which are not contained in this contract".

Plaintiff made two payments to defendant Vaughn and three payments to defendant Pacific Finance Corporation, and at the time of making the third payment to the finance company, he allegedly discovered that there were six additional payments to be made.

The issues were joined on the second amended complaint. At the conclusion of the trial, the trial judge reviewed the evidence, stating that the amount of the carrying charges was computed correctly, that the amount claimed by plaintiff to be the purchase price was unreasonably low, that there was some evidence of concealment of one copy of the contract, and that the evidence was insufficient to entitle plaintiff to reformation on the ground of fraud and no basis for reformation on the ground of mistake, and thereupon he orally ordered

judgment for defendants. However, when the findings of fact and conclusions of law were signed, they were in favor of plaintiff.

The judgment ordered reformation of the contract by reducing the final payment from $95 to $55.85 (being the difference between the last payment agreed to be made and the sum of $39.15, the amount set up by the finance company as a reserve account when it purchased the contract from defendant Vaughn) and ordered a money judgment in the sum of $80.85 against defendant Vaughn and in favor of plaintiff (being the $120 or 6 payments of $20 each, less the $39.15 deducted by the finance company when purchasing the contract from Vaughn). Thus, under the judgment, the contract remained as written and covered a period of 25 months but contained a reduction in the amount of the last payment. A motion for a new trial was filed by each defendant and denied, whereupon both defendants prosecute this appeal.

As a first ground of appeal it is urged by appellants that the court erred in granting a money judgment in the absence of proper pleadings praying for such relief, and in the absence of any evidence to support such money judgment.

[1-4] The pleadings alleged and there was evidence to support the claim that the contract as agreed upon was to provide for 18 payments of $20 instead of 24 payments in the same amount. The court so found and in revising the contract to conform to the terms agreed upon, found the damages to be in the sum of $120, or the difference between the amount agreed upon between the parties and the amount provided for in the contract as written. It is well established in our law (section 3402, Civil Code) that a contract in the same action may be first revised, and then specifically enforced. Messer v. Hibernia Savings & Loan Society, 149 Cal. 122, 126, 84 P. 835. And, where through no fault of the plaintiff in equity, specific performance cannot be decreed, the court, having obtained jurisdiction of the subject matter properly within its jurisdiction, will grant, as an alternative, monetary relief, which in an action strictly at law would be by way of damages. Neither the seeking nor the award of different kinds of relief establishes different causes of action. Where, as here, the award of damages was purely incidental to the equitable relief originally sought, the trial court was not without power to make such an award of damages. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 184, 66 P.2d 1215.

[5-8] Appellants' claim that respondent's only remedy was to rescind and sue for a return of the consideration paid, or ratify the contract and sue for damages on the ground of fraud, cannot be sustained. The action as filed, being one for reformation of contract, was of an equitable nature. Once having acquired jurisdiction equity was justified in retaining such jurisdiction until all issues in the action should be determined. The award of damages herein was purely incidental to the relief of reformation which respondent sought by his equitable action. Because equity does not look with favor upon litigation by piecemeal, it will, whenever possible, dispose of the entire controversy between the parties. will grant complete relief, and will, whenever possible, settle and determine all differences between the parties in the one action, thereby leaving nothing for further litigation between the same parties and upon the same subject matter. Sonnicksen v. Sonnicksen, 45 Cal.App.2d 46, 52, 113 P.2d 495; Union Oil Co. v. Reconstruction Oil Co., supra. By the action taken in the instant case the court, in reforming the contract, also protected the interests of appellant Pacific Finance Corporation which was a bona fide purchaser for value, of the contract, without notice of the defects therein. Once it acquires jurisdiction, equity's broad powers will permit the granting of relief as varied and diversified as the means employed to produce the injury complained of. And in so doing equity is not bound to the strict legal rights of the parties. Munchenberger v. City of Santa Monica, 206 Cal. 635, 646, 275 P. 803. Furthermore, under the facts of the instant case, we do not consider the trial court's award of a money judgment against defendant Vaughn as an award of damages but regard the same merely as an award made incidental to the equitable relief sought by plaintiff. It seems clear that the money judgment was given, as heretofore indicated, in order to adjust the equities between the parties and to prevent defendant Pacific Finance Corporation from suffering any prejudice to the rights acquired by it through an assignment of the contract, taken in good faith and without notice of any infirmities therein.

[9, 10] Appellants next assert that the court erred in ordering judgment for refor-

mation of the written contract in view of the evidence and findings of fact that defendant Pacific Finance Corporation was a bona fide purchaser of such contract for value and without notice of its infirmities. A statutory right of action for reformation arises whenever a written contract does not truly express the intention of the parties either because of fraud or mistake (Civil Code, section 3399). True, such reformation, according to the code section, should not transgress or prejudice the rights acquired by third persons in good faith and for value. In the instant case, if any prejudice ensued to defendant Pacific Finance Corporation, assignee of the contract, as a result of the judgment, it might well be argued that respondent was not entitled to the reformation sought because he could easily have avoided any such prejudice to the innocent assignee by simply reading the contract and thereby ascertaining his obligations thereunder. Not having done this, it might be held, as to the innocent assignee, that it was through respondent's negligence that the wrong occurred from which either himself or the innocent assignee would suffer. And therefore, the rule laid down by section 3543 of the Civil Code, that "where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer", should be given application to the facts. But we fail to perceive wherein the defendant assignee, Pacific Finance Corporation, suffered any detriment or prejudice by reason of the judgment rendered herein. As we read the record the sum of $39.15, referred to as a "reserve account", amounted simply to a deduction of that amount from the face value of the contract as assigned to the Pacific Finance Corporation; the latter paying the defendant Vaughn the amount of the face value of the contract less the sum of $39.15. The judgment as rendered provided that respondent should pay the amount to the assignee of the contract as originally written less the aforesaid $39.15, so that when the final payment was made by respondent to the Pacific Finance Corporation the latter would have received all that it paid for the contract, while appellant Vaughn alone was required to pay to respondent the sum of $80.85, representing the $120 or 6 payments of $20 each, less the $39.15 deducted by appellant finance corporation when purchasing the contract from defendant Vaughn. In other words, under the judgment, the contract so far as the finance corporation was concerned remained as written, and as reformed covered a period of 25 months save and except for a reduction of $39.15 in the amount of the last payment. Appellant assignee's rights not being prejudicially affected by the judgment rendered herein, it cannot be heard to complain of the action of the court in reforming the contract to the end that it would express the real understanding and agreement of the original parties thereto.

[11-13] Appellants next assert that a legal obligation rested upon respondent to read the contract as written, and that he signed a statement that he did read the instrument and that all representations made were contained therein. But the law seems well settled that where the evidence was sufficient to satisfy the court that the contract did not express the intention of the parties, and that plaintiff had been mistaken in supposing that it did, then the fact of his having read the instrument would not prevent the court from finding that it was executed under a mistake. Sullivan v. Moorhead, 99 Cal. 157, 160, 33 P. 796. Plaintiff in the instant case testified that he did not read the instrument but relied upon the representations of defendant Vaughn as to its contents. Whether or not relief should be denied because of such failure to read the contract depends upon the circumstances of each individual case. Such failure it is true must be explained, but the question is removed from the case when the testimony satisfactorily explains such failure. While the question is a perplexing one and there are contrary opinions thereon in this and other jurisdictions, we are persuaded that the better and more equitable rule is that where one's failure to familiarize himself with the terms of a written contract prior to its execution can be traced solely to carelessness and negligence, generally speaking, reformation should be denied. But, on the other hand, if such failure or even negligence is brought about through the false representations or fraud of the other party to the contract that the terms thereof are different from those actually contained in the instrument, the courts will reform the contract to the end that it may speak the true intentions and agreement of the parties. California Trust Co. v. Cohn, 214 Cal. 619, 626, 627, 7 P.2d 297; Romano v. Seibt, 95 Cal.App. 586, 272 P. 1065; Strauss v. Bruce, 139 Cal.App. 62, 33 P.2d

71; Johnson v. Sun Realty Co., 138 Cal. App. 296, 32 P.2d 393; Siem v. Cooper, 79 Cal.App. 748, 250 P. 1106. While the rule is that before a court is justified in ordering reformation of a contract on the ground of mistake, clear, convincing and satisfactory proof thereof must be offered, nevertheless, a conflict in the testimony, such as we have here, does not of necessity require that relief shall be denied. And the decision arrived at by the trial court upon such conflict of evidence cannot be disturbed by this court. Sullivan v. Moorhead, supra.

[14, 15] Appellants' contention that the court committed error by inserting terms in the contract as reformed which were never contemplated by the parties nor supported by the pleadings and evidence, is without merit. The court found that the real agreement between the parties was that the contract should provide for 18 payments of $20 each instead of 24 payments of the same amount, and that by reason of defendant Vaughn's false representations the contract as executed did not reflect the true intentions and agreement of the parties. In the exercise of the broad equitable powers conferred upon the chancellor, the court, in order to avoid any prejudice to the assignee, permitted the 24 payments to be made to the latter and redressed the damage suffered by plaintiff by an award to him of a money judgment against the offending defendant Vaughn alone. Certain benefits which appellants claim respondent will receive in the way of additional insurance and credit for which no financing or carrying charge is made, is answered by the statement that respondent was obligated to pay financing charges for 24 months; he is also required to pay carrying charges for the additional six payments which the court found were fraudulently inserted in the contract, and which he would not have been required to pay had the contract been written as the court found it should have been, to provide for only 18 payments. And finally, a party may not be heard to complain because a judgment does not permit him to obtain an advantage as a result of his own wrong.

[16] Next, appellants contend that conceding reformation may have been proper, the recovery of a money judgment was without legal sanction; that the measure of damage awarded plaintiff was incorrect as being the difference between the price of the automobile as specified in the written contract as reformed, and the price plaintiff agreed to pay for the automobile. This it is contended is not the true or correct measure of damages for fraud. However, the court's award of a money judgment against defendant Vaughn cannot be considered in the light of a money judgment for the issue was not one of fraudulent representations as to the value of the automobile in question but of fraudulent representations as to the contents of the written instrument which plaintiff signed. No representations of fraud are alleged in the pleadings nor raised by the evidence insofar as the value of the automobile is concerned.

[17, 18] By their last ground of appeal wherein they charge that the evidence is insufficient to support the judgment, appellants in effect ask us to pass upon the credibility of witnesses who gave conflicting testimony. This we cannot do. While a reading of the cold transcript might impress us that the verity of appellant Vaughn's testimony seems more probable than does the testimony of respondent, nevertheless, reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Therefore, in accordance with our constitutional provision (section 19, Art. VI, Constitution of California), the legislature has ordained that the triers of fact are the exclusive judges of the credibility of witnesses (Code of Civil Procedure, section 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates (Code of Civil Procedure, section 2061). As a necessary corollary to the rules just enunciated, it follows that the court, in the instant case, was authorized, if it felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that given by the plaintiff, and, therefore, to disbelieve the testimony of defendant Vaughn in connection with the facts immediately surrounding and leading up to the execution of the contract in question. Appellate tribunals are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, and in that case it is not a review of a question of fact, but purely one of law. Furthermore, in the

case with which we are here concerned there were circumstances in connection with the advertising of the automobile for sale, and mathematical deductions which could reasonably be made from various amounts going to make up the total sale price of the automobile, which tended to corroborate plaintiff's version of what was the true intentions and agreement of the parties.

The attempted appeal from the order denying defendants' motion for a new trial is dismissed. For the reasons herein stated the judgment from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.



63 Cal.App.2d 78

PRATT et al. v. ROBERT S. ODELL & CO. et al.

Civ. 13974.

District Court of Appeal, Second District, Division 3, California.

Feb. 29, 1944.

1. Costs ⇐264

Costs bill verified by defendants' attorney, stating that to best of his knowledge and belief items therein were true and correct and had been necessarily incurred, satisfactorily complied with statute and made prima facie case for costs on appeal which the plaintiff had burden of overcoming. Code Civ.Proc. § 1034.

2. Costs ⇐264

Plaintiffs' affidavit, alleging on information and belief that all sums demanded in cost bill to extent that any of sums were expended were paid by corporate defendant only and that no part was paid by any of individual defendants, was insufficient to overcome defendants' prima facie case. Code Civ.Proc. § 1034.

3. Affidavits ⇐18

Where an affidavit is to serve as evidence, those portions which are made on information and belief have no evidentiary value.

4. Costs ⇐264

Parties defendant who have expended money in a common appeal may file a joint cost bill irrespective of the amount each individual may have contributed. Code Civ.Proc. §§ 17, 1034.

5. Costs ⇐264

Allowance of cost bill, entitled "memorandum of costs and disbursements on appeal claimed by defendants and appellants", was not objectionable as allowing costs on appeal to appellant whose appeal had been dismissed where verification was by one of attorneys of parties who claimed costs and affiant did not represent defendant whose appeal had been dismissed.

6. Appeal and error ⇐239

Objection to cost bill not made ground of motion to strike out the bill could not be made on appeal.

7. Appeal and error ⇐1024(5)

Where affidavit supporting plaintiffs' motion to reduce amount claimed as costs of reporter's transcript and defendant's affidavit were positive and contradictory, conclusion of trial judge was binding on District Court of Appeal.

8. Costs ⇐264

Defendants' cost bill, allowed by court, constituted a judgment against plaintiff.

9. Costs ⇐240

In stockholders' derivative action against corporation and its officers and directors, where judgment against defendants was reversed as to all defendants except one who made compromise payment during pendency of appeal, the trial court did not err in declining to use corporation's money obtained as a result of the compromise to discharge the plaintiffs' liability for defendants' costs on appeal.

10. Appeal and error ⇐1203(1)

In stockholders' derivative action against corporation and its officers and directors, where judgment was reversed as to all defendants other than defendant who made compromise payment pending appeal, the problem as to whether receiver should be required to retain unexpended balance of compromise fund to finance a retrial called for an exercise of discretion lodged in equity court, and refusal to require receiver to retain the fund was not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Frank G. Swain and Thurmond Clarke, Judges.

Stockholders' derivative action by Anthony F. Pratt and others against Robert S. Odell & Company and others. From an order denying plaintiff's motion to strike out defendant's bill of costs on appeal as to all defendants other than defendant State Guaranty Corporation and denying motion to reduce item for reporter's transcript, and from an order denying plaintiff's motion requiring receiver for the State Guaranty Corporation to pay cross-bill, plaintiffs appeal.

Affirmed.

See also 49 Cal.App.2d 550, 122 P.2d 684.

Baldwin Robertson, of Los Angeles, for appellants.

Freston & Files and John L. Mace, all of Los Angeles, for respondents.

BISHOP, Justice pro tem.

No objection can rightfully be made to the facts that but one notice of appeal was filed, one clerk's and one reporter's transcript certified, and that one set of briefs covers all the problems that the parties have presented, so long as it is kept clearly in mind that two distinct orders have been appealed from, made over a month apart and by different trial judges, and that the record before the one judge was quite different from that before the other. We shall follow the precedent set by the parties, by passing upon both appeals in one opinion, and that set by the trial judges, by holding adversely to the plaintiffs, who are the appellants.

Appeal from order re costs.

Plaintiffs' first appeal is from an order denying two motions they had made: The one, a motion to strike the bill of costs on appeal amounting to $1021.35, as to all of the defendants, other than the defendant State Guaranty Corporation; the other, to reduce the item for the reporter's transcript to $428. "Said motion," the "notice to tax costs," announced, referring to the two motions which we have mentioned, "will be made upon the ground that none of the defendants other than State Guaranty Corporation paid any part of the items included in said cost bill, and upon the ground that the reporter's transcript and a copy thereof did not cost in excess of $428.00." Obviously, the ground first mentioned is applicable alone to the motion to strike, the second ground applies only to the motion to tax costs at a lower figure than that claimed in the cost bill.

The cost bill here involved was verified by Ralph E. Lewis, who averred: "I am one of the attorneys of the parties who claim costs herein, and as such am better informed than such parties, or than any of my associate counsel herein, relative to the costs and disbursements mentioned within; to the best of my knowledge and belief the items in the within memorandum of costs and disbursements are true and correct and have been necessarily incurred in this cause * * *." The items in the cost bill were all for expenditures normal to an appeal: filing fees; costs of clerk's transcript; $100 for briefs that cost in excess of that ceiling price; and "Reporter's Transcript $825.35."

[1-3] Plaintiffs' contention that their motion to strike should have been granted, is premised upon two propositions: First, that a party is entitled to his costs on appeal only in such amounts as he himself has actually paid out; and, second, that the State Guaranty Corporation had advanced all of the costs on appeal in this case; the other defendants had paid none of them. The last proposition does not appear to be established. We have noted the nature of the items of the cost bill and the manner of its verification. The provisions of section 1034, Code of Civil Procedure, and of the preceding section to which it refers, were satisfactorily complied with (Stafford v. Hill, 1923, 63 Cal.App. 15, 16, 217 P. 766; Rosenfield v. Vosper, 1943, 57 Cal.App.2d 605, 607, 608, 134 P.2d 529, 135 P.2d 579) and a prima facie case for costs on appeal was made on behalf of the defendants, which the plaintiffs had the burden of overcoming. Wilson v. Nichols, 1942, 55 Cal.App.2d 678, 682, 131 P.2d 596; Rosenfield v. Vosper, supra, and cases cited. Plaintiffs' only effort to support their contention was by way of an affidavit, which did not allege even that the affiant had received any information about the matter, but only that "I have reason to believe and do believe, and on information and belief allege, that all of the sums demanded in the cost bill * * * to the extent that any of said sums were expended, were paid and expended by State Guaranty Corporation only, and that no part of any item set forth in said cost bill was paid directly or indirectly by any of

the individual defendants." This affidavit was quite insufficient to overcome defendants' prima facie case, for where an affidavit is to serve as evidence those portions which are made on information and belief have no evidentiary value. Gay v. Torrence, 1904, 145 Cal. 144, 151, 78 P. 540; Kellett v. Kellett, 1934, 2 Cal.2d 45, 48, 39 P.2d 203. Plaintiffs themselves recognize this principle, for they criticize a statement in the defendants' counter affidavit as "meaningless" for the reason that "it is upon information and belief and does not reach the dignity of evidence."

[4] In the counter affidavit filed on behalf of the defendants a paragraph was devoted to plaintiffs' claim that all the costs were paid by the State Guaranty Corporation. This paragraph begins with the words: "That affiant is informed and believes, and on such information and belief alleges," and with this introduction continues with several statements, each introduced by a "that." The trial court may well have disregarded the entire paragraph because it was all on information and belief. But if it be interpreted as establishing for the purposes of the motion that of the costs on appeal $411.43 were advanced by the defendant Robert S. Odell & Company, and the balance by State Guaranty Corporation, it does not follow, without more, that plaintiffs' motion should have been granted. It is true that the second sentence of section 1034, Code of Civil Procedure provides: "The party entitled to costs [on appeal] * * * may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal * * *." However, this sentence was under discussion in Danley v. Merced Irr. Dist., 1925, 76 Cal.App. 52, 55, 243 P. 676, and it was held that so long as the costs were actually paid "it appears to be immaterial whether the plaintiff paid the same personally or procured the payment thereof to be made by another person under an agreement that he would repay such other person the amount thereof." We agree with the plaintiffs that it does not appear that whatever costs the State Guaranty Corporation may have advanced were (or were not) advanced on the promise of the other defendants to pay their share. We cite the case primarily because it warrants our taking a further step and concluding that, as in the Code of Civil Procedure "the singular number includes the plural," Code Civ.Proc. § 17, the second sentence of section 1034 may properly be understood as authorizing parties defendant who have expended money in a common appeal to file a joint cost bill, irrespective of the amount each individually may have contributed. No unjust burden is placed upon the plaintiffs by this conclusion, nor would any defendant be unjustly enriched.

[5, 6] Plaintiffs' further argument that as a result of the court's ruling costs on appeal have been allowed even to defendant White, whose appeal was dismissed, is without merit. The argument hangs on the thread that the cost bill is entitled "Memorandum of Costs and Disbursements on Appeal claimed by Defendants and Appellants." The verification being by "one of the attorneys of the parties who claim costs herein" serves to eliminate the defendant White, who was not represented by the affiant, from those claiming costs. Moreover, plaintiffs are in no position now to urge this point, for they did not make it a ground of their motion.

[7] When we come to the second motion respecting costs, the motion to reduce the amount claimed as the cost of the reporter's transcript, we find the affidavits of the plaintiffs and that of the defendants, speaking positively, but contradictorily. The conclusion of the trial judge, in such a situation, is binding on this court. Wilson v. Nichols, supra, 55 Cal.App.2d 678, 683, 131 P.2d 596. The record reveals no error in denying plaintiffs' motion respecting the taxing of costs.

Appeal from Order Directing Receiver.

[8] The cost bill we have just been considering constituted a judgment against the plaintiffs. Supera v. Moreland Sales Corp., 1938, 28 Cal.App.2d 517, 521, 82 P.2d 963. Plaintiffs' second appeal arises from an unsuccessful effort on their part to obtain satisfaction of this judgment by having the receiver for the State Guaranty Corporation ordered to pay it.

This appeal necessitates, and the record makes possible, a more comprehensive understanding of the history of the case, in which the two appeals were taken, than we have had. The action was brought on behalf of the plaintiffs and all other stockholders of the State Guaranty Corporation against the officers and directors of that organization and against the organization itself to recover for the corporation dam-

ages which it had suffered by reason of the use of its assets and funds not in furtherance of its interests, but to further the purposes of defendant Robert S. Odell and of some corporations which he controlled. Plaintiffs were at first successful; they obtained a judgment in the Superior Court that they, for the benefit of the State Guaranty Corporation, and that corporation itself, recover from the several defendants various sums ranging from $900 to more than $180,000. As to the defendant Gerald R. White a recovery of $10,400 was authorized. The judgment named Harley E. Riggins as receiver of the corporation for the purpose of enforcing and collecting the judgment. Provision was made therein that the plaintiffs recover from the State Guaranty Corporation, for the benefit of their counsel, at least $5,000. The judgment further prohibited the defendants from making payments for any of a number of specified purposes, including the cost of litigation in which the corporation was not a party. Further details concerning the action and the judgment are not needed for our purposes; some of them appear in the opinion written when the judgment was reversed as to all the defendants other than the defendant White, and reported in Pratt v. Robert S. Odell & Co., 1942, 49 Cal.App. 2d 550, 122 P.2d 684.

The reason that the judgment was not reversed as to defendant White plainly appears. During the pendency of the appeal, and during the pendency of bankruptcy proceedings, the judgment against him was compromised; he paid the receiver $2000 in full satisfaction and a few days before the judgment was reversed his appeal was dismissed, the remittitur being issued forthwith. Of the sum of $2000 thus received, the receiver paid $666.66 to plaintiffs' attorney, upon order, leaving a balance on hand of $1333.33. The proceeding now of special interest to us was initiated by the filing of a petition, by State Guaranty Corporation, to obtain an order directing the receiver to pay this balance to it, less his expenses and fees. An order to show cause gave notice that the petition was to be heard, and by way of showing cause plaintiffs filed a response. After a hearing, at which evidence was received, the order was made from which the second appeal was taken. It allowed the receiver $110 for his fees and expenditures; directed him to pay two printing bills the plaintiffs had incurred for their futile petitions, first for a rehearing and then for a hearing by the Supreme Court, following the reversal of their judgment; and, lastly, ordered the receiver to pay what was left of the $2000, namely, $1013.27, to the corporation for whose benefit the plaintiffs had recovered it.

In their response the plaintiffs had urged a different disposition of the $1333.33 remaining after their attorney had received a third of the sum recovered. They were willing that the receiver should have his fees and expenses; they prayed that their printing bills be paid; and then, they urged, the receiver should pay to the State Guaranty Corporation the sum of $1021.35, the amount of the judgment against them, and in satisfaction of that judgment. Lastly, such amount as might be left after these payments were made, they wished retained in order to defray a part, at least, of the costs of a retrial. That the payment of their judgment is plaintiffs' main concern appears from their notice of appeal, which takes exception to the order appealed from "to the extent that said order of June 26, 1942, directs Harley E. Riggins, the receiver, to pay to State Guaranty Corporation the sum of $1013.27 without the requirement that State Guaranty Corporation first satisfy of record pro tanto the judgment asserted by it against plaintiffs for costs on appeal."

The principle of law upon which plaintiffs rely in support of their claim that because it was due to their efforts that $2000 was recovered for the corporation, they should be relieved of the burdens they have incurred, is thus expressed in Corpus Juris Secundum (18 C.J.S., Corporations, § 579): "Where a stockholder is successful in a suit instituted by him in behalf of the corporation, and the corporation is thereby enriched, he is entitled to reimbursement from the corporation out of its assets or out of money or property under the control of the court for his reasonable costs and expenses, including attorney's fees, and his recovery for such fees and expenses may be made a specific lien against the assets or property recovered for the corporation * * *." One of several cases illustrating the principle is Fitzgerald v. Bass, 1927, 122 Okl. 140, 252 P. 54, 49 A.L.R. 1141, where a number of cases are reviewed. The case of Fox v. Hale & Norcross Silver Mining Co., 1895, 108 Cal. 475, 41 P. 328, serves as an authority in this state. None of these cases, however, and none cited by plaintiffs or of which we are aware supports

plaintiffs' real position. They present the question as though it involved their right to make use of the funds recovered for the corporation to reimburse them for funds expended, or costs incurred, in the recovery of the funds. For example, in black type they head a division of their opening brief in these words: "As a Result of the Activities of Plaintiffs and the Incurring by Them of the Liability Taxed Against Them in the Judgment for Costs on Appeal, the Money Here Involved Was Recovered." Obviously, it appears to us, plaintiffs' claim is not within the principle upon which they rely. The costs which they vainly wished to have the receiver pay were not costs incurred by them in recovering the $2000 from defendant White, but the costs which the other defendants, including the defendant corporation, expended in winning a reversal of the judgment which plaintiffs had erroneously secured. Plaintiffs find themselves burdened with a judgment not because of their successful efforts on behalf of the corporation with respect to defendant White, but as the result of their failure successfully to defend the judgment which they had obtained against the State Guaranty Corporation and the other defendants.

In their return plaintiffs made some allegations, to the effect that defendant Odell had controlled and still did control the State Guaranty Corporation, which the trial court properly found not to be true (Dieterle v. Bekin, 1904, 143 Cal. 683, 688, 77 P. 664), for the burden was on the plaintiffs to prove them, and they failed to do so. Their failure may have been due, in part at least, to the fact that the trial court sustained objections to questions, the answers to which might have tended to prove Odell's domination. As to the court's rulings at this point plaintiffs would have had a good ground of appeal if they were prejudiced in any way. It did appear that Odell's attorney represented the State Guaranty Corporation and the other defendants, including the defendant White up until shortly before his demise as an appellant, and it appeared that the State Guaranty Corporation had appealed from the judgment which plaintiffs had obtained in its favor. The fact that the judgment, in part, favored the corporation, did not serve to save it from a reversal in toto as to the corporation, and we fail to see that it would have added any strength to plaintiff's claim, that the judgment against them should be satisfied by the corporation, if the trial court had permitted proof demonstrating that Odell did exercise control over the corporation. We find no prejudicial errors in any of the trial court's rulings and the finding that Odell did not dominate the State Guaranty Corporation was on an immaterial issue.

[9] Plaintiffs point to the fact that their printing bills incurred on appeal were ordered paid out of the fund in the receiver's hands, and argue that it was inconsistent for the trial court to refuse to order the judgment for costs on appeal satisfied from the same fund. We shall not weigh the charge of inconsistency other than to note that there is a difference between relieving the plaintiffs of their costs and relieving them of their obligation to pay the defendants' costs. But if the order is inconsistent because the costs were incurred alike in fruitless efforts on plaintiffs' part, the only result would be to stamp the part of the order which favored plaintiffs as being in error. The desirability of consistency is not so great that an order correct in part should be reversed so that it may be made entirely erroneous. The trial court did not err in declining to use the corporation's money to discharge plaintiffs' liability for defendants' costs on appeal.

[10] Nor was it an abuse of his discretion for the trial judge to decline to order the receiver to retain the balance on hand to finance a retrial, if one is to be had, a fact neither alleged nor proved. We may grant, for the purposes of this appeal, that it would have been within the power of the court to have made such an order. The problem called for an exercise of the discretion lodged in a court of equity, and we are far from convinced that the practice of letting the outcome of the litigation determine whether or not corporate funds should be used to pay court costs in such a case as this, is not the better course.

The orders appealed from are affirmed.

DESMOND, P. J., and SHINN, J., concur.

63 Cal.App.2d 219

HERSHEY et ux. v. LASWELL et al.

Civ. 3113.

District Court of Appeal, Fourth District, California.

March 7, 1944.

Rehearing Denied March 24, 1944.

1. Appeal and error ⇐1008(1)

Where driver of truck colliding with plaintiffs' automobile at street intersection did not stop at stop sign but stopped near pavement line, whether his conduct was proximate or contributing cause of accident was question of fact for trier of fact. Vehicle Code, § 577, St.1939, p. 1608.

2. Appeal and error ⇐1008(1)

Where truck collided with plaintiffs' automobile at street intersection, whether truck driver, who stopped and started again believing he had sufficient time to make crossing, was guilty of contributory negligence in entering and proceeding across intersection when he did, was question of fact for trier of facts. Vehicle Code, § 552, St.1935, p. 187.

3. Automobiles ⇐244(43)

Trial court's implied finding, that automobile approaching street intersection from right was not close enough to constitute an immediate hazard when truck driver started across intersection, was sustained by evidence. Vehicle Code, § 552, St.1935, p. 187.

4. Appeal and error ⇐1011(1)

Trial judge's findings on conflicting evidence are conclusive in District Court of Appeal.

5. Appeal and error ⇐994(3), 1012(1)

Credibility of a witness and weight to be given his testimony is primarily a question addressed to trier of fact.

6. Appeal and error ⇐994(3)

Where story told by defendant as witness was not inherently improbable, District Court of Appeal was bound by conclusion of trial judge on weight of defendant's evidence and his credibility as witness.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Fred A. Hershey and wife against Cort Laswell and another for damages resulting from a motor vehicle collision, in which defendants filed a cross-complaint. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Harvey, Johnston & Baker, of Bakersfield, for appellants.

Wagy & Hulsy, of Bakersfield, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of defendants and cross-complainants for damages resulting from a motor vehicle collision which occurred in the city of Bakersfield on the evening of August 13, 1941.

The case was tried before the court without a jury and the findings absolved defendant Laswell from negligence and contributory negligence and found Fred A. Hershey guilty of negligence that proximately caused the accident. Plaintiffs attack these findings as being contrary to the evidence. This is the principal question presented here. It will require a brief summary of that portion of the evidence tending to support the findings and judgment, disregarding conflicting evidence supporting the position of plaintiffs, which is amply sufficient to support a judgment in their favor had this evidence been accepted as true by the trial court.

Union Avenue is a public street of the city of Bakersfield. It is 56 feet wide and runs north and south. It has a paved portion 24 feet wide with a white line down its center. Between the east edge of the pavement and the curb there is a 29 foot oiled shoulder. There is a three-foot dirt shoulder west of the pavement. There is no curb on the west side of the avenue. Thirtieth Street intersects Union Avenue at right angles from the west and becomes Pacific Street to the east. There is a boulevard stop sign on Thirtieth Street about 17 feet west of the intersection. There is also a stop sign on Pacific Street.

Arvin Richardson was the owner of an old Ford winch truck which was being driven by Cort Laswell with the owner's consent at the time of the collision. Plaintiffs were husband and wife. Before the collision they were approaching the intersection from the south in an automobile driven by Fred A. Hershey.

Laswell testified that he approached the intersection from the west on Thirtieth

Street; that the lights of the truck were burning; that he did not stop at the stop sign nor the westerly intersection line but near the west pavement line; that he looked and saw no vehicle approaching from the north; that he saw plaintiffs' car approaching from the south about a block and a half away; that he believed he had sufficient time to make the crossing and proceeded into the intersection; that when his truck was across the east half of the pavement it was struck on the south side by plaintiffs' car. The force of the collision was considerable. This would support the conclusion that Mr. Hershey was driving faster than the 25 miles per hour which he admitted.

Plaintiffs urge that this evidence demonstrates that Laswell was guilty of negligence as a matter of law, sufficient to bar his recovery, in failing to make the proper stop as required by section 577 of the Vehicle Code, St.1939, p. 1608, and in violating section 552 of the same code, St. 1935, p. 187, by entering the intersection when plaintiffs' car was approaching so closely on the through highway as to constitute an immediate hazard.

[1] It must be conceded that there was a technical violation of the Vehicle Code on the part of Laswell in failing to make boulevard stop in the exact place and manner required. However, he did stop, and whether this conduct was a proximate or a contributing cause of the accident was a question of fact for the trier of fact and is not one of law for this court under the facts before us. Miller v. Cranston, 41 Cal.App.2d 470, 106 P.2d 963; Ferguson v. Nakahara, 43 Cal.App.2d 435, 110 P. 2d 1091.

[2, 3] Whether or not Laswell was guilty of negligence or contributory negligence in entering and proceeding across the intersection when he did was also a question of fact and not one of law. The evidence concerning the distance of plaintiffs' car from the intersection when Laswell started to drive across it was conflicting. The trial court adopted defendants' theory that plaintiffs' car was not close enough to constitute an immediate hazard and that implied finding is conclusive on appeal under such circumstances. Dickinson v. Pacific Greyhound Lines, 55 Cal. App.2d 824, 131 P.2d 401.

[4] Plaintiffs argue that the lights on the truck were either not illuminated or were so poor as not to be visible. The evidence on that question is conflicting. The trial judge resolved that conflict against the plaintiffs which is conclusive here.

Plaintiffs urge that Laswell was under the influence of intoxicating liquor at the time of the accident. Again we must remark that the evidence on this question was conflicting and that we have nothing to do here with mere conflicts in the evidence.

[5, 6] It is next urged that Laswell so thoroughly impeached himself, chiefly in extra-judicial statements, that his evidence is unworthy of belief. We must again point out, as we have done many times before, that the credibility of a witness and the weight to be given his testimony is primarily a question addressed to the trier of fact. The story told by Laswell while on the witness stand is not inherently improbable so we are bound by the conclusion of the trial judge on the weight to be given his evidence and his credibility as a witness. His extra-judicial statements merely created a conflict in the evidence which was resolved against plaintiffs in the trial court.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



63 Cal.App.2d 65

ELFORD et al. v. HILTABRAND.

Civ. 14311.

District Court of Appeal, Second District, Division 1, California.

Feb. 29, 1944.

Rehearing Denied March 23, 1944.

1. Trial ⇐108½, 127

Attempts to impress jury with idea that an insurance company may be required to respond in damages are looked upon with disfavor.

2. Trial ⇐108½

Questions on voir dire of jury which are likely to impress jury with idea that an insurance company and not individual

defendant may be required to respond in damages are restricted to those which in good faith are reasonably necessary to ascertain whether prospective jurors are free from a bias that may affect verdict.

3. Trial ⇐108½

The test of good faith of plaintiff's counsel in inquiring whether a juror is interested in a particular insurance company is whether interrogatories are propounded in manner as to necessarily convey impression that a defendant is in fact insured.

4. Appeal and error ⇐978(2)

Where question as to whether jurors were interested in particular insurance company was not answered and trial court admonished jury that no insurance company was a party to action and that jury should not speculate as to insurance, denial, on ground of plaintiff's good faith and lack of prejudice to defendant, of defendant's motion for new trial for misconduct of plaintiff's counsel would not be disturbed on appeal.

5. Automobiles ⇐246(48)

In action arising out of rear end collision where plaintiff testified that she did not see any signal given by defendant and there was no evidence that stop light on defendant's automobile was a device approved by Division of Motor Vehicles, court properly refused to instruct that defendant could lawfully have signaled stop by means of mechanical device in lieu of hand signal. Vehicle Code, §§ 544, 546(c), St.1935, pp. 185, 186; § 545, St. 1937, p. 1607.

6. Automobiles ⇐246(48)

In action arising out of rear end automobile collision, in absence of testimony as to character of highway at point of accident, two photographs and a diagram received in evidence were insufficient to warrant instruction on codal provision pertaining to mountain driving. Vehicle Code, § 597, St.1935, p. 194.

7. Evidence ⇐10(1)

Court properly refused to take judicial notice that Highway No. 6 in Los Angeles County, commonly known as Mint Canyon Road, at bridge which overpasses Southern Pacific Railroad tracks, was a mountain highway for want of sufficient common knowledge thereof.

8. Evidence ⇐4

A court may properly assume existence of a fact without proof where there is sufficient notoriety, but whenever there is possibility of dispute judicial notice cannot be taken of existence of claimed fact.

9. Evidence ⇐4

Doctrine of judicial notice of matters claimed to be of common and general knowledge should be cautiously exercised.

10. Automobiles ⇐245(81)

A motorist is not necessarily guilty of negligence because he collides with rear of another vehicle.

11. Automobiles ⇐245(60, 90)

Whether defendant's failure to give appropriate stop signal and act of stopping on bridge in violation of codal provision or manner in which plaintiff operated her automobile, or both, was proximate cause of rear end collision, was for jury. Vehicle Code, §§ 544, 546(c), St. 1935, pp. 185, 186; § 545, St.1937, p. 1607; § 586(j), St.1941, p. 2724.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Blanche Elford and Dorthea Mae Elford against Mary E. Hiltabrand for injuries sustained in an automobile collision. Verdicts and judgments for plaintiffs, and defendant appeals.

Affirmed.

C. A. Pinkham, of Los Angeles, for appellant.

Arthur C. Miller and Lee A. Solomon, both of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs, who are mother and daughter, instituted this action to recover damages for personal injuries sustained as the result of a rear end collision between two automobiles, both of which were proceeding in a general northerly direction along Highway No. 6, commonly known and referred to as the "Mint Canyon Road", in the County of Los Angeles. For some distance north and south of where the collision occurred the highway is divided into three traffic lanes, designated by white painted lines. The two outer lanes are respectively 13 feet in width,

while the center or passing lane measures 11 feet in width.

At approximately 5 o'clock on the afternoon of November 27, 1942, while it was still daylight and the road was dry, defendant Mary E. Hiltabrand, with three passengers, was driving in a general northerly direction on the highway in question. The plaintiff Blanche Elford, accompanied by the minor plaintiff Dorthea Mae Elford and two other children, was driving in the same direction, following defendant's vehicle. The accident occurred on a bridge which overpasses the Southern Pacific Railroad tracks. From a review of the testimony we feel that the same may be fairly epitomized by saying that the only car in sight ahead of plaintiffs' was that of the defendant, and the only vehicle following was a quarter of a mile away. Plaintiff Blanche Elford testified that she first observed defendant's car as the latter was "coming down the grade" approaching the bridge; the south end of the east side of which bridge is visible for between three and four miles as one approaches it. At the time of this initial observation of defendant's automobile by plaintiff Blanche Elford, the former's vehicle was "approximately 200 feet ahead." At this time plaintiffs' speed was 35 miles per hour and both cars were traveling in the extreme easterly traffic lane. According to the testimony of plaintiff driver she continued to observe defendant's car up to the time of the collision, and noticed that as the latter's automobile "dropped into the valley" it was slowed down to "about 25 miles per hour"; that upon starting up the grade defendant speeded up her car and plaintiff driver did likewise. During all of this time a distance of approximately 200 feet separated the vehicles. As plaintiff driver's automobile entered upon the bridge she noticed that the distance between her car and the defendant's was only about 50 or 60 feet. Plaintiff driver testified that the defendant brought her car to a sudden stop on the bridge whereupon plaintiff driver applied her brakes and "gave them all she had"; that at the time of making the brake application she was 18 to 20 feet distant from defendant's automobile and driving between 20 and 25 miles per hour. A rear end collision between the two automobiles ensued. Plaintiff driver also testified that the defendant gave no visible signal prior to making a sudden stop upon the bridge or overpass.

According to defendant's testimony when she was within a quarter of a mile of the point of impact she noticed a railroad train approaching the bridge on the tracks below, and at that point she commenced to slow down her automobile in order to be upon the bridge when the train passed underneath thereof so that the children riding with her could view the train passing below. Defendant denied that she stopped upon the bridge at any time and maintained that at the moment of the collision she was proceeding at a rate of speed estimated as between 5 and 10 miles per hour.

One disinterested witness, who arrived upon the scene following the accident, testified that when she inquired of defendant as to how the accident happened the latter stated: "We stopped for the children to see the train go by." Testimony to the same effect was also given by another disinterested witness.

Upon being struck the defendant's automobile proceeded on to a point approximately 125 feet from the point of collision where it came to rest. The force of the impact broke the backs of the two front seats of defendant's car which was a 1937 Chevrolet sedan. Plaintiff was operating a Ford V–8 automobile which, according to her testimony, was in good mechanical condition and was equipped with good tires.

The cause proceeded to trial before a jury, resulting in a verdict in favor of plaintiff Blanche Elford for $2,500 and in favor of the minor plaintiff Dorthea Mae Elford for the sum of $1,000. At the conclusion of plaintiffs' case the defendant moved for a judgment of non-suit against both plaintiffs, which motions were denied. Following rendition of the verdict defendant, reserving her right to move for a new trial, moved the court to enter judgment in her favor notwithstanding the verdicts. This motion, made as to each plaintiff, was denied, as was a subsequent motion made by defendant for a new trial. From the judgments entered upon the aforesaid verdicts, defendant prosecutes this appeal.

As a first ground for reversal it is contended that the court erred in refusing to declare a mistrial. In that connection the record reveals that during the voir dire examination of prospective jurors plaintiffs' counsel inquired of the veniremen and women under examination:

"Q. Is there any one of the jurors who is interested in the General Accident Insurance Company of America?

"Mr. Pinkham (defendant's counsel): Just a moment, if the court please, I ask the court at this time to instruct the jury there is no insurance company involved in this case, there is no insurance company a party to the action.

"The Court: That is true, no insurance company is involved that is a party to this case.

"Q. (Mr. Solomon, plaintiffs' counsel) I take it there is no one of you who is a stockholder in the General Insurance Company of America—

"Mr. Pinkham: Just a moment, may we approach the bench?

"The Court: Yes."

Thereupon, at the bench and outside the presence of the jury, defendant's counsel moved the court to declare a mistrial and call another jury panel, which motion was denied. Upon resumption of proceedings in the presence of the jury, plaintiffs' counsel again propounded the same interrogatory, whereupon the following transpired:

"Mr. Pinkham: I again repeat that now you have repeated it the second time after the court has instructed the jury, that the court should declare a mistrial and discharge the jury.

"Mr. Solomon: I asked the question in good faith believing it is a proper question."

Thereupon, the court and counsel adjourned to chambers where, outside the presence of the jury, after discussion, the court again denied defendant's motion to declare a mistrial. Upon resuming the trial with the jury present, the following proceedings were had: "The Court: In the examination of prospective jurors for service in the trial of this case, questions were asked by counsel to learn whether any juror had an interest in a casualty insurance company. This was done for the sole purpose of discovering if any of you had a biased viewpoint. You are reminded that no insurance company is a party to this action and that whether either party is insured, has no bearing whatsoever on any issue that you must decide. Therefore, the oath you took as jurors requires that you refrain from any inference, speculation or discussion about insurance. You may proceed." Thereupon, in the presence of the jury, defendant's motion for a mistrial was formally denied.

[1-4] Attempts to impress a jury with the idea that an insurance company and not the individual defendant may be required to respond to such damages as the jury may assess are not looked upon with favor by the courts. This, because such knowledge as to a defendant's protection in that regard may tend to make jurors careless as to the amount of their verdict. Arnold v. California Portland Cement Co., 41 Cal.App. 420, 425, 183 P. 171; Levens v. Stocco, 5 Cal.App.2d 693, 43 P.2d 357. Such questions are restricted to those that are reasonably necessary to ascertain whether prospective jurors are free from a bias or interest that may affect their verdict. And the cases are harmonious in holding that all such questions must be propounded in good faith. The test of good faith upon the part of counsel would seem to be whether such interrogatories are propounded in a manner as to necessarily convey the impression that a defendant is in fact insured. However, in the instant case the court, as heretofore indicated, decisively and squarely admonished the jury that no insurance company was a party to the action and that under their oaths as jurors they were required and bound to "refrain from any inference, speculation or discussion about insurance". Furthermore, in the instant case the challenged questions remained unanswered, and at the trial, when plaintiffs' counsel protested that he asked the question in good faith and "believing it is a proper question", defendant's counsel stated "I believe you did ask it in good faith". By its action in denying a motion for a mistrial based upon the ground of misconduct of plaintiffs' attorney, the trial court must be deemed to have concluded that the questions were asked in good faith and that no prejudice resulted therefrom. Under the circumstances presented by the record before us, we would not be justified in disturbing such conclusion in holding that a reversal is required.

[5] Passing now to the consideration of claimed errors in the refusal of the court to give certain instructions proffered by the defendant, it appears that the court instructed the jury that section 544 of the Vehicle Code, St.1935, p. 185, provides that no person shall stop or suddenly decrease the speed of a vehicle on a highway without first giv-

ing to the driver of any vehicle immediately to the rear, an appropriate signal in the manner provided by such Vehicle Code, when there is opportunity to give such signal. And further, that section 546 of the same code, St.1935, p. 186, prescribes the method of giving such signals, which method insofar as pertinent to the instant case is governed by subdivision (c) of the last mentioned section, which reads: "(c) Stop or sudden decrease of speed signal—hand and arm extended downward beyond the side of the vehicle." In view of the foregoing instructions given to the jury, appellant contends that the court committed prejudicial error in rejecting the following instruction offered by her: "I have heretofore instructed you that Section 546 of the Vehicle Code of the State of California provides and at the time of this accident provided that all signals required given by hand and arm shall be given from the left side of a vehicle in the manner described in such instruction and in said section. I further instruct you, however, that at the time of the happening of this accident Section 545 of the Vehicle Code of the State of California, St.1937, p. 1607, was likewise in full force and effect and reads as follows: '545. Signals by Hand and Arm or Signal Device. The signals herein required shall be given either by means of the hand and arm or by signal lamp or mechanical signal device of a type approved by the department, but when the body of a vehicle or the body or load on any vehicle in a combination of vehicles projects thirty-two inches or more to the left of the center of the steering wheel, or under any condition when a hand and arm signal would not be visible both to the front and rear of such vehicle or vehicles then such vehicle or vehicles must be equipped with and said signals must be given by such a lamp or device.'" Appellant insists that in view of her testimony that her automobile was equipped at the rear with a stop light of the "flasher light" type and that the same was in good working order to her personal knowledge about an hour prior to the accident, the jury should have been advised that the law of this state (section 545, Vehicle Code) permits the signals required by sections 544 and 546 to be given either by hand or by a mechanical device. Appellant asserts that if the jury believed from all the evidence that she did actually stop her vehicle on the bridge, they could have found, had the instruction in question been given, that an appropriate signal and warning had been given of appellant's intention to stop. There are several answers to appellant's claims. In the first place the evidence is in conflict as to whether the signal claimed to have been displayed by the stop light flashed at a time just prior to the collision. Respondent driver having testified that she did not see any signal given, either mechanical or by hand, Secondly, the record is barren of any evidence that the stop light on appellant's vehicle was such a mechanical or electrical device which had been examined or approved by the Division of Motor Vehicles of the State of California as required by section 545 of the Vehicle Code. Hardin v. Sutherland, 106 Cal.App. 473, 481, 289 P. 900; Wohlenberg v. Malcewicz, 56 Cal.App.2d 508, 512, 133 P.2d 12. The record therefore, contains no evidence which would excuse appellant for her alleged failure to observe subdivision (c) of section 546 of the Vehicle Code, and it was not error for the court to reject the proffered instruction.

As her next ground of appeal appellant assigns as prejudicial error the refusal of the court to instruct the jury as to the existence in our laws of section 597 of the Vehicle Code, St.1935, p. 194, and which refusal was, by the court, grounded upon the claim that no evidence was offered which warranted such an instruction. In this regard appellant offered the following instruction: "I instruct you that at the time of the happening of this accident Section 597 of the Vehicle Code of the State of California was in full force and effect and reads as follows: '597. Mountain Driving. The driver of a motor vehicle traveling through defiles or canyons or upon mountain highways shall hold such motor vehicle under control and as near the right hand edge of the highway as is reasonably possible and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway shall give audible warning with the horn of such motor vehicle.'"

[6-9] While conceding that there was no direct testimony offered that the highway upon which the accident occurred comes within the definition of the quoted Vehicle Code section, appellant contends that two photographs and a diagram received in evidence warranted the giving of the instruction in question; and that in any event, the trial court could take judicial notice of the general topography of the country and its surrounding terrain. In the absence of any

testimony as to the character of the highway at the point involved herein, we do not feel justified in holding that the documentary evidence referred to conclusively warrants the conclusion that the terrain in question should be characterized as the type designated in the code section, and that the refusal of the court to instruct the jury as requested constituted reversible error. Nor do we think that the character of the territory adjacent to the place where the accident occurred on this particular highway is of such common and universal every-day knowledge as a mountain highway, that the court was required to take judicial notice of such fact. Such common knowledge existed as to the facts judicially noticed in Van Fleet v. Heyler, 51 Cal.App.2d 719, 726, 125 P.2d 586; Mogle v. Moore, 16 Cal.2d 1, 4, 104 P.2d 785, and Vela v. Huberty, 1 Cal.2d 466, 467, 35 P.2d 531, cited by appellant. It is only where sufficient notoriety attaches to a fact that it is proper to assume its existence without proof. Whenever there is possibility of dispute judicial notice cannot be taken of the existence of a claimed fact. Communist Party v. Peek, 20 Cal.2d 536, 546, 127 P.2d 889. Furthermore, the doctrine of judicial notice of matters claimed to be of common and general knowledge should be cautiously exercised. Communist Party v. Peek, supra.

Appellant's final claim may be summarized in the following quotation from her brief: "Considering the evidence as a whole and in the light most favorable to respondents it is clear that in the operation of her automobile the respondent Blanche Elford failed to exercise ordinary care but on the contrary paid not the slightest heed to what might lie ahead of her as she proceeded along the highway and that her negligence solely and proximately caused the injuries and damage of which respondents complain."

[10, 11] It cannot be regarded as the law that an automobile driver is necessarily guilty of negligence because he collides with the rear of another vehicle. Wohlenberg v. Malcewicz, supra. Each case must be governed and judged under its own facts. And we are not here concerned with the law applicable to a case where the driver of the vehicle ahead stopped, pursuant to a traffic signal, or under circumstances where, under the law, the driver was required to make a sudden stop. From the facts here present the jury could have concluded that respondent driver was denied a sufficient opportunity to avoid a collision with the rear end of appellant's automobile because of the jury's belief that the latter's negligence in failing to give the appropriate signal required by sections 544 and 546 of the Vehicle Code; or the jury could have concluded that defendant was guilty of negligence in stopping upon a bridge under circumstances which violated subdivision (j) of section 586 of the Vehicle Code, St. 1941, p. 2724; and that either or both acts of negligence on the part of defendant contributed proximately to the happening of the accident. Depending as it does upon the circumstances of each individual case, the question of whether the driver of the vehicle in the rear was negligent in colliding with the car in front is essentially a question of fact and not of law. It is, therefore, addressed primarily to the triers of fact. Conceding that the evidence is conflicting and that more than one conclusion can be reasonably drawn therefrom, nevertheless the question of whether the negligence of one driver or both was the proximate cause of the accident is one of fact, and time and again it has been held that if there be substantial evidence to support the determination arrived at by the jury, it cannot be disturbed on appeal.

From what we have herein stated it follows that the judgments and each of them must be affirmed. It is so ordered.

YORK, P. J., concurs.

DORAN, Justice (dissenting).

I dissent. It is my conviction that the questions asked on voir dire were highly prejudicial and that the court's refusal either to declare a mistrial or grant defendant's motion for a new trial on account thereof was error.

It is conceded in the prevailing opinion that, "Attempts to impress a jury with the idea that an insurance company and not the individual defendant may be required to respond to such damages as the jury may assess are not looked upon with favor by the courts." And the prevailing opinion further recites, "the cases are harmonious in holding that all such questions must be propounded in good faith." For example, Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538, was concerned with alleged misconduct resulting from the examination of witnesses and statements of counsel. In that connection the court observed (at page 725 of 183 Cal., at page 540 of 192 P.):

"We certainly cannot say that there was any intent on the part of counsel to get before the jury matters which he knew were inadmissible. It seems to us from the record that he was acting in perfect good faith upon the theory that he was entitled to rebut the inference of recovery which might be drawn by jurors from plaintiff's discharge from St. Luke's Hospital, * * *." Dermer v. Pistoresi, 109 Cal.App. 310, 293 P. 78, was an action for personal injuries. Misconduct was assigned to plaintiff's counsel for disclosing the interest of an insurance company during the examination of a witness. In that connection the court observed (at page 315 of 109 Cal.App., at page 80 of 293 P.): "This was a perfectly legitimate cross-examination of the witness. It does not appear to have been conducted in bad faith." Wieck v. Hockett, 115 Cal.App. 600, 2 P.2d 476, was also a personal injury action. Reference to an insurance company by plaintiff's counsel during the course of the trial was assigned as misconduct, with reference to which the court commented as follows, at page 605 of 115 Cal.App., at page 478 of 2 P.2d: "There is absolutely nothing in the record from which it could be inferred or insinuated that plaintiff's counsel did not ask said question in the utmost good faith, or that he attempted in any way to get before the jury the fact, if it be a fact, that the defendant was insured." Arnold v. California Portland Cement Company, 41 Cal.App. 420, 183 P. 171. In this action for damages for personal injuries the court went into the subject at great length, and I am in substantial accord with the court's comments and conclusions in this decision, with the exception of the reference to the subject of good faith, which is as follows (page 426 of 41 Cal.App., page 173 of 183 P.): "Asking a juror whether he is interested in a specified casualty company, or, generally, in any insurance company, if the question be propounded in good faith, may be necessary * * *." In McVea v. Nickols, 105 Cal.App. 28, 286 P. 761, a personal injury action, prejudice was assigned to the inquiry regarding an insurance company. The District Court of Appeal in upholding the judgment made the following pertinent observation (at page 33 of 105 Cal.App., at page 763 of 286 P.): "Appellant concedes that the decisions are against his contention, but urges that we change the law, on account of the impossibility of proving that such questions are not asked in good faith, and because of the more or less obvious dangers that are inherent in permitting such an impression or suggestion to reach the jury. While we have some sympathy with appellant's point of view, we feel that the rule has been sufficiently established to require that any change, or consideration thereof should come from the Supreme Court."

Misconduct that results in prejudice is no less prejudicial because committed in good faith. Damage resulting from an act performed in good faith is just as painful as if done in bad faith. By no process of logical reasoning can the question as to the effect of improper conduct, either in the examination of jurors on voir dire or in the examination of witnesses, be determined by a consideration of the good or bad faith of the inquirer. The innocent victim gets no comfort from the assurance that such misconduct is the product of good faith. Nor is it ever possible to know definitely whether such misconduct is really performed in good faith. Bad faith can easily be concealed by cunning subterfuge.

In determining the extent of damage or prejudice the intent of the inquirer is clearly beside the issue. The damage is no less extensive when the cause is unintentional.

Here the cause was aggravated. When objection was made and the question assigned as misconduct, plaintiffs' counsel declared: "I asked the question in good faith, believing it is a proper question." This declaration carried the implication that actually there was a valid background for the question, and hence tended to confirm that which counsel's objection properly sought to avoid. The contention that instructions cure such errors is based on presumptions that in fact are no more than assumptions, if indeed they amount to that. "Speculations" would be a more accurate term. Moreover, whether the objectionable questions were answered is also immaterial. It is the implications of the questions that constitute the misconduct, which the answers thereto cannot in any case erase. And whether the result of good faith, bad faith, ignorance, lack of understanding or poor judgment, the effect of prejudicial misconduct is the same. Either may be an excuse but neither amounts to a valid defense for such conduct.

If there is the slightest doubt as to the possible prejudicial effect as the result of misconduct, such doubt should be resolved

in favor of the innocent party. Simple justice demands such a course. As was said in Hoyt v. J. E. Davis Mfg. Co., 112 App. Div. 755, 98 N.Y.S. 1031, cited in Arnold v. California Portland Cement Co., supra, 41 Cal.App. page 426, etc., 183 P. page 173: "When counsel ask such questions, overreaching the limit, with a hope to gain a benefit from them, it is but fair that he should take the risk, and in a close case the court may properly consider that such suggestion had the very effect which counsel intended it should have." Not only should the risk be borne when such questions are asked surreptitiously but, as well, when asked in ignorance of the law, or on account of any other limitation.

In such circumstances the trial court may in its discretion declare a mistrial forthwith or await the termination of the trial and pass judgment on the possible prejudicial effect of such misconduct on a motion for a new trial. In the instant case both motions were denied.

The record herein reveals the question to have been close, hence the determination thereof should have been resolved in favor of the injured party and a new trial granted.

For the foregoing reasons, the judgment should be reversed and a new trial ordered.



63 Cal.App.2d 262

PEOPLE v. HAWTHORNE.

Cr. 3756.

District Court of Appeal, Second District, Division 1, California.

March 10, 1944.

1. Criminal law ⇐1081

Document, filed by defendant in trial court within five days after denial of motion for new trial and pronouncement of judgment, denominated "notice of intention to appeal and other relief", was such a substantial compliance with statute pertaining to appeals so as to constitute notice of appeal from both judgment and order denying new trial.

2. Criminal law ⇐989

The statutory requirements that when judgment is rendered in felony case defendant must be personally present and must be informed by court or clerk of nature of charge, his plea, and verdict, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him, are mandatory and require a substantial compliance therewith. Pen.Code, § 1200.

3. Criminal law ⇐989

The "legal cause" which defendant may show when asked whether he has any legal cause to show why judgment should not be pronounced against him consists of a showing either that defendant is insane or that legal grounds exist by reason of which he should be granted a new trial or an arrest of judgment. Pen.Code, § 1200.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Cause".

4. Criminal law ⇐974(1, 3)

A defendant, relying upon possible fact that he is insane at time of appearance for sentence, must specify such ground as basis for motion in arrest of judgment and furnish evidence of that fact. Pen.Code, § 1201.

5. Criminal law ⇐1186(4)

Where defendant, before sentence, moved for a new trial, which motion was denied, and waived right to show any reason in arrest of judgment by failure to demur to information, and did not then or thereafter contend that he was insane, error in failure of court to ask defendant whether he had any legal cause to show why judgment should not be pronounced against him was harmless. Pen.Code, §§ 1185, 1200, 1201; Const. art. 6, § 4½.

6. Criminal law ⇐1186(4)

Before a reversal is authorized, appellant must show that error was committed and that by reason of such error he suffered thereby through a denial of some substantial right guaranteed to him by law. Const. art. 6, § 4½.

7. Criminal law ⇐1186(4)

Where proof of defendant's guilt was overwhelming, and at time of sentence defendant took advantage of certain rights and waived others and did not claim injury to his substantial rights by erroneous denial of one of his rights, there was no

"miscarriage of justice" authorizing a reversal. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Fred C. Hawthorne was convicted of forgery, and, from the judgment of conviction and an order denying his motion for new trial, he appeals.

Affirmed.

Fred C. Hawthorne, in pro. per., for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WHITE Justice.

In an information containing five counts the defendant was charged in each count with the crime of forgery. It was also alleged that the defendant had theretofore suffered three convictions on felony charges upon each of which convictions he served a term in prison. Following the entry of not guilty pleas on all counts in the information, the cause proceeded to trial before the court sitting without a jury, resulting in defendant's conviction upon all five counts. The court also found the allegations as to all alleged prior convictions to be true.

From the order denying his motion for a new trial and from the judgment of conviction, defendant prosecutes this appeal.

[1] Respondent moves to dismiss the appeal on the ground that the record does not indicate whether it was taken from the judgment, the order denying the motion for a new trial, or from both. We feel, however, that the document filed by defendant in the trial court within five days after denial of the motion for a new trial and the pronouncement of judgment, and denominated "notice of intention to appeal and other relief", was such a substantial compliance with the statute as to constitute a notice of appeal from both the judgment and the order denying a new trial. The notice was so considered by the trial judge who ordered the clerk's and reporter's transcripts prepared and the same are now before us. In the interest of justice we shall, therefore, give consideration to the appeal as being one from both the judgment and the order denying the motion for a new trial.

The sole and only ground urged for a reversal is that the trial court, at the time defendant was arraigned for judgment, did not inquire of him as to whether "he has any legal cause to show why judgment should not be pronounced against him" as prescribed by section 1200 of the Penal Code. Respondent concedes and the reporter's transcript shows that the pertinent inquiry was not made. This being the only issue presented in this proceeding, we deem it unnecessary to set forth a statement of the evidence other than to say that it was abundantly sufficient to establish defendant's guilt upon all counts pleaded in the information.

[2] There can be no question but that in felony cases, when judgment is rendered the defendant must be personally present and at that time, in accordance with the provisions of section 1200 of the Penal Code "he must be informed by the court, or by the clerk, under its direction, of the nature of the charge against him, and of his plea, and the verdict, if any thereon, and *must be asked whether he has any legal cause to show why judgment should not be pronounced against him*" (emphasis added). A perfunctory adherence to these provisions will not suffice, and a substantial compliance therewith is essential, for they are mandatory, affecting as they do important rights of the defendant, who when thus advised and called upon, may show either that he is insane, or that there are existing grounds warranting a new trial, or move for arrest of judgment. People v. Walker, 132 Cal. 137, 140, 64 P. 133.

The attorney general, however, contends that appellant's claim is answered by the following which appears in the clerk's transcript of the proceedings had when the defendant appeared for judgment: "No legal cause appearing why judgment should not be pronounced, the Court pronounces judgment and sentence as to Counts 1, 2, 3, 4 and 5 of the information as follows: Defendant is sentenced to the State Prison for the term prescribed by law as to each count and remanded into the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of the State Prison of the State of California at San Quentin. These sentences are ordered to run *concurrently* and are entered in Judg-

ment Book No. 51, Pages 356, 357 and 358."

While it is true that the clerk's transcript does show compliance with section 1200 of the Penal Code, nevertheless, a strong showing to the contrary is made by reference to the reporter's transcript, which furnishes ample grounds for the inference, if not the conclusion, that the clerk entered up a judgment based upon his own conclusions, upon a stereotyped form showing full compliance with the above quoted Penal Code section, when in fact, as revealed by the reporter's transcript, the provisions of said section were ignored.

[3-6] However, insofar as the instant case is concerned, it is indicated by judicial determination (People v. Walker, supra) that the "legal cause" if any existed, which might have been urged by the defendant at the time he was arraigned for judgment, "why judgment should not be pronounced against him", consisted of a showing either that he was then insane, or that legal grounds existed by reason of which he should be granted a new trial, or a motion for arrest of judgment. The record herein reveals that prior to the pronouncement of judgment the defendant made a motion for a new trial which was submitted without argument and denied by the court. As to a motion in arrest of judgment, the same is defined by section 1185 of the Penal Code, which specifies the grounds upon which such a motion may be based "unless the objection has been waived by a failure to demur," etc. The record in the case at bar discloses that the defendant interposed no demurrer to the information. Consequently, it must be assumed that he waived his right to show any reason in arrest of judgment as a "legal cause" why judgment should not be pronounced against him. People v. Swift, 140 Cal.App. 7, 10, 34 P.2d 1041, 1042. However, in addition to the grounds set forth in section 1185 of the Penal Code, the defendant is entitled by the provisions of section 1201 of the same code, as one of the "causes which may be shown against judgment", to show at the time of his arraignment for judgment "that he is insane." In his briefs filed herein defendant makes no such contention, nor did he make such a claim in the trial court. Furthermore, had defendant relied upon the possible fact that he was insane when he appeared before the trial court for sentence, it was necessary for him not only to specify such ground as a basis for his motion in that regard, but it was incumbent upon him to furnish evidence of that fact. And as was said in People v. Swift, supra, "Since he failed in that regard and does not now urge it as a reason that he either could or would have assigned such cause in arrest of judgment, he neither was at that time, nor is now, injured because he was not afforded an opportunity in that regard". The law is well settled that before a reversal is authorized the appellant must not only show that error was committed but he is required to further show that by reason of such error he has suffered thereby through a denial to him of some substantial right guaranteed to him by law.

[7] Since the decision was rendered in the case of People v. Walker, supra, section 4½ of Art. VI has been added to our State constitution. This section, we feel, covers this case. By its provisions we are restrained from directing a reversal unless "after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice". Since, in the case with which we are here concerned, the record indicates that the defendant took advantage of certain of his rights at the time sentence was pronounced, waived others, and neither in the trial court nor here makes any claim that injury to his substantial rights was occasioned by the denial of his remaining right, coupled with the fact that a reading of the reporter's transcript convinces us that the proof of defendant's guilt was overwhelming, there is no sufficient reason shown why the judgment and order appealed from should be reversed.

For the foregoing reasons the judgment and the order by which defendant's motion for a new trial was denied are, and each is affirmed.

YORK, P. J., and DORAN, J., concur.

63 Cal.App.2d 253

SILVA et al. v. FRESNO COUNTY.

Civ. 3102.

District Court of Appeal, Fourth District, California.

March 9, 1944.

1. Counties ⇐213

The statute requiring claimants against county to file a claim specifying date and place of accident and extent of injuries is intended to enable the authorities to make proper investigation and decide whether the case is one for settlement or litigation, and when the notice contains the information necessary for that purpose the statute is complied with. Gen.Laws 1937, Act 5149.

2. Automobiles ⇐293

A claim against county for personal injuries, describing the place of injury as "on a public highway approximately four miles east of Dos Palos in the county of Fresno, state of California", where the highway came to an "abrupt end", constituted sufficient compliance with statute requiring place of accident to be specified. Gen. Laws 1937, Act 5149.

3. Automobiles ⇐301(4)

In action against county for injuries allegedly caused by negligence of county in failing to maintain warning sign at a point where highway came to an abrupt end, complaint was not subject to objection that it failed to allege that a reasonable time had elapsed for the county to remedy the condition after acquiring knowledge thereof. Gen.Laws 1937, Act 5619.

4. Automobiles ⇐306(5)

Evidence supported finding that county had at least constructive notice of dangerous and defective condition of highway due to lack of warning sign at point where highway came to an abrupt end, and that county failed to remedy the condition after reasonable time had elapsed, justifying recovery against county for personal injuries resulting from such negligence. Gen. Laws 1937, Act 5619.

5. Appeal and error ⇐1064(1)

In action against county for injuries sustained by automobile occupants due to alleged defective condition of highway, an instruction as to necessity of notice on part of county of defective condition, although confusing as to plaintiffs' theory of notice, whether actual or constructive, was not prejudicial where evidence supported theory that county had constructive notice. Gen.Laws 1937, Acts 5149, 5619.

6. Trial ⇐296(3)

In action against county for injuries caused by alleged defective condition of highway, an instruction respecting county's liability, although not containing all necessary elements, was not prejudicial when considered with other instructions. Gen. Laws, 1937, Act 5619.

7. Automobiles ⇐276

Implied or constructive notice to a county of a defective condition of streets arises from facts from which it may be reasonably inferred. Gen.Laws 1937, Act 5619.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by John G. Silva and Lester Thyards against County of Fresno for personal injuries sustained in an accident allegedly caused by defective condition of public highway. General and special demurrers to the complaint were overruled, verdict and judgment entered for both plaintiffs, and defendant appeals.

Affirmed.

W. C. Tupper and Gilbert H. Jertberg, both of Fresno, for appellant.

James M. Thuesen and Martin C. Thuesen, both of Fresno, for respondents.

GRIFFIN, Justice.

On the night of December 18, 1940, plaintiffs were proceeding south in an automobile on a public road known as Fairfax Avenue, in Fresno County, about four miles east of Dos Palos (John G. Silva driving), and were approaching another public road known as Hart Avenue. The intersection of these two roads is in the nature of an "L". Neither road extends beyond the point of intersection. It is plaintiffs' claim that they approached the "L" intersection and at that time there were no warning signs being maintained indicating the sharp right-angle turn, and as a consequence plaintiff driver was unable to make the turn or stop in time to avoid running into and through a ditch or borrow pit constructed by defendant county along the

southerly edge of the intersection and into a plowed field. Plaintiffs brought this action against the County of Fresno to recover damages for their injuries received in the accident which they alleged resulted from a dangerous and defective condition of the public highway as maintained by it.

The complaint contains two causes of action, one on behalf of plaintiff Silva and the other on behalf of plaintiff Thyards. The liability of the county, if any, is grounded on chapter 328, Statutes of 1923, page 675, Deering's General Laws 1937, Act 5619, which subjects counties to liability in certain instances for negligence of their officers. Prior to the filing of the complaint, each plaintiff filed on March 3, 1941, a claim with the clerk of the Board of Supervisors specifying that "the place of injury was on a public highway approximately four miles east of Dos Palos in the County of Fresno, State of California" and that "* * * the cause and manner of such injury and facts connected therewith are as follows: A dangerous and defective road in that there were no signs kept or maintained by said County of Fresno indicating that the public highway upon which this claimant was riding came to an abrupt end * * *." On August 4, the complaint was filed alleging the place of accident to be on Fairfax Avenue "at a point where the said Fairfax Avenue intersects with Hart Avenue * * *." Each cause of action alleged that at the said intersection the county negligently maintained the highway and the signs and signals at the intersection, in a dangerous and defective condition and by reason thereof plaintiffs drove off of the highway into a ditch negligently maintained by the County of Fresno. Defendants interposed general and special demurrers to the complaint which were overruled.

The case was tried mainly on the theory that the dangerous and defective condition of the highway was due to the lack of a certain sign which defendant had erected and was permitted to remain down after having been knocked down from a previous accident or accidents at the same corner, and which was down at the time of the accident in question.

It is alleged that the defendant's road man in that district knew or should have known that the sign was down and that defendant's negligence in failing to maintain the sign in a proper place proximately caused plaintiffs' injuries. A jury awarded Silva $2,250 and Thyards $7,500.

The main and by far the closest question here involved, which question was also presented on demurrer, is that the claim filed with the county was defective in form and therefore did not meet the requirements of the statute, Chap. 1167, Stats. 1931, p. 2475, Deering's Gen.Laws, 1937, Act 5149, which requires that the claim "shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." It is argued that the claim failed to state the name of the highway and failed to specify the place of the injury with sufficient particularity. Defendant objected to the introduction of any testimony by plaintiff on this same ground. The objection was overruled. It has been held that the statutory requirements in respect to the filing of such claims are mandatory and compliance therewith is a prerequisite to the maintenance of a suit for any such claimed damages. Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13; Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570.

In the Hall case [19 Cal.2d 198, 120 P.2d 15] the claim filed by plaintiff was for personal injuries received from slipping on a "sidewalk which was covered with mud * * *" in the City of Los Angeles. The court held the claim was defective in that it failed to state with sufficient particularity the place where the accident happened and that actual knowledge by the officials of the facts required to be stated in such a claim did not dispense with the necessity for filing of a proper claim. Defendant claims here that there is no distinction between the claims filed in the instant case and the claim filed in the Hall case. In that case it was held there was an entire failure to designate in the claim the place where the accident occurred. Considering the territorial extent of the city limits of the city of Los Angeles, such a description of a sidewalk as one being somewhere in the city limits of that city would be quite indefinite and uncertain. In the instant case, however, there was an endeavor to state the place of the accident and injury. The place where the accident occurred was on a country road, away from the inhabited portions of the valley, about four miles east of the small town of Dos Palos, and was a public highway which

came to an abrupt end, where no signs were maintained by the county so indicating.

[1] According to many cited cases, the plain purpose of the statute is to guard the county against imposition by requiring notice of the circumstances of an injury upon which a claim for damages is made so that its authorities may be in a position to investigate the facts as to the time and place and to make proper investigation of the condition of the premises and decide whether the case is one for settlement or litigation. When a notice contains the information necessary for that purpose it is substantial compliance with the statute, but when it falls short of that test it is insufficient. Hall v. City of Los Angeles, supra, and cases cited; Purdy v. City of New York, 193 N.Y. 521, 86 N.E. 560.

The question here presented is whether there has been a substantial compliance with the statute under the rules enunciated, whereby the officials charged would be enabled to locate the place of the accident and make proper investigation of the condition of the premises.

[2] The evidence discloses that the member of the Board of Supervisors here concerned testified that the claim was filed with the board; that later an action was brought against the county and that after receiving such notice he went out there (probably four miles east of Dos Palos "as the crow flies"); that he and his foreman looked at the corner intersection at the end of the road and also the post and that there "was not anything to see except the corner where an accident was alleged to have occurred." It therefore appears from the record that the one intended to be guided to the location was so guided there by the description given. However, the supervisor stated that it was quite a long time before he discovered where the accident had happened. The record is not clear from what source he received the information which led him to the scene of the accident. We might assume therefrom, under the circumstances here related, that there was but one public highway approximately four miles east of Dos Palos which "came to an abrupt end", and where no signs were maintained by the county so indicating. We must conclude, as the trial court did, that there was a substantial compliance with the statute in describing the place of the accident under the conditions here prevailing. Dillard v. County of Kern, 23 Cal.2d 271, 144 P.2d 365.

[3] Defendant next contends that the complaint fails to state a cause of action in that it fails to allege that a reasonable time had elapsed for the county to remedy the condition or to protect the public against such condition after it acquired or should have acquired knowledge of the defective condition. There is no merit to this argument. The complaint alleges that the Board of Supervisors had knowledge and notice of the defective condition, and at the time of said accident a reasonable time had elapsed since said board had acquired knowledge of the dangerous condition and it failed to remedy it and it had the financial ability and necessary funds to place the said highway sign signals at said intersection at a proper and safe position. The pleading was a sufficient allegation of liability. Meyer v. City of San Rafael, 22 Cal.App.2d 46, 48, 70 P.2d 533.

It is next argued that the evidence is insufficient to sustain the verdicts because there was no competent evidence of either actual or constructive notice to the county of the alleged dangerous and defective condition of the public highway. A deputy constable testified that he had previously investigated three other accidents where "cars went off the end of Fairfax into this ditch", and that he made a monthly report of all of those accidents involving injury to persons to the district attorney's office and received mileage paid by the county for such service through an itemized claim which set forth the nature of his services.

[4] Plaintiffs' evidence established that a certain sign or marker with a road reflector indicating that the road turned or ended, had been placed at the south end of Fairfax Avenue by defendant county; that on the night of plaintiffs' accident it was down and lying in the grass about 12 feet from the place where it originally was erected; that it had been knocked down on previous occasions and occasionally replaced. One witness testified that on the particular night involved he noticed the post to which the marker was attached "had been laying there for some time"; that he could tell "by the color of the grass underneath, not getting the sunshine". Another witness testified that he had seen the sign up and down three times before "he went over it"; that on one occasion he replaced the sign himself. The supervisor of

the district testified that he was "intimately familiar" with this and each intersection of the 1029 miles of road in his district; that he had a road foreman in the district here involved who had "charge of the maintenance of signs" and devices for the purpose of indicating turns and ends of roads and that he should be "cognizant of things that were needed"; that the signs were placed there as "a warning sign of danger" and it was one of the foreman's duties to see that "these signs were properly maintained". There is substantial evidence that the defendant county had at least constructive notice of the dangerous and defective condition, and after a reasonable time had elapsed, failed to remedy the condition. It remained for the jury to determine whether, in fact, such dangerous condition existed and whether the condition complained of existed for sufficient time to give the public agency constructive notice. Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 157, 108 P.2d 989; Edwards v. City of San Diego, 126 Cal.App. 1, 14 P.2d 119; Wise v. City of Los Angeles, 9 Cal.App.2d 364, 50 P.2d 1079; Lorraine v. City of Los Angeles, 55 Cal.App.2d 27, 130 P.2d 140.

Defendant selects two of plaintiffs' instructions given by the court and complains of them. One instructed the jury that "* * * if you find * * * that the original construction of the road and signs at the place alleged * * * or the manner in which the road or signs have been maintained by defendant was defective and dangerous, and that such defective and dangerous condition had existed for a long period of time prior to the time of the accident * * * then you may find that the defendant had constructive notice of the condition of the road or highway or signs". The other instruction stated that "* * * if you find that the highway or signs were in a dangerous and defective condition, then, even though the defendant county did not have actual knowledge of such dangerous and defective condition of the highway or signs, if in the exercise of ordinary care it should have known of the dangerous and defective condition of the highway or signs, and if you further find that the defendant county took no precautions to remedy said dangerous condition, the defendant county is guilty of negligence; and in this regard you are further instructed that if you find that another accident or accidents occurred on the same highway and at the same place as the accident referred to in plaintiffs' complaint and under the same or similar conditions, it is a circumstance that may be considered by you in determining whether or not in the exercise of ordinary care the defendant county should have known of the dangerous and defective condition of the highway and signs."

[5] It is argued that the instructions are misleading; that part of the first instruction is based on the theory that if the county constructed the road and signs "in a dangerous and defective condition it would have actual (not constructive) notice of such fact", and further that it cannot be determined whether the dangerous and defective condition refers to the original construction of the signs and roads or the maintenance of them in such condition. The instruction as given is confusing as to plaintiffs' theory of notice, i. e., whether actual or constructive. However, the evidence supports the theory that defendant county had constructive notice. No prejudice resulted.

[6] The second instruction, although it does not contain all of the elements respecting the liability of the county, when considered in connection with other proper instructions given on the subject, cannot be considered to be prejudicially erroneous. In other instructions the court fully and correctly instructed the jury that "counties * * * are liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways * * * signs * * * and property in all cases where the governing or managing board of such county or other board, officer or person having authority to remedy such condition had knowledge or notice of the defective or dangerous condition of any such highway, building, signs, grounds, works or property, and failed or neglected for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition, or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[7] The court also properly instructed the jury that: "Implied or constructive notice to a county of a defective condition of its streets arises from facts from which it

may be reasonably inferred, or from proof of circumstances from which it appears that the defect ought to have been known and remedied * * * that there is no fixed or definite rule as to what length of time would be required in order to justify an inference of notice of a defective condition of a public highway or signs on the part of a county, but each case must depend upon the facts and circumstances attending and surrounding it."

These are the main questions presented on this appeal. The other questions raised are likewise without merit.

The judgment and order are affirmed.

BARNARD, P. J., and MARKS, J., concur.



63 Cal.App.2d Supp. 851

LESTER v. ISAAC.

No. C. A. 5710.

Appellate Department, Superior Court, Los Angeles County, California.

March 2, 1944.

1. Forcible entry and detainer ⇐6(1)

The action of unlawful detainer is statutory in character.

2. Landlord and tenant ⇐278½
War ⇐4

A complaint in unlawful detainer action against tenant under month to month tenancy, in order to state cause of action, must plead compliance with applicable provisions of O.P.A. rent regulation. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq.

3. Landlord and tenant ⇐278½
War ⇐4

A written notice of termination of month to month tenancy reciting that owner desired possession of premises for his own use and occupancy was insufficient under the self-occupancy provision of the O.P.A. rent regulation for housing for failure to state that owner sought "in good faith" to recover possession of premises. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq.

4. Landlord and tenant ⇐278½
War ⇐4

The element of good faith is criterion of owner's right to recover possession of housing accommodations from tenant for his own use and occupancy under the self-occupancy provision of O.P.A. rent regulation for housing. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq.

5. Pleading ⇐17

A pleading must allege matters of substance in direct terms and not by way of recital or reference.

6. Pleading ⇐17

A complaint must allege whatever is an essential element to a cause of action by distinct averment, and cannot leave matter to inference to be drawn from construction of, or recitals in, document attached to or incorporated in complaint.

7. Landlord and tenant ⇐278½
War ⇐4

Complaint in unlawful detainer action alleging service on month to month tenant of written notice terminating tenancy which notice, as set out in complaint, recited that owner desired possession of premises for his own occupancy was insufficient for absence of direct allegation that landlord "in good faith" sought such possession, as required by O.P.A. rent regulation for housing. Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix § 901 et seq.

8. Pleading ⇐34(1)

The rule of liberal construction of pleadings provided for by Code did not apply where matter of substance was not alleged in direct terms, but at most was left merely to inference from construction of or recitals in document incorporated in complaint. Code Civ.Proc. § 452.

Appeal from Municipal Court of Los Angeles; May D. Lahey, Judge.

Action in unlawful detainer by P. N. Lester against Josie Isaac to recover possession of real estate. From a default judgment for plaintiff entered after defendant's general demurrer to complaint was overruled and defendant's subsequent failure to answer, defendant appeals.

Reversed, with direction to sustain the demurrer.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Thomas L. Griffith, Jr., of Los Angeles, for respondent.

FOX, Judge.

Plaintiff seeks, through proceedings in unlawful detainer, to recover from defendant the possession of certain described premises in the city of Los Angeles. Plaintiff alleges that he owned said premises prior to November 1, 1942 (the effective date of O.P.A. Rent Regulation in this defense-rental area), and that defendant occupies the same on a month to month tenancy. Plaintiff further alleges that on September 4, 1943 he served on defendant a written notice terminating her tenancy on October 4, 1943, and that he gave a copy of said notice to the O.P.A. area rent office within twenty-four hours after service upon defendant. A copy of this notice is set out in the complaint. To the complaint, defendant filed a general demurrer, which was overruled. Defendant did not answer. Thereafter, a default judgment by the court was entered in favor of plaintiff. Defendant appeals from this judgment, contending that the complaint fails to state a cause of action and that therefore her demurrer should have been sustained. This contention must be upheld.

[1-4] In order for a plaintiff to state a cause of action in a proceeding of this kind, which is statutory in character (Seidell v. Anglo-California Trust Co., 1942, 55 Cal. App.2d 913, 920, 132 P.2d 12), he must plead compliance with the applicable provisions of the O.P.A. Rent Regulation for Housing, 8 Federal Register 7322, issued pursuant to the Emergency Price Control Act of 1942, Pub.L.No.421, 77th Cong. 2d Sess., c. 26, 56 Stat. 29, 50 U.S.C.A.Appendix § 901 et seq. See McLain v. Llewellyn Iron Works, 1922, 56 Cal.App. 60, 65, 66, 204 P. 869; Bailey Trading Co. v. Levy, 1925, 72 Cal.App. 339, 344, 345, 237 P. 408; Green v. Grimes-Stassforth Stationery Co., 1940, 39 Cal.App.2d 52, 56, 102 P.2d 452. This the plaintiff failed to do. In the first place, the notice to the defendant, which he pleads, is insufficient. Section 6(d) (1) of the said Rent Regulation, provides that: "Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground under this section upon which the landlord relies for removal or eviction of the tenant." In this connection, the notice to defendant recites that "The undersigned (the plaintiff) desires the possession of said premises for his own use in order that the same may be occupied by him." Plaintiff is apparently attempting to bring himself within the self-occupancy provision of section 6(a) (6) of said Regulation. Under the terms of this latter subdivision, provision is made for the recovery of possession of housing accommodations by a landlord (owner of the property prior to November 1, 1942) who "seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself." The element of good faith is the criterion of the owner's right to recover possession of housing accommodations for such purpose. Bumgarner v. Orton, 1944, Cal.Super., 146 P.2d 67. Such an owner must, therefore, state in his notice to the tenant that he seeks in good faith to recover possession of the housing accommodations in question for the aforesaid purpose, and he must allege in his complaint that he gave the tenant such a notice. The notice which plaintiff served on defendant made no mention of plaintiff's good faith, and was, therefore, wholly insufficient to meet the requirement of the O.P.A. Rent Regulation. Sec. 6(d) (1), supra.

[5] Plaintiff's complaint fails to state a cause of action for the further reason that there is no allegation therein of any ground for the removal of the defendant under the said O.P.A. Rent Regulation. Section 6 of said Regulation enumerates a number of grounds for the removal of a tenant. To state a cause of action for a tenant's removal, a landlord must allege facts which bring his case within one of the specified grounds.

[6, 7] We may assume from the wording of the notice to the defendant that plaintiff desires possession of the premises for his own occupancy. However, even if this statement in the notice to the tenant were a sufficient statement (which it is not) of one of the grounds for the latter's removal, it nevertheless could not serve as an allegation of that fact in the complaint. Matters of substance must be alleged in direct terms and not by way of recital or reference. Whatever is an essential element to a cause of action must be presented by distinct averment, and cannot be left to an inference to be drawn from the construction of or recitals in a document attached to or incorporated in

a complaint. Burkett v. Griffith, 1891, 90 Cal. 532, 542, 27 P. 527, 13 L.R.A. 707, 25 Am.St.Rep. 151; Hibernia S. & L. Society v. Thornton, 1897, 117 Cal. 481, 483, 49 P. 573; Hayt v. Bentel, 1913, 164 Cal. 680, 686, 130 P. 432; People v. Reid, 1924, 195 Cal. 249, 260, 232 P. 437, 36 A.L.R. 1435; California Trust Co. v. Gustason, 1940, 15 Cal.2d 268, 272, 273, 101 P.2d 74.

[8] In order for plaintiff to state a cause of action, it was necessary for him, by appropriate allegations, to directly allege in his complaint that he, in good faith, sought to recover possession of the housing accommodations in question for his immediate use and occupancy as a dwelling. There is a total absence of such an allegation in the complaint. Hence, the rule of liberal construction of pleadings provided by section 452, Code of Civil Procedure, is inapplicable here. Howard v. D. W. Hobson Co., 1918, 38 Cal.App. 445, 449, 176 P. 715; Estrin v. Superior Court, 1939, 14 Cal.2d 670, 677, 96 P.2d 340; Feldesman v. McGovern, 1941, 44 Cal.App. 2d 566, 571, 112 P.2d 645. Nor may we assume that this issue was tried with the consent of the defendant, since the judgment of the court was by default, the defendant having elected to stand upon her demurrer.

The judgment is reversed, and the trial court is directed to sustain the demurrer. Appellant shall recover her costs of appeal.

SHAW, P. J., and KINCAID, J., concur.

23 Cal.2d 719

MAGUIRE et al. v. HIBERNIA SAVINGS & LOAN SOC. et al.

EDWARDS et al. v. SAME.

CRILLY v. SAME.

CROWLEY v. SAME.

Nos. 16494, 16496, 16500, 16503.

Supreme Court of California.
Feb. 29, 1944.

Rehearing Denied March 27, 1944.

1. Action ⇐6

A complaint for declaratory relief is sufficient if it sets forth facts showing existence of actual controversy relating to legal rights and duties of respective parties under written instrument and requests that these rights and duties be adjudged by court. Code Civ.Proc. § 1060.

2. Action ⇐6

Where first and second counts alleged that existence in plaintiffs or their predecessor of rights asserted by them was denied by defendants, and that defendants intended to convert reserve fund of savings and loan society into capital stock and distribute it in disregard of plaintiffs' claimed rights as members and as depositors, and such counts set forth certain instruments on which plaintiffs based their controverted claims and prayed for judicial construction thereof, complaint showed there was actual controversy warranting declaratory relief. Code Civ.Proc. § 1060.

3. Action ⇐6

A declaratory complaint will not be dismissed because court disagreed with construction of contract contended for by plaintiff, and a complaint in action for declaratory relief which recites in detail dispute between parties and prays for declaration of rights and other legal relations of parties states facts constituting cause of action against motion to dismiss for insufficiency. Code Civ.Proc. § 1060.

4. Action ⇐6

Purpose of declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation. Code Civ.Proc. § 1060.

5. Action ⇐6

Plaintiff in proceeding for declaratory judgment is not required to allege facts entitling him to a favorable declaration. Code Civ.Proc. § 1060.

6. Action ⇐6

Counts alleging that existence in plaintiffs or their predecessors of rights asserted by them as members and as depositors of savings and loan society was denied by defendants and that defendants intended to convert reserve fund into capital stock and distribute it in disregard of plaintiffs' claimed rights, and setting forth written instruments upon which plaintiffs based their controverted claims, and praying for judicial construction thereof, stated facts constituting cause of action. Code Civ. Proc. § 1060.

7. Courts ⇐107

Cases are not authority for propositions not considered.

8. Action ⇐12

That a party seeking judicial aid has unclean hands may well justify trial court in concluding that its adjudication would not be proper.

9. Action ⇐6

Availability of another adequate remedy may condition necessity for declaratory relief. Code Civ.Proc. § 1060.

10. Action ⇐6

A controversy regarding status of one claiming membership in a corporation is a proper subject of a declaratory judgment. Code Civ.Proc. § 1060.

11. Action ⇐6

Propriety or necessity for declaratory relief to determine status of persons claiming membership in corporation was not dependent upon which party to controversy sought judicial aid. Code Civ. Proc. § 1060.

12. Action ⇐6

Before court may properly exercise its discretion to refuse declaratory relief on ground that other remedies are available, it must clearly appear that the asserted alternative remedies are available to the plaintiff, and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief. Code Civ. Proc. § 1060.

13. Action ⇐6

In action for declaratory relief, abuse of leave to amend is not ground for exer-

cise of court's discretion under statute authorizing court to refuse to exercise power granted where its declaration is not necessary or proper at time under all the circumstances. Code Civ.Proc. § 1061.

14. Action ⇐6

Procedure and practice with respect to amendments in declaratory actions is similar to that prevailing in ordinary actions at law and suits in equity, and when a party to an action for remedial or preventive relief abuses leave to amend the pleading, trial court may refuse to permit filing of amendment, or may strike the amended pleading from the files. Code Civ.Proc. § 1060.

15. Limitation of actions ⇐16

Nature of rights sued upon and not the form of action nor the relief demanded determines applicability of statute of limitations. Code Civ.Proc. §§ 22, 30, 312.

16. Limitation of actions ⇐18

Actions for declaratory relief are "civil actions" within statute of limitations. Code Civ.Proc. § 312.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action".

17. Limitation of actions ⇐43

Generally, a cause of action "accrues" when a suit may be maintained thereon, and the statute of limitations then begins to run.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

18. Limitation of actions ⇐18

Period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Code Civ. Proc. §§ 22, 30, 312.

19. Limitation of actions ⇐18

If declaratory relief is sought with reference to an obligation which has been breached and a right to commence an action for coercive relief upon a cause of action arising therefrom is barred by statute, the right to declaratory relief is likewise barred, but if declaratory relief is sought before there has been a breach of obligation or within statutory period after breach, the right to relief is not barred by lapse of time.

20. Action ⇐6
Limitation of actions ⇐95(1)

If lapse of time can bar an action by stockholder to establish his interest in a corporation, it does not commence to run under the statute of limitations or doctrine of laches until the stockholder has knowledge that his rights are denied or status controverted by corporation. Code Civ.Proc. §§ 22, 30, 312.

21. Action ⇐63

Policy of state with respect to lapse of time is embodied in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by statute, does not bar relief. Code Civ. Proc. §§ 22, 30, 312.

22. Action ⇐63

Defense of stale claims is nothing more than a particular application of the doctrine of laches, and is based on estoppel.

23. Action ⇐63

Fact that determination of controversy involves an investigation of rights originating many years past, did not render the claim stale.

24. Action ⇐6
Limitation of actions ⇐95(1)

Action for declaratory relief by plaintiffs claiming that existence in plaintiffs or their predecessor of rights asserted by them as members of savings and loan society was denied by defendants, and that defendants intended to convert reserve fund into capital stock and distribute it in disregard of plaintiffs' claimed rights was not barred by statute of limitations or by laches on ground that plaintiff's predecessor was excluded from membership by by-laws on September 29, 1864, and that statute of limitations was set in motion then, where complaint did not show that plaintiffs or predecessor had knowledge of existence of questioned by-laws. Code Civ.Proc. §§ 22, 30, 312.

25. Action ⇐6
Limitation of actions ⇐55(5)

Under count of complaint in action for declaratory judgment alleging that plaintiffs and predecessor had certain alleged rights as depositors in savings and loan society, and that although there had been equality of treatment between depositors and members in the past, distribution of reserve fund in manner inimical to plaintiffs'

asserted rights would be made by defendants in the future, cause of action was not barred by statute of limitations or by laches. Code Civ.Proc. §§ 22, 30, 312.

In Bank.

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Actions for declaratory relief by Thomas M. Maguire and others, by Minnie B. Edwards and others, by Mary F. Crilly, and by Kate Hayes Crowley, as executrix, against the Hibernia Savings & Loan Society, a corporation, and others. From judgments for defendants, plaintiffs appeal.

Reversed.

Prior opinion, 128 P.2d 149.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, and Rosenshine, Hoffman, Davis & McAuliffe, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Tobin & Tobin, Theodore J. Roche, Sullivan, Roche & Johnson, Garrett W. McEnerney, Garrett McEnerney, II, Maurice J. Harrison, and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs in these four actions seek declaratory relief as successors in interest to alleged members of and depositors in defendant The Hibernia Savings and Loan Society, hereafter referred to as the society. Demurrers were sustained to amended complaints without leave to amend upon the ground that neither the first nor the second counts thereof stated a cause of action, and upon the specific ground that relief was barred by the statute of limitations and by laches. Special demurrers and motions to strike portions of the complaints were interposed but were not ruled upon by the trial court. The court did, however, grant motions of some of the individual defendants to dismiss the actions on the ground that declaratory relief was not "necessary or proper." Code Civ.Proc. sec. 1061. Judgments were entered in the four actions in favor of defendants. The appeals therefrom are submitted on a single set of briefs. Inasmuch as the amended complaints in the four actions contain substantially the same allegations and exhibits, we single out the complaint in the Maguire case for discussion of the facts and law involved in the several cases. The following statement of the facts is based on that complaint.

Defendant society was organized as a savings bank in 1859 under an act authorizing the formation of corporations "for the purpose of engaging in any species of trade or commerce." Stats.1853, p. 87. The act provided for the formation of corporations having a capital stock and made no provision for corporations composed of members rather than stockholders. See People v. Perrin, 56 Cal. 345. The society's certificate of incorporation stated that the amount of its capital stock would be $600,000, consisting of 6,000 shares, and recited that the incorporators "have associated ourselves together for the purpose of forming a Society," and that "the object for which it is formed is, that by means of it the members thereof may be enabled to find a secure and profitable investment for small savings, and may have an opportunity of obtaining from it the use of moderate capital."

Bylaws and rules of order were adopted in 1859 governing the mutual rights, duties and privileges of members of the society. It was provided therein that "Those who shall sign these by-laws * * * and pay the entrance fee of two dollars, shall be styled and considered members of this corporation. Those, who, in addition to the above, shall hold one or more shares of its stock, shall further be styled and considered stockholders. * * *" Members of the society were entitled to make deposits in sums of not less than $2.50 and were to be furnished with passbooks in which their deposits would be entered. It was further provided that "the fixed value of each share shall be One Hundred Dollars," and that whenever the amount to the credit of a depositor "shall form a full share, he shall be entitled to a certificate of stock, up to the number of twenty shares, the corresponding debt being entered on his passbook," and any "excess over this number shall become a simple deposit," which "shall share equally in all dividends * * * declared, or in losses * * * sustained." The bylaws could be amended only by three-fourths of the shares represented at a meeting of the society, and the rules of order, by a vote of three-fourths of the members present at a meeting.

In 1862 a statute was enacted specifically providing for the formation of corporations "for the purpose of aggregating the funds and savings of the members thereof and others." Stats.1862, p. 199. It authorized the incorporation of savings banks with or without capital stock. In 1864 the act was amended to provide that "All corporations for the accumulation, preservation, and investment of funds and savings, and all associations or societies for the like purpose, claiming in good faith to be incorporated under the laws of this State, may avail themselves of the provisions of and become incorporated under this Act by filing with the County Clerk * * * and * * * Secretary of State, a certificate stating their intention and election to become so incorporated, which intention and election may be made and declared by the Trustees or Acting Trustees of such corporation, association, or society, or a majority thereof. * * *" Stats.1864, p. 531. In August, 1864, defendant society, following favorable vote of its members, resolved to become incorporated under the amended statute and filed the required certificate, which recited that the society would have no capital stock.

On September 29, 1864, a new code of bylaws was adopted by the board of directors. Section 1, article 4, provided that all persons who were members of the society on August 29, 1864, should be deemed and considered members of the corporation; that as speedily as possible the signatures of such persons should be procured to an agreement on their part to become members of the corporation and ratifying the reincorporation; that others would be permitted to become members by vote of the directors and not otherwise; and that membership should not pass with the ownership of moneys deposited with or under the control of the corporation. On several occasions thereafter the board of directors amended the bylaws. In 1867, section 1, article 4, was amended to apply only to persons who were members on August 29, 1864, and whose accounts had not since been closed. In 1868, it was again amended to apply only to persons who, on August 29, 1864, "had respectively not less than one hundred dollars to his credit, and whose accounts were not subsequently at any time closed," and a provision was added that "such persons shall sign an agreement on their part to become members." In 1870 a further amendment provided that "All persons, who, on November 1st, 1870 has signed the agreement to become members of, and who then had accounts open with this corporation, are deemed and considered members thereof." In 1871, the date "November 1st, 1870" was changed to "January 1st, 1871." In 1874, the article was again amended to provide that "The only members of this Corporation are the persons who have signed the agreement hereinafter described, and who have kept accounts open with the Corporation since they respectively signed said agreement. Membership ceases when a member once closes his or her account." In 1886 another amendment added the provision that "Any person shall cease to be a member of this Corporation * * * who shall not have continuously and at all times, at least One Hundred Dollars to his or her credit upon an open deposit account on the books of this corporation." Later amendments made no substantial change relative to membership.

Section 6, article 22, of the bylaws of 1864 dealt with depositors who were not members and provided that "The board of directors shall have the right to determine the terms and conditions upon which deposits will be received from persons not members of the corporation, and to make contracts in the name of the corporation with such persons for that purpose. Until otherwise provided by such contracts, depositors shall be entitled to the same share of profits as members." In 1868 the article was amended by deleting the reference to contracts authorized or made with depositors who were not members. In 1888, the provision was repealed and a bylaw adopted providing that "the board of directors shall have the right to determine the terms and conditions upon which deposits will be received" but that "until otherwise provided by the board of directors, depositors who are not members shall get a dividend equal to that given to members." This provision was not later altered.

In the first count of the complaint plaintiffs claim membership in the society as assignees of Michael Maguire, who, it is alleged, entered into a "contract of membership" with the society on March 10, 1862, by signing the bylaws of 1859 and paying the entrance fee of two dollars. It is alleged that a passbook showing the payment of such membership fee and a deposit of $2,498 was issued to Michael Maguire as evidence of his contract of membership,

that on October 5, 1922, he assigned to plaintiffs his account, membership, and all right and interest to the society, and that he and his assignees continuously maintained a deposit with the society which at the commencement of this action amounted to approximately $135. It is further alleged that it was the plan and intention of the incorporators that the society should be conducted as a membership corporation, wherein the members were to be the owners; that this plan was carried out by the members, stockholders, and trustees without objection, the members alone exercising the right to vote, elect trustees, amend bylaws, and hold meetings; that while the society issued shares of stock to certain members between June 14, 1859, and November 29, 1861, the outstanding shares were voluntarily surrendered and cancelled after the last mentioned date; that all but four certificates had been cancelled by June 27, 1863, the whereabouts of the four being unknown, and thereafter the society was composed of members only, none of whom held any shares of stock; that dividends were paid to members on their deposits while no dividends were ever declared or paid upon the outstanding stock; that the members were recognized and considered as the owners; that after the reincorporation of August 31, 1864, and until September 29, 1864, the society conducted its business as it had prior thereto, having the same members, trustees or directors, and bylaws; that on September 29, 1864, the directors, without authority, vote or consent of, and without any action by the members, purported to adopt the new code of bylaws mentioned above, and thereafter to amend the same from time to time, in an attempt to deprive existing members of their rights as members of the society.

It is alleged in the first count that plaintiffs claim the rights of a member which claim is controverted by defendants; that the individual defendants claim to be the only members of the society, predicating their claims to membership on election by the directors; and, that plaintiffs deny that defendants are members. It is further alleged that the society has accumulated a reserve fund of approximately $8,000,000; that defendants intend to reorganize the society into a capital stock corporation pursuant to section 29 of the Bank Act, Deering's Gen.Laws 1937, Act 652; Stats.1909, p. 87 as amended, convert the reserve fund into capital stock, and distribute the shares thereof among the individual defendants; and that by reason of the facts alleged, an actual controversy exists relating to the legal rights and duties of the respective parties under the written instruments and contracts and in respect to the property rights of the respective parties in the society.

The second count is based upon an alleged controversy regarding the nature and extent of plaintiffs' rights as a depositor in the society. Plaintiffs here again claim as assignees of Maguire and, in addition to their admitted right to receive the amount of the deposits in their account together with accrued interest thereon, claim the right to share in the profits of the society, and assert that as depositors they have the "same rights in the reserve fund * * * as any member of said corporation." These claims are predicated, in part, upon the above mentioned section 6, article 22, of the bylaws of 1864, and the 1868 and 1888 amendments thereto. The second count also alleges that neither Maguire nor his successors made any contract modifying or waiving any right as a depositor to the same share of profits or dividends as a member; that no provision to that effect was made by the society; and that after the reincorporation of 1864 no distribution of any dividend or profits was made to any depositor or to any member, but that all profits were accumulated in the reserve fund which defendants intend to convert into capital stock and distribute among themselves. Finally, it alleges that an actual controversy exists by reason of the fact that defendants deny that plaintiffs have the rights claimed by them. The complaint requests the court to enter judgment "construing the written instruments and contracts, and declaring the rights and duties of plaintiffs and defendants in said defendant corporation."

[1, 2] Plaintiffs contend that the trial court erred in sustaining a demurrer to the complaint for want of facts. A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Code Civ.Proc. sec. 1060; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422; City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810; Pacific States Corp. v. Pan-American Bank, 213 Cal. 58,

1 P.2d 4, 981; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 277 P. 487; Andrews v. W. K. Company, 35 Cal. App.2d 41, 94 P.2d 605; Oldham v. Moodie, 94 Cal.App. 88, 270 P. 688. Both the first and second counts of the complaint herein allege that the existence in plaintiffs or their predecessor of the rights asserted by them is denied by defendants and that defendants intend to convert the reserve fund into capital stock and distribute the same in disregard of plaintiffs' claimed rights; both counts set forth the written instruments upon which plaintiffs base their controverted claims and pray for a judicial construction thereof. The complaint, therefore, shows that there is an actual controversy relating to the legal rights and duties of the respective parties.

[3] Defendants, however, contend, in effect, that the complaint fails to state a cause of action for declaratory relief unless it appears therefrom that plaintiffs are entitled to a favorable declaration. They urge that the written instruments set forth may be construed on demurrer and if it appears that plaintiffs lack the rights asserted, they are not entitled to declaratory relief. Accordingly, defendants argue the merits of the controversy. This court has never expressly determined whether a complaint in an action for declaratory relief is defective if the facts alleged show that the plaintiff is not entitled to a favorable declaration. See Pacific States Corp. v. Pan-American Bank, supra, 213 Cal. at page 64, 1 P.2d 4; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 216, 277 P. 487; Empire W. S. I. Dist. v. Stratford Irr. Dist., 10 Cal.2d 376, 74 P.2d 248; Haynes v. Annandale Golf Club, 4 Cal.2d 28, 47 P.2d 470, 99 A.L.R. 1439; cf. Gore v. Bingaman, 29 Cal.App.2d 460, 85 P.2d 172; Sunset Scavenger Corp. v. Oddou, 11 Cal.App.2d 92, 95, 53 P.2d 188; Phelps v. Loop, 53 Cal.App.2d 541, 128 P.2d 63. Courts in other jurisdictions, however, have rejected the view that the legal sufficiency of a complaint in an action of this nature is to be tested by a determination of the merits of the claims or controversy alleged therein. Rockland Power & Light Co. v. City of New York, 289 N.Y. 45, 43 N.E.2d 803; Bruckman v. Bruckman, 60 Ohio App. 361, 21 N.E.2d 481; Merchants Mut. Casualty Co. v. Leone, 298 Mass. 96, 9 N.E.2d 552; Cabell v. City of Cottage Grove, 170 Or. 256, 130 P.2d 1013, 144 A.L.R. 286; see City of Cherryvale v. Wilson, 153 Kan. 505, 510, 112 P.2d 111; Anderson, Declaratory Judgments, p. 275; 15 So.Cal.L.Rev. 268, 271. And it has been held that where the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action. Frazier v. City of Chattanooga, 156 Tenn. 346, 1 S.W.2d 786; Northwestern Nat. Ins. Co. v. Freedy, 201 Wis. 51, 227 N.W. 952; Smith v. Pettis County, 345 Mo. 839, 136 S.W.2d 282. The rule is stated in Anderson, Declaratory Judgments, page 275, as follows: "A declaratory complaint will not be dismissed because the court disagrees with the construction of the contract involved, contended for by plaintiff. A complaint in an action for declaratory relief which recites in detail the dispute between the parties and prays for a declaration of rights and other legal relations of the parties, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint."

[4-6] The purpose of a declaratory judgment is to "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation." New York Foreign Trade Z. Operators v. State Liquor Authority, 285 N.Y. 272, 34 N.E.2d 316, 319; cf. Hess v. Country Club Park, 213 Cal. 613, 616, 2 P.2d 782; Jackson v. Lacy, 37 Cal.App.2d 551, 561, 100 P.2d 313; Borchard Declaratory Judgments, pp. 279 et seq., 984; Anderson, Declaratory Judgments, p. 11. To hold that a plaintiff on the wrong side of a controversy is not entitled to the security and relief against uncertainty which a declaratory judgment affords would require us to read into the statute a limitation not there present. Section 1060 of the Code of Civil Procedure provides that a party may bring an action for "a declaration of his rights and duties in the premises" and that the "declaration may be either affirmative or negative in form and effect." It contains no suggestion that the pleader must allege facts entitling him to a favorable declaration. Cf. Zimmer v. Gorelnik, 42 Cal.App.2d 440, 448, 109 P.2d 34; Bank of America N. T. & S. Ass'n v. Gillett, 36 Cal.App.2d 453, 455, 97 P.2d 875; In re San Joaquin L. & P. Corp., 52 Cal. App.2d 814, 825, 127 P.2d 29. It follows, therefore, that both counts of the complaint state sufficient facts to constitute a cause of action.

[7] Defendants cite Bogardus v. Santa Ana W. G. Ass'n, 41 Cal.App.2d 939, 108

P.2d 52, as being opposed to this view. In affirming the judgment there entered after the sustaining of a demurrer, the appellate court concluded that the complaint for declaratory relief did not state sufficient facts because, under the law applicable to the facts alleged, plaintiff did not possess legal rights in the fund in controversy. It does not appear, however, that the plaintiff argued or that the court discussed whether a complaint for declaratory relief is sufficient without regard to the merits of the controversy, and cases are not authority for propositions not considered. See Cate v. Fresno Traction Co., 213 Cal. 190, 202, 2 P.2d 364; Mortgage Guarantee Co. v. Chotiner, 8 Cal.2d 110, 114, 64 P.2d 138, 108 A.L.R. 1080.

[8, 9] Defendants also argue that the decision in Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422, establishes the propriety of the ruling here challenged. The Moss case holds that a trial court does not commit reversible error when in ruling on demurrer it exercises its discretion and refuses declaratory relief to a party of equal fault to an illegal transaction. It does not hold that the fact that a plaintiff is not entitled to a favorable declaration is a proper basis for the exercise of the trial court's discretion under section 1061 of the Code of Civil Procedure. By that section the trial court is given discretion to refuse to make a binding declaration of rights and duties, including a determination of any question of construction or validity arising under a written instrument or contract, "where its declaration or determination is not necessary or proper at the time under all the circumstances." That a party seeking judicial aid has "unclean hands" may well justify a trial court in concluding that its adjudication would not be proper. Availability of another adequate remedy may condition the necessity for declaratory relief. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d 889. But the fact that the party seeking to set the judicial machinery in motion is on the wrong side of a controversy cannot be ascertained prior to the court's consideration and determination thereof, and it cannot be said that a declaration embodying that determination would not be necessary or proper merely because the plaintiff entertained a misconception of law. Thus, as previously noted, it has been held that where the plaintiff is not entitled to a favorable declaration, the court should render a judgment embodying such determination and should not merely dismiss the action. Anderson, Declaratory Judgments, p. 271.

[10, 11] A controversy regarding the status of one claiming membership in a corporation is a proper subject of a declaratory judgment (Honetsky v. Russian Consol. Mut. Aid Society of America, 114 N.J.L. 240, 176 A. 670; cf. Haynes v. Annandale Golf Club, 4 Cal.2d 28, 47 P.2d 470, 99 A.L.R. 1439), and the nature of the controversy is essentially the same whether it is presented by the claimant or by the corporation. See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 244, 57 S. Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000. We are of the opinion that the propriety or necessity for declaratory relief in this case is not dependent upon which party to the controversy seeks judicial aid. If the trial court should conclude upon a proper construction of the written instruments involved that plaintiffs are or are not members of the society, or that they are or are not entitled to share in the reserve fund, a declaration to that effect would guide the parties as to their future conduct. See Jackson v. Lacy, 37 Cal.App.2d 551, 561, 100 P.2d 313; Anderson, Declaratory Judgments, p. 11; Borchard, Declaratory Judgments, p. 299.

[12] There are no other circumstances appearing on the face of the complaint which indicate that declaratory relief is not "necessary or proper." Defendants contend, however, that mandamus, quo warranto, and injunctive relief are available to plaintiffs for the protection of their rights and that the trial court had discretion to deny declaratory relief on the ground that it was not necessary or proper because of the existence of other remedies. Defendants do not point out, nor are we able to ascertain, upon what theory the suggested alternative remedies would be available to plaintiffs, or, if available, that they would be speedy or adequate or serve as well or better than the remedy invoked. While some authorities limit a trial court's discretion to refuse to make a declaration on the ground that other remedies are available to cases where special statutory proceedings have been provided for the particular type of case or where other remedies would afford more effective relief (see Borchard, Declaratory Judgments, pp. 302, 303, 325–331, 375; Anderson, Declaratory Judgments, pp. 521, 530; cf. Communist Party v. Peek, 20 Cal.2d 536, 127 P.2d

889, all agree that before a court may properly exercise its discretion to refuse relief on that ground, it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to the plaintiff's needs as declaratory relief. See Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543, 549, 122 P.2d 3; Henderson v. Oroville-Wyandotte Irr. Dist., 207 Cal. 215, 216, 277 P. 487; Welfare Investment Co. v. Stowell, 132 Cal.App. 275, 278, 22 P.2d 529; Borchard, Declaratory Judgments, p. 293 et seq.

[13, 14] Defendants further argue that the trial court properly exercised its discretion to refuse declaratory relief because plaintiffs assertedly abused leave to amend their complaint by failing to make averments called for by demurrers sustained to earlier complaints, by omitting allegations, and by making allegations contrary to those in earlier complaints. Abuse of leave to amend is not a ground for the exercise of the trial court's discretion under section 1061 of the Code of Civil Procedure. The procedure and practice with respect to amendments in declaratory actions is similar to that prevailing in ordinary actions at law and suits in equity (see Anderson, Declaratory Judgments, p. 287), and when a party in an action for remedial or preventive relief abuses leave to amend a pleading, the trial court may refuse to permit the filing of the amendment or may strike the amended pleading from the files. See Wheeler v. West, 78 Cal. 95, 97, 20 P. 45; 21 Cal.Jur. 190. Moreover, the order granting the motions to dismiss indicates that the trial court acted solely on the basis of facts appearing on the face of the complaint. The order recites that the motion is granted "although the demurrer * * * has been herein sustained upon the same ground, among others."

[15, 16] Plaintiffs next contend that it was error to sustain the demurrer on the ground that the alleged causes of action were barred by the statute of limitations and by laches. They argue, first, that the statute of limitations can have no application to an action for declaratory relief since the main allegation in such an action is the existence of an actual, and consequently, present controversy. Cf. Kirn v. Noyes, 262 App.Div. 581, 31 N.Y.S.2d 90; Clarke v. Walker, 25 Tenn.App. 78, 150 S.W.2d 1082. The argument overlooks the fact that the nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code. Bell v. Bank of California, 153 Cal. 234, 94 P. 889; Banks v. Stockton, 149 Cal. 599, 87 P. 83; see, also, Wood, Statute of Limitations, 4th Ed., sec. 57a. Actions for declaratory relief are included in the code definition of civil actions Code Civ.Proc., secs. 22, 30, and section 312 of the Code of Civil Procedure provides that "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued." As stated in Bogart v. George K. Porter Co., 193 Cal. 197, 201, 223 P. 959, 961, 31 A.L.R. 1045, "The Legislature has there specified the limitations applicable to a wide variety of actions, and then, to rebut the possible inference that actions not therein specifically described are to be regarded as exempt from limitations, it has specified a 4-year limitation upon 'an action for relief not hereinbefore provided for' (section 343); and where it has intended that an action shall be exempt from limitations it has said so in clear and unmistakable language. Code Civ.Proc., § 348; Civ.Code, § 309."

[17-19] It is the general rule that a cause of action accrues when a suit may be maintained thereon, and the statute of limitations then begins to run. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P.2d 37, 136 A.L.R. 800; Osborn v. Hopkins, 160 Cal. 501, 506, 117 P. 519, Ann.Cas.1913A, 413. While ordinarily a suit may be maintained only after the breach of an obligation (see Hurt v. Haering, 190 Cal. 198, 201, 211 P. 228; McKee v. Dodd, 152 Cal. 637, 641, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82; Pomeroy, Code Remedies, 5th Ed., p. 528), the declaratory judgment statute provides that "the court may make a binding declaration * * * whether or not further relief is or *could be claimed* at the time" and that "Such [a] declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." Code Civ.Proc. sec. 1060. (Italics added.) The availability of declaratory relief under such circumstances would seem to suggest that the ability to maintain a suit therefor is not the criterion for determining when the statute of limitations commences to run against an action of that nature. But see Salada Beach, etc., Dist. v. Anderson, 50 Cal.App.2d 306, 123 P.2d

86; Pollack v. Josephy, 162 Misc. 238, 294 N.Y.S. 219; Anderson, Declaratory Judgments, p. 282. We are of the opinion that the period of limitations applicable to ordinary actions at law and suits in equity should be applied in like manner to actions for declaratory relief. Thus, if declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for "coercive" relief upon the cause of action arising therefrom is barred by the statute, the right to declaratory relief is likewise barred. On the other hand, if declaratory relief is sought "before there has been any breach of the obligation in respect to which said declaration is sought," or within the statutory period after the breach, the right to such relief is not barred by lapse of time. See Toomey v. Toomey, 13 Cal.2d 317, 321, 89 P.2d 634. There is no anomaly in the fact that a party may have a right to sue for declaratory relief without setting in motion the statute of limitations. Quiet title actions, forerunners of declaratory actions, may be maintained when an adverse claim to property is asserted, but the period of limitations does not commence to run at that date. Newport v. Hatton, 195 Cal. 132, 231 P. 987; Secret Valley Land Co. v. Perry, 187 Cal. 420, 202 P. 449.

[20] Plaintiffs next argue that no invasion of their rights or title has yet occurred and that, therefore, the present action is not barred by the statute of limitations nor by laches. With respect to the first count, however, defendants contend that plaintiffs' predecessor was excluded from membership after the adoption of, and pursuant to, the bylaws of September 29, 1864, that a remedy was then available to redress the wrongs thus inflicted, and that the statute of limitations was set in motion at that date. They argue that plaintiffs and their predecessor were denied the privileges of membership and that the enactment of bylaws purporting to restrict membership to persons who had signed a particular agreement and whose accounts did not fall below $100 terminated the membership.

It does not appear from the allegations of the complaint that plaintiffs or their predecessor were deprived of the right to attend meetings, vote thereat, share in dividends or otherwise participate in the affairs of the society. Nor does it appear that they had knowledge of the passage of the bylaws, and the authorities agree that if lapse of time can bar an action by a stockholder to establish his interest in a corporation, it does not commence to run under the statute of limitations or doctrine of laches until the stockholder has knowledge that his rights are denied or status controverted by the corporation. Yeaman v. Galveston City Co., 106 Tex. 389, 167 S.W. 710, Ann. Cas.1917E, 191; Mountain Water Works Const. Co. v. Holme, 49 Colo. 412, 113 P. 501; Owingsville & Mt. S. Turnpike Road Co. v. Bondurant's Adm'r, 107 Ky. 505, 54 S.W. 718; cf. Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 P. 981; Snyder v. Charleston & S. Bridge Co., 65 W.Va. 1, 63 S.E. 616, 131 Am.St.Rep. 947; 14 C.J. 840; [18 C.J.S., Corporations, § 479]. Yeaman v. Galveston City Co., supra, was an action by the successor of an original stockholder of defendant corporation to establish his rights as a stockholder. Defendant contended that by a resolution passed more than sixty years before the action was commenced, the stock of plaintiff's predecessor had been repudiated and that, therefore, the action was barred by limitations. In rejecting the contention, the court stated at page 723 of 167 S.W.: "* * * when a corporate act is invoked as a repudiation of a shareholder's stock or a conversion of its profits, before affecting his rights with limitation, it is only just to require that he or those standing in his stead have notice of it." Similarly, in Mountain Water Works Construction Company v. Holme, supra, 113 P. at page 510, where plaintiff sought to have her status as a stockholder recognized, the court stated: "* * * if lapse of time can bar an action in such a case, it did not begin to run * * * until the company repudiated the relation, claimed the stock adversely, and brought the repudiation and claim to the knowledge of [the stockholder]."

[21-24] Defendants contend that under the doctrine of stale claims lapse of time is a defense to an equitable action independently of statutory limitations or laches. They argue that since the rights here sought to be declared had their origin in the contract of 1862 and since a determination of those rights requires an inquiry into transactions commencing in 1859, plaintiffs' claim of membership is stale and consequently, barred. The policy of this state with respect to lapse of time is embodied

in statutes applicable to both legal and equitable actions, and mere lapse of time, other than that prescribed by such statutes, does not bar relief. Wolpert v. Gripton, 213 Cal. 474, 2 P.2d 767; Burns v. Ross, 190 Cal. 269, 212 P. 17; Meigs v. Pinkham, 159 Cal. 104, 112 P. 883; Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021. The defense of stale claims is nothing more than a particular application of the doctrine of laches and is based on estoppel. See 19 Am.Jur. 355. Where, for example, an action is commenced many years *after its accrual,* the death of witnesses or destruction of evidence, presumed as well as actual, may prejudice the defendant and justify denial of relief because of staleness of the claim. United States v. Beebee, C.C., 17 F. 36, affirmed 127 U.S. 338, 8 S.Ct. 1083, 32 L.Ed. 121; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516. While the opinion in United States v. Beebee, supra, 17 F. at page 39, states "that lapse of time may be a good defense in equity, independently of any statute of limitations, and * * * that the doctrine rests not alone upon laches," the authorities there relied upon refer only to laches or use the terms laches and stale claims interchangeably. Brown v. County of Buena Vista, 95 U.S. 157, 24 L.Ed. 422; Badger v. Badger, 2 Wall. 87, 69 U.S. 87, 17 L.Ed. 836. Similarly, the opinions in Garrity v. Miller, 204 Cal. 454, 459, 268 P. 622, and Emerson v. Kennedy Mining & Milling Co., 169 Cal. 718, 722, 147 P. 939, which quote from the Beebee case, use the terms interchangeably. Even the authorities which refer to staleness of claims as a distinct concept recognize that lapse of time is of no consequence in the absence of a showing of any act by the defendant in denial of the plaintiff's rights which would have required affirmative action by the plaintiff. As previously noted, the complaint does not show that plaintiffs or their predecessor had knowledge of the existence of the questioned bylaws, in the absence of which affirmative action was not required. The fact that determination of the controversy involves an investigation of rights originating many years past does not render the claim stale. Cf. Toomey v. Toomey, 13 Cal.2d 317, 89 P.2d 634; Williams v. Stillwell, 217 Cal. 487, 19 P.2d 773; Clarke v. Walker, 25 Tenn.App. 78, 150 S.W.2d 1082.

[25] The second count does not disclose any past invasion of plaintiffs' alleged rights as depositors but, on the contrary, alleges that there has been equality of treatment between depositors and members in the past, and that distribution of the reserve fund in a manner inimical to plaintiffs' asserted rights is to occur in the future.

It does not appear from the face of the complaint, therefore, that the cause of action alleged in either the first or second count is barred by the statute of limitations or by laches.

We conclude that the trial court erred in sustaining the general demurrer to the complaint and in dismissing the action. In view of the conclusion that the complaint is sufficient against general demurrer, it is unnecessary to consider the merits of plaintiffs' claims and we express no opinion with regard thereto. Nor do we pass upon any of the grounds of special demurrer urged by defendants. It has been held that when a complaint is good against a general demurrer, it is an abuse of discretion for the trial court to sustain the demurrer without leave to amend because of defects in the form of pleading. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Olivera v. Grace, 19 Cal.2d 570, 122 P.2d 564, 140 A.L.R. 1328; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1. In sustaining the demurrer in this case the trial court expressly refused to consider the special grounds of demurrer. We are not inclined to presently pass upon the approximately two hundred grounds of alleged uncertainty, ambiguity and unintelligibility assigned by defendants in their demurrer and not ruled upon by the trial court. We do not decide that the complaint is not subject to special demurrer but send the cause back to the trial court, which may in its discretion require the clarification of uncertainties or ambiguities. Cf. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal.2d 713, 720, 128 P.2d 522, 141 A.L.R. 1358.

The judgments in the four actions are reversed.

SHENK, EDMONDS, CARTER and TRAYNOR, JJ., and WARD, and GRIFFIN, Justices pro tem., concur.

23 Cal.2d 738

SAUNDERS v. HIBERNIA SAVINGS & LOAN SOC. et al.

HAYES et al. v. SAME.

ORDWAY v. SAME.

Nos. 16498, 16499, 16501.

Supreme Court of California.

Feb. 29, 1944.

1. Action ⇐6

In action for declaratory judgment in which plaintiffs alleged they had deposits in savings and loan society, affidavit and depositions showing that one account was closed by payment of balance to sheriff under execution, and affidavits, a judgment of superior court, and record of satisfaction of judgment showing that society paid the state the credit balances then in other accounts pursuant to judgment of escheat constituted at least prima facie showing that allegations respecting plaintiffs' credit balances were fictitious.

2. Action ⇐6

Where, in count one, plaintiffs sought declaratory relief as successors in interest to persons who entered into contract of membership with savings and loan society by signing by-laws and paying entrance fee and alleged that defendants intended to convert reserve fund into capital stock and distribute it in disregard of plaintiff's claimed rights, court improperly dismissed action on ground plaintiffs had no credit balances as alleged, since absence of subsisting credit balances was not fatal to such count. Code Civ.Proc. § 1061.

3. Pleading ⇐352

It is error to dismiss a complaint for sham pleading if it contains at least one cause of action which is unassailable.

In Bank.

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Alice G. Saunders, individually and as administratrix, by Julia L. Hayes and others, and by Virginia McAran Ordway, individually and as administratrix, against the Hibernia Savings & Loan Society for a declaratory judgment. From judgment for defendant, plaintiffs appeal.

Reversed.

Prior opinion, 128 P.2d 160.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, Rosenshine, Hoffman, Davis & Martin, Heller, Ehrman, White & McAuliffe, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Tobin & Tobin, Theodore J. Roche, Sullivan, Roche & Johnson, Garrett W. McEnerney, Garrett McEnerney II, Maurice E. Harrison, and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

GIBSON, Chief Justice.

The complaints in these cases contain substantially the same allegations as those in the Maguire case, Maguire v. Hibernia Savings & Loan Soc., Cal.Sup., 146 P.2d 673 differing only in allegations respecting deraignment of title and amounts of deposits. The demurrers and the motions under section 1061 of the Code of Civil Procedure cover the same grounds as the demurrer and similar motion in the Maguire case. The decision in that case is therefore determinative of the main questions presented on these appeals.

[1] A further problem is presented here, however, by the order of the trial court dismissing these actions upon the ground that the complaints were sham and based upon false allegations. The motions to dismiss for sham pleading attacked as false the allegations of the complaints respecting subsisting credit balances. The complaint in the Ordway action alleged that Patrick McAran became a member of and depositor in the society on May 16, 1859, that he and his successors in interest continuously maintained a deposit with the society from May 16, 1859, to the present time, which deposit on February 18, 1880, and all times subsequent, amounted to $246.10, and that plaintiff succeeded to his rights. Upon the motion to dismiss, defendants introduced affidavits and depositions showing that Patrick McAran's account was closed on February 18, 1880, by the payment of the then balance of $246.10 to the sheriff under an execution issued pursuant to a judgment rendered against McAran by the superior court, that no money had been on deposit to McAran's credit after that date, and that plaintiff had knowledge of those facts. The complaints in the Hayes and Saunders actions alleged that Julia Leary and John Barron became members and depositors on November 20, 1860, and May 18, 1861, that they and their successors in interest maintained deposits with the society at all times after November 20,

1860, and May 18, 1861, which deposits amounted to $36.91 and $18.35, respectively, on and at all times subsequent to January 9, 1933, and that plaintiffs succeeded to their rights. The motions to dismiss directed to these actions were supported by affidavits, a judgment of the superior court, and record of satisfaction of the judgment, which showed that on April 21, 1933, the society paid to the state the credit balances then in the accounts of Julia Leary and John Barron pursuant to a judgment of escheat dated January 9, 1933, that no money had thereafter been deposited to the credit of either Julia Leary or John Barron, and that plaintiffs had knowledge of those facts. The proof thus presented constitutes at least a prima facie showing that the allegations respecting credit balances are fictitious.

[2, 3] The motions in these cases were acted upon before section 437c of the Code of Civil Procedure was amended to authorize the dismissal of a complaint in certain specified actions upon motion supported by affidavits showing the action has no merit. Assuming, but not deciding, that independent of statutory authority, a court may dismiss an action on the ground that the complaint, although good on its face is false in fact, we are satisfied that the trial court erred in dismissing these actions since the absence of subsisting credit balances is not fatal to count one of the complaint, which we held in the Maguire case stated sufficient facts to constitute a cause of action. In count one plaintiffs seek declaratory relief as successors in interest to persons who entered into "contracts of membership" with the society by signing the bylaws of 1859 and paying the entrance fee of two dollars. Even if it is conceded that the allegations respecting credit balances are false, the cause of action stated in count one is not thereby affected since the existence of the controversies concerning plaintiffs' status as members is not dependent upon subsisting deposits. Thus, while count two, which is based upon plaintiffs' rights as depositors, may have been subject to a motion to strike, the court was not justified in dismissing the actions. It is error to dismiss a complaint for sham pleading if it contains at least one cause of action which is unassailable. The situation is analogous to the case where a general demurrer is interposed to a complaint containing several counts, one of which states a cause of action. Brandt v. Brandt, 178 Cal. 548, 174 P. 55; see, also, cases cited in 21 Cal.Jur. 117. We do not, of course, express any opinion as to the effect of the absence of continued credit balances upon the merits of these cases.

The judgments in the three actions are reversed.

SHENK, EDWARDS, CARTER, and TRAYNOR, JJ., and WARD and GRIFFIN, Justices pro tem., concur.



23 Cal.2d 741

ARNOLD v. HIBERNIA SAVINGS & LOAN SOC. et al.

VAGER v. SAME.

WELLS FARGO BANK & UNION TRUST CO. v. SAME.

Nos. 16495, 16497, 16502.

Supreme Court of California.

Feb. 29, 1944.

1. Action ⇐6

In action for declaratory relief by plaintiffs claiming rights as members or depositors of savings and loan society, in which the plaintiffs alleged assignments to them, court improperly dismissed action on ground that complaint, although good on face, was false in fact, where proof presented in support of motions did not expressly controvert allegations of complaints respecting the assignments. Code Civ. Proc. § 1061.

2. Pleading ⇐34(3), 352, 354(1), 359

Before court can strike pleading as sham or dismiss complaint under statute, it must clearly appear that allegations are false or that action is without merit, and every reasonable doubt must be resolved in favor of pleading. Code Civ.Proc. § 437c.

3. Judgment ⇐181

On motion for summary judgment, issue for trial court is whether defendant had presented any facts which give rise to triable issue or defense, and court is not to pass on or determine issue itself. Code Civ.Proc. § 437c.

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Actions by Catherine M. Arnold, by Aileen K. Vager and by Wells Fargo Bank & Union Trust Company against the Hibernia Savings & Loan Society for declaratory relief. From judgments for defendants, plaintiffs appeal.

Reversed.

Prior opinion, 128 P.2d 159.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, Rosenshine, Hoffman, Davis & Martin, Heller, Ehrman, White & McAuliffe, of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Tobin & Tobin, Theodore J. Roche, Sullivan, Roche & Johnson, Garrett W. McEnerney, Garrett McEnerney II, Maurice E. Harrison, and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

GIBSON, Chief Justice.

The above-entitled cases are companion to Maguire v. Hibernia Savings & Loan Society et al., 146 P.2d 673.

Plaintiffs claim membership in the society as assignees of various persons, who it is alleged, entered into "contracts of membership" with the society between 1859 and 1864, by signing the bylaws of 1859 and paying the entrance fee of two dollars. The complaints contain but one count which is similar to the first count of the complaint in the Maguire case. The only material difference is that the complaints herein show that there has been no continuous maintenance of deposits with the society while the complaint in the Maguire case alleged that plaintiffs and their predecessor continuously maintained a deposit with the society.

We are of the opinion that the trial court erred in sustaining demurrers to the complaints and in granting motions to dismiss the actions under section 1061 of the Code of Civil Procedure for the reasons set forth in the Maguire case, 146 P.2d 673, and the Saunders case, Saunders v. Hibernia Savings & Loan Soc., Cal.Sup., 146 P.2d 683.

Additional considerations are presented by these appeals, however, as the trial court granted motions made by six of the individual defendants to dismiss the actions on the ground that the complaints were sham and based upon false allegations respecting the assignments of memberships, deposit accounts, and passbooks. The motions were supported by affidavits, depositions, papers, records and pleadings on file in these and companion cases.

The complaint in the Arnold action alleged that Catherine Dowling Arnold, who became a member of and depositor in the society on December 8, 1862, assigned all her right, title and interest in her account, all moneys on deposit, and all rights of membership to plaintiff on September 30, 1903. In support of the motion to dismiss it was shown that on August 31, 1916, plaintiff presented to the society a writing dated September 30, 1903, whereby Catherine Dowling Arnold assigned to plaintiff "all moneys * * * on deposit * * * as represented by Pass book issued by said Society. * * * And all my right and interest in said Said Book and the amount therein represented to which I am or may be entitled."

The complaint in the Vager action alleged that Catherine Murphy Keefe became a member and depositor on October 7, 1862, that she assigned all her right, title and interest in her account, all moneys on deposit, and rights of membership to Catherine V. Keefe on July 22, 1916, and that Catherine V. Keefe assigned her interest to plaintiff on December 23, 1932. Proof was presented by defendants that Catherine Murphy Keefe closed her account on September 25, 1913, that she gave her original passbook to Catherine V. Keefe in 1916, stating that if "anything ever came out of this, any interest in it," she wanted Catherine V. Keefe to have it, and that shortly before her death, Catherine V. Keefe delivered the passbook to an attorney to hold for plaintiff.

In the Wells Fargo action it was alleged that Patrick Plover became a member and depositor on September 8, 1860, that he assigned all his right, title and interest in his account, passbook, all moneys on deposit, and rights of membership to Jane Plover on January 1, 1901, that Jane Plover assigned her interest to John Plover on August 13, 1914, and that John Plover died testate on October 10, 1934, naming plaintiff trustee of his estate. The motion to dismiss was supported by proof that Patrick Plover died on January 16, 1901, that Jane Plover, his widow, withdrew the balance to his account on August 14, 1914, by

statutory affidavit ordering payment of the balance to John Plover, and that John Plover received the same and opened an account therewith in his own name. It further appeared that at the hearing upon an earlier motion, counsel for plaintiff, in response to a request to produce the assignment from Patrick to Jane Plover, stated that he had no such assignment in his possession and that he did not know whether there was a written assignment.

[1, 2] The motions in these cases were acted upon before section 437c of the Code of Civil Procedure was amended to authorize the dismissal of a complaint in certain specified actions upon motion supported by affidavits showing the action has no merit. Assuming, but not deciding, that independent of statutory authority a court may dismiss an action on the ground that the complaint, although good on its face, is false in fact, it is obvious that the proof presented in support of these motions does not expressly controvert the allegations of the complaints respecting assignments. Defendants argue, however, that from proof of the assignment of the deposit account in the Arnold case it may be inferred there was no assignment of membership; that from proof of the manual tradition of the passbook in the Vager case it may be inferred there was no assignment of membership; and that the use of the statutory affidavit by the widow in the Wells Fargo case, as well as counsel's unwillingness or inability to produce a written assignment therein, showed that there was no assignment of either deposit account or membership. The theory of defendants apparently is that the trial court in passing on the motions was at liberty to infer from the proof that the allegations were false or that plaintiffs would be unable to substantiate them. The rule is that before a court can strike a pleading for sham or dismiss a complaint under section 437c it must clearly appear that the allegations are false or that the action is without merit, and every reasonable doubt must be resolved in favor of the pleading. Continental, etc., Ass'n v. Boggess, 145 Cal. 30, 34, 78 P. 245; Eagle Oil & Ref. Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264; see 49 Cal.Jur. 702.

[3] The principles announced in Eagle Oil & Ref. Co. v. Prentice, supra, 19 Cal.2d at pages 555, 556, 122 P.2d 264, at page 265, with respect to a motion for summary judgment under section 437c of the Code of Civil Procedure, are pertinent here. It was there said: "The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. * * * If that were not true, controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto. The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact."

The judgments in the three cases are reversed.

SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., and WARD and GRIFFIN, Justices pro tem., concur.



63 Cal.App.2d 223

LAVAYSSE et ux. v. SUPERIOR COURT, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT NO. 14.

No. 12592.

District Court of Appeal, First District, Division 1, California.

March 8, 1944.

1. Motions ⇐11

One who is not a party to proceeding may not make a motion therein.

2. Parties ⇐40(2)

One who is not a party to action and has no disclosed interest in result thereof cannot file any character of pleading therein.

3. Divorce ⇐139

An attorney, joining in his client's request for dismissal of her divorce action, and afterwards suing on her promise, made before filing such request to pay attorney additional fee, terminated any personal interest he had in subject matter of action and his relationship as attorney therein, so that orders granting his motions to vacate dismissal and allow him additional fee were void for want of jurisdiction. Code Civ. Proc. §§ 473, 581; Civ.Code, § 137.5.

4. Divorce ⇐139

The superior court's finding that wife's dismissal of her divorce action was filed pursuant to fraud practiced on counsel and court, "as set forth in the affidavit" of her attorney, was insufficient to sustain order granting attorney's motion to set aside dismissal, in absence of specification of fraud as ground of motion or claim of fraud in such affidavit, especially where dismissal was entered by clerk without court order. Code Civ.Proc. §§ 473, 581.

5. Certiorari ⇐5(1)

A superior court's order, vacating clerk's dismissal of wife's divorce action on her written request, consented to by her attorney, was not appealable as "special order made after final judgment," so that parties to divorce action were entitled to writ of certiorari to annul order. Code Civ.Proc. §§ 473, 581.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order Made After Final Judgment".

6. Certiorari ⇐31

A certiorari proceeding by parties to divorce action for annulment of order granting motion of wife's attorney to vacate wife's dismissal of such action will not be dismissed as presenting "moot question" by allegations of petition that order would be enforced by writ of execution unless dismissal were annulled, though transcript reveals that order directing issuance of execution was filed, execution levied, and amount due collected and paid to attorney in satisfaction of order allowing him additional fee before institution of certiorari proceeding. Code Civ.Proc. §§ 473, 581; Civ.Code, § 137.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

7. Certiorari ⇐60

Denial of motion to dismiss certiorari proceeding for annulment of superior court's orders, granting attorney's motions to vacate his client's dismissal of her divorce action and allow additional attorney's fee after levy of execution and payment of amount collected to attorney in satisfaction of previous order allowing fee, does not mean that petitioners are entitled as matter of law to restitution of such fee, as superior court may not make order to such effect, and petitioners cannot recover amount thereof in action for money had and received. Code Civ.Proc. §§ 473, 581; Civ.Code, § 137.5.

8. Money received ⇐1

An "action for money had and received" is equitable action based on defendant's possession of money which in equity and good conscience he should pay plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Money Had and Received".

Proceeding in certiorari by Gabriel Lavaysse and wife to annul orders of the Superior Court in and for the City and County of San Francisco, Department No. 14, granting motions by the wife's attorney to vacate orders dismissing her divorce action and allow additional attorney's fees. On respondent's motion to dismiss the proceeding.

Motion denied, and order setting aside dismissal of action and all proceeding subsequent thereto annulled.

Edmund J. Holl, of San Francisco, for petitioners.

Edgar C. Levey and Marcus Lorne Samuels, both of San Francisco, for respondent.

KNIGHT, Justice.

The petitioners herein are husband and wife, and were parties to a divorce action brought by the wife and subsequently dismissed by her with the written consent of her attorney. By this proceeding in certiorari they seek to have annulled two orders of the superior court made subsequent to the dismissal of the action, granting two motions presented by the wife's attorney in his own behalf. One was a motion to va-

cate the dismissal of the action, and the other was for the allowance of additional attorney's fees. It is evident that the validity of the second order depends upon the validity of the first.

The following are the essential facts: On May 28, 1943, pursuant to citation issued at the commencement of the action and on stipulation of the parties, an order was made directing the husband to pay to his wife monthly alimony pendente lite and costs, and to her attorney a fee of $125 on account. The husband fully complied with the terms of the order, and the wife's attorney received the $125. Soon thereafter and pending a property settlement the parties became reconciled, whereupon the wife and her attorney joined in filing a written request for the dismissal of the action; and in conformity therewith the action was dismissed by entry in the clerk's register. About six weeks later the wife's attorney, in his own behalf, gave notice that he would move to set aside the dismissal, and for the allowance of additional attorney's fees. The motion to set aside the dismissal was made under the authority of section 473 of the Code of Civil Procedure, and as shown by the attorney's supporting affidavit the basis of the motion was that prior to the filing of the request for dismissal the wife in behalf of herself and her husband, had promised to pay him an additional fee of $100 for additional services rendered, and that after the entry of the dismissal she repudiated the promise. Meanwhile and before giving notice of said motions the wife's attorney, through an assignee, brought an action in the municipal court against the wife and her husband to recover the $100. Petitioners, by way of a motion to strike, objected to the hearing of the motion to set aside the dismissal, and at the same time the wife filed an affidavit denying having promised to pay an additional fee. As the result of the hearing of the motions, at which oral testimony was introduced, the trial court denied petitioners' motion to strike, granted the attorney's motions, and fixed the amount of his additional fee at $125. The municipal court action was then dismissed; and pursuant to an execution issued by the superior court the additional fee of $125 was collected by the sheriff and paid to the attorney. Thereupon petitioners brought this proceeding.

[1-3] The ground upon which they seek to have the first order annulled is that the attorney was not a party to the action; that prior to the making of the motion to vacate the dismissal he ceased to have any interest whatever, personal or otherwise, in the subject matter of the action; and that therefore the trial court was without jurisdiction to entertain or grant the motion.

We are of the opinion that the position so taken by petitioners must be sustained. To quote from the decision of the Supreme Court in Difani v. Riverside County Oil Co., 201 Cal. 210, 256 P. 210, 212: "It is settled that one who is not a party to a proceeding may not make a motion therein. [In re] Estate of Aveline, 53 Cal. 259; Bennett v. Wilson, 122 Cal. 509, 514, 55 P. 390, 68 Am. St.Rep. 61; United States Bank v. Kendall, C.C., 179 F. 914. As stated in the opinion in the latter case: 'It is a recognized rule of legal procedure that no one not a party to the action, without any disclosed interest in the result thereof, can be permitted to thrust himself into the controversy by filing any character of pleading therein. * * * .'" Furthermore, that portion of section 473 of the Code of Civil Procedure which the attorney sought to invoke as the legal authority for his motion to vacate the dismissal, is, by express provision, made available only to a party to the action or his legal representative. (Smith v. Roberts, 1 Cal.App. 148, 81 P. 1026.) It reads: "The court may, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him * * *." Here the attorney was not a party nor the legal representative of a party to the action, nor at the time he made his motion to set aside and vacate the dismissal did he have any personal interest in the subject matter of the action for whatever interest he may have acquired therein by virtue of section 137.5 of the Civil Code upon the making of the order of May 28, 1943, allowing him the original fee of $125, was definitely and completely terminated by the payment to him of that fee and the subsequent filing by him of his written consent to the dismissal of the action. Conceding, as he claimed, that prior to the filing of the request for the dismissal, the wife promised to pay him an additional $100 for services rendered subsequent to the payment of the first fee, he could easily have enforced such promise by refusing to join in the written request for the dismissal until the promise was fulfilled, in which event no valid dismissal could have been

entered without an order of court. Sec. 581, Code Civ.Proc. But instead of adopting that course he elected to join in the request for the dismissal, and afterwards sue upon the promise in case it was breached; and having elected so to do he thereby not only terminated any personal interest he may have had in the subject matter of the action but also his relationship as an attorney therein.

Respondent cites cases holding that where an order has been made in a divorce action allowing alimony pendente lite and counsel fees, and the terms of the order have not been complied with, the subsequent voluntary dismissal of the action by either or both of the parties does not deprive the trial court of jurisdiction to enforce the terms of its order by means of contempt proceedings. In re Larrabee, 29 Cal.App. 2d 240, 84 P.2d 224; In re Robbins, 212 Cal. 534, 299 P. 51. But those cases are not in point here for the reason that here, prior to the dismissal, there was full compliance with the terms of the order. Other cases are cited wherein for different reasons dismissals have been set aside on motion of one of the parties to the action; but no case has been brought to our attention wherein it has been held that a voluntary dismissal of this type may be set aside on motion of the attorney for one of the parties acting in his own behalf.

[4] Respondent points out that the order setting aside the dismissal contains a finding that the dismissal was filed "pursuant to a fraud committed and practiced upon counsel and the court by the plaintiff herein, all as set forth in the [attorney's supporting] affidavit"; and it is contended that this finding alone is legally sufficient to sustain the trial court's order. There is no merit in the contention. Fraud was not specified as a ground of the motion; nor was any claim of fraud made in the attorney's supporting affidavit. Nowhere therein were the words "fraud" or "fraudulent" mentioned. It merely charged the breach of an oral promise to pay him an additional fee. And clearly there could have been no fraud practiced on the trial court for the reason that the court had nothing whatever to do with the dismissal. As stated, it was entered by the clerk of the court in the clerk's register pursuant to plaintiff's written request consented to by the attorney.

[5] Nor are we able to agree with respondent's contention that the order vacating the dismissal of the action is "a special order made after final judgment" and therefore appealable, for the reason that under the procedure set up by section 581 of the Code of Civil Procedure no judgment, final or otherwise, is necessary to a dismissal by a plaintiff with the consent of his or her attorney; nor was a judgment of any sort entered herein. Under the provisions of the statute the dismissal became effective at once upon the making of the entry in the clerk's register in conformity with the written request of the plaintiff, consented to by her attorney. Formerly the statute provided that in dismissals of this type, upon the entry of the dismissal in the clerk's register, "judgment may be entered accordingly"; and in construing that portion of the statute as it then stood it was held that an action was still pending and that the court did not lose jurisdiction of the case until the entry of a judgment of dismissal. But the provision just quoted was eliminated by amendment in 1895 and the rule since then has been that the mere entry of the order upon the clerk's register is sufficient to effect a dismissal. 9 Cal.Jur. p. 515. In so holding the court in Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299, 300, said: "* * * we think the change in the statute was designed to be, and is in fact, a substantial change. No judgment is any longer required to be entered. The mere entry of the order upon the clerk's register of actions is sufficient, and, as was said, in effect, in Page v. Superior Court, above quoted, [76 Cal. 372, 18 P. 385] the only jurisdiction left in the court upon this showing was the jurisdiction to order the clerk to make the proper entry. Kaufman v. Superior Court, 115 Cal. 152, 46 P. 904." Section 581 as it now stands goes on to provide that when written consent of the attorney of record to the dismissal is not filed, the dismissal "must be made by order of the court entered upon the minutes thereof." But that situation is not here involved. The written consent of the attorney was filed. We are of the opinion, therefore, that under the circumstances above set forth the petitioners were entitled to invoke the remedy of certiorari.

[6-8] One of the allegations of the petition was "that unless said order setting aside the dismissal is set aside and annulled * * * it will be enforced against your petitioners in a writ of execution provided by law"; whereas the transcript of the superior court proceedings subsequently

filed herein revealed that more than two weeks prior to the date on which the certiorari proceeding was instituted an order was made and filed in the superior court directing the issuance of an execution and that the next day the sheriff levied the same on petitioners' bank account, collected the amount of money due thereunder and paid it to plaintiff's attorney in satisfaction of the order theretofore made allowing the additional fee. In view of these facts, respondent moved for a dismissal of the certiorari proceeding on the ground that it presents a moot question.

The motion to dismiss must be denied. The paramount issue presented by the certiorari proceeding is the one relating to the validity of the order vacating the dismissal. As stated, that order was granted pursuant to a separate motion, and the obvious effect of the order was to reopen and leave open the action for divorce. Clearly, therefore, the parties to the divorce action are entitled to an adjudication of the validity of that order regardless of whatever proceedings may have been taken thereafter as to the allowance and collection of the additional fee. It does not follow, however, from the denial of the motion to dismiss, that petitioners are entitled as a matter of law to restitution of the additional fee; nor should the decision herein be interpreted as so holding. Certainly no order to that effect may be made by the superior court for the reason that its jurisdiction ended with the entry of the dismissal in the clerk's register. Nor in any action for money had and received would petitioners be entitled to recover the amount of additional fee upon a showing merely that the attorney received it under proceedings which were afterwards declared void, for such an action is in its nature an equitable one, the basis of which is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff (17 Cal.Jur. pp. 602, 603); in other words, "* * * it is a defense that the defendant has no money which in equity and good conscience belongs to the plaintiff." 17 Cal.Jur. p. 621. Here, laying aside for the moment the jurisdictional question, the record discloses evidence which was amply sufficient to support the trial court's allowance of the additional fee. It shows that subsequent to the payment of the original fee and prior to the reconciliation plaintiff's attorney performed additional services in negotiating and preparing a draft of a property settlement agreement which was satisfactory to all parties; and that at the time plaintiff notified him of her desire to dismiss the case she agreed to pay him and at that time he agreed to accept the sum of $100 as compensation for the additional services so rendered. It further shows that after he had prepared the written request for dismissal and signed it, plaintiff promised and agreed that if he would file it she would pay him the fee the next day; that relying on the good faith of her promise and agreement he filed the request, but the next day plaintiff repudiated her promise and agreement. It is apparent, therefore, that notwithstanding the invalidity of the proceedings pursuant to which the additional fee was allowed and paid, said attorney will be entitled to urge as a defense in any action which may be brought against him for money had and received, that in equity and good conscience petitioners are not entitled to recover back the fee.

The motion to dismiss is denied and the order setting aside the dismissal of the action and all proceedings had subsequent thereto are annulled.

PETERS, P. J., and WARD, J., concur.



63 Cal.App.2d 395

PEOPLE v. CRENSHAW.

Cr. 2276.

District Court of Appeal, First District, Division 1, California.

March 22, 1944.

1. Larceny ⇐19, 23

The offense of "grand theft" is complete if any of enumerated stolen articles were taken from prosecuting witness' person, regardless of whether property was carried away or its value exceeded $200. Pen.Code, § 487.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

2. Larceny ⇐19, 23

It is the felonious taking of property from another's person that constitutes

"grand theft", not taking of any specified amount from the person or taking of property from any specified place on the person. Pen.Code, § 487.

3. Larceny ⇐65

Evidence sustained conviction of grand theft.

4. Criminal law ⇐1159(2)

Where there is evidence that crime was committed and that defendant was perpetrator thereof, appellate court will not attempt to determine weight of evidence, but will decide only whether, on face of evidence, sufficient facts could not have been found by jury to warrant inference of defendant's guilt.

5. Criminal law ⇐741(1), 1160

It is function of jury, in first instance, and of trial court after verdict, to determine what facts are established by evidence, and before jury's verdict, approved by trial court, can be set aside on appeal as not supported by sufficient evidence, it must clearly appear that there is no sufficient substantial evidence to support trial court's conclusion on any hypothesis.

6. Criminal law ⇐562

Determination of criminal charge involves proof that offense charged was committed and that it was perpetrated by person or persons accused thereof.

7. Criminal law ⇐1144(13)

The appellate court must assume, in favor of jury's verdict of conviction, existence of every fact which jury could reasonably have deduced from evidence, and then determine whether such facts are sufficient to support verdict.

8. Criminal law ⇐1159(2)

Where circumstances reasonably justify jury's verdict of conviction, reviewing court's opinion that they might also reasonably be reconciled with defendant's innocence will not warrant interference with jury's determination.

Appeal from Superior Court, Alameda County; Benjamin C. Jones, Judge.

James Crenshaw was convicted of grand theft, and he appeals.

Affirmed.

James Crenshaw, in pro. per.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

WARD, Justice.

Defendant appeals from a judgment entered upon a verdict of guilty of grand theft, and from an order denying a motion for a new trial. The information charged the theft of $80, more or less, a wrist watch, a hat and an overcoat from the person of John Dee Doster. It also charged two prior convictions of larceny in other states.

From the evidence it appears that Doster, a shipyard worker, and the defendant, who was employed by a contractor, met at a cafe where they both worked on off hours. On the date of the offense Doster, who had worked on the "graveyard shift," proceeded to the dormitory where he and defendant both lived, and he was there joined by the latter, who proposed that they visit a nearby city. Doster did not attempt to obtain any sleep after coming off shift, and both men had several drinks of beer and whisky as they went from place to place during the morning and afternoon, Doster paying for the refreshment in the presence of defendant with money from his wallet, which at the time contained about $84. Toward evening Doster accompanied the defendant to the home of a friend of the latter. Doster testified that he observed the time of their visit by his wrist watch, which he was wearing. Other witnesses also testified that they saw the watch on Doster's wrist. Doster's hat and overcoat were removed with the assistance of defendant, and he fell asleep shortly thereafter on a couch in the living room. He was awakened by defendant's hand in his pocket and testified that "he [the defendant] had taken the pocketbook away from me." A scuffle ensued, which was joined in by a third man who had accompanied Doster and defendant to the friend's home, and the wallet was eventually found on the floor or on the couch, "but there wasn't anything in it." During the melee Doster obtained the pocketbook of the third man, which contained some money, and, with the assistance of still another man, he left the premises and proceeded to a drug store, from which he called the police and delivered the wallet to them. He tried to direct the officers to the house where the events narrated occurred but was unable to locate it. In the meantime defendant left the friend's home, taking with him the complainant's

hat and overcoat. When arrested the next evening he was wearing Doster's wrist watch.

It is the contention of appellant, appearing in propria persona, that the evidence of the prosecuting witness is so contradictory as to amount to practically no evidence at all, and that the verdict is contrary to law for the reason that in a conviction of grand theft the evidence must show that the property was attached to the person or was in his physical possession unless its value was in excess of $200.

[1, 2] If any of the enumerated stolen articles were taken from the person, the offense alleged in the information is complete. It is immaterial whether the property was carried away or its value exceeded $200. 15 Cal.Jur. p. 889. "It is the felonious taking of property 'from the person of another' that constitutes grand theft, and not the taking of any specified amount from the person nor taking the property from any specified place on the person. Sec. 487, Pen.Code." People v. Fiegelman, 33 Cal.App.2d 100, 104, 91 P.2d 156, 158; People v. Mills B. Sing, 42 Cal.App. 385, 183 P. 865; People v. Fleming, 220 Cal. 601, 32 P.2d 593.

[3] The evidence is conflicting in some instances, and certain apparent contradictions appear in the testimony of the victim Doster, but as a matter of law the evidence is sufficient, and hence this court may not disturb the verdict.

As a witness in his own behalf defendant testified that he and Doster left Richmond early on Sunday afternoon, proceeded to Oakland, visited a shoe shining parlor, bought whisky and that he loaned Doster $5. He explained his possession of the watch by the statement that Doster had given it to him to be repaired; he denied making a loan thereon. Inspector Trowbridge testified that when defendant was arrested he told the following story: That he and Doster had left Richmond at 11 A.M.; that they had gone to the shoe shining parlor where he loaned Doster $5, taking the watch as security; that he separated from Doster at the shoe shining parlor and didn't see him again until arrested at Richmond. He positively denied being at the friend's house. On the trial he admitted being there after Doster and two women had testified as to his presence.

[4-8] In People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, the court said: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed, and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." See, also, People v. Gin Shue, 58 Cal.App.2d 625, 137 P.2d 742; People v. Caldwell, 55 Cal.App.2d 238, 130 P.2d 495; People v. Stangler, 18 Cal.2d 688, 117 P.2d 321; People v. Fleming, 58 Cal.App.2d 37, 136 P.2d 88; People v. Seymour, 54 Cal. App.2d 266, 128 P.2d 726.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and KNIGHT, J., concur.

63 Cal.App.2d 286

YOUNG v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14263.

District Court of Appeal, Second District, Division 3, California.

March 14, 1944.

Hearing Denied May 11, 1944.

1. Workmen's compensation ⇐1857

Where compensation claimant did not file a petition for a rehearing, but some six months after time to apply for a rehearing had expired he filed a petition to reopen seeking a re-examination of the award upon circumstances existing and known to Commission when it made its findings and award, denial of petition by Commission could not be set aside on claimant's application for writ of review. St.1937, pp. 291, 302, 303, 304, §§ 5302, 5900, 5901, 5903, 5904, 5906, 5907, 5908, 5950.

2. Workmen's compensation ⇐1857

Where a petition is filed to reopen a compensation award on grounds that could have been presented upon a petition for a rehearing of the award upon the record upon which the award was based, a writ of review does not lie if Commission declines to reopen case. St.1937, pp. 291, 302, 303, 304, §§ 5302, 5900, 5901, 5903, 5904, 5906, 5907, 5908, 5950.

Application by Harold Young for a writ of review to annul an order of the Industrial Accident Commission of the State of California against applicant and in favor of the Luer Packing Company.

Order affirmed.

Charles A. Son, of Los Angeles, for petitioner.

Everett A. Corten, Atty., Industrial Accident Commission, and R. C. McKellips, Asst. Atty., both of San Francisco, for respondents.

BISHOP, Justice pro tem.

In this proceeding we are invited to annul an order of the respondent Commission denying a petition to reopen the case. The petition was based on the ground that the award which had been made was wrong, working an injustice to the petition. The problem presented is whether a party, claiming to be aggrieved by an award, but who failed to apply for a rehearing within the statutory time limit, can obtain a judicial review of the award by the expedient of petitioning for a reopening of the case. We have reached the conclusion that the validity of the award may not be presented for review in this way.

This matter has engaged the attention of the Commission many times. It began in April, 1940, when the petitioner applied for an adjustment of his claim, alleging that his lungs had been injured in the autumn of the previous year while he was spraying with a solution of caustic soda and trilite. Findings and an award were filed June 28, 1940, reciting that petitioner had injured his back. A rehearing was requested and granted, the back injury being another matter, and on August 13, 1940, a Decision After Rehearing Granted was filed wherein an injury to petitioner's upper respiratory tract was found to have been sustained, but no award made because the resulting disability did not exceed seven days. A petition to reopen on the ground of new and further disability was filed, granted and new findings were made December, 1940, entitled "Decision on Petition to Reopen." In addition to the finding that "Harold Young * * * while employed as a laborer in the latter part of September, 1939 * * * sustained injury arising out of and occurring in the course of said employment to the upper respiratory tract," it was declared that the petitioner was entitled to medical care, and the possibility of some permanent disability was recognized.

Six months later, June 10, 1941, a petition was filed to reopen the action in order to prove the extent of petitioner's disability. Evidence was taken, at some length, resulting in an order filed in September, 1941, denying the petition to reopen. In the following February a petition for a permanent disability rating was filed, a further hearing had, and then on July 23, 1942, new Findings and Award were filed by way of an amendment to the December, 1940, Decision on Petition to Reopen. Again it was found that petitioner had been injured, and then this finding was made: "Said injury caused permanent disability consisting of chronic atrophic rhinitis; chronic atrophic pharyngitis and laryngitis; chronic tracheo-bronchitis. The percentage of said permanent disability which followed the injury herein is 39½ per cent. At the

time of the injury said applicant was suffering from a pre-existing nasal and bronchial condition, and this Commission now finds that a proper apportionment between said pre-existing condition and injury is to charge 50 per cent of the permanent disability to injury and 50 per cent of said permanent disability to pre-existing condition, the injury having aggravated such pre-existing condition." An award in accordance with the finding followed, service of the award being made at once upon the employee, his attorney, and others. The employer petitioned for a rehearing, August 12, 1942, which was promptly denied. The employee, the petitioner before us, did not file a petition for a rehearing, but on February 16, 1943, some six months after the time to apply for a rehearing had expired (section 5903, Labor Code, St.1937, p. 303) he filed a Petition to Reopen, from which we quote extensively enough to show its scope. "Now Comes Applicant and for good cause to reopen the award of July 23, 1942, herein, alleges as follows:

"I. That Finding No. 2 of said award is erroneous, as a matter of law, in deducting $1287.70 from the amount awarded to applicant, and that no deduction at all should have been made because of the apportionment set out in said finding.

"II. In support of the foregoing allegation of error, applicant's position may be briefly stated as follows:

"(a) The 'pre-existing nasal and bronchial condition,' to which was charged 50% of the permanent disability, arose out of this same defendant's employment and was so adjudged in the award of December 6, 1940 * * *.

"(b) The pre-existing nasal and bronchial condition was not such an active and progressive disease as legally supports an apportionment. * * *" The Commission denied the petition to reopen, a rehearing was requested and denied, and a petition for a writ of review inaugurated the pending proceedings.

The first argument of the Commission to engage our attention is its contention that it was without power to grant the petition to reopen the case because all that the petitioner sought was a re-examination of the award upon the circumstances existing and known to it when it made its findings and award. The premise expressed in this contention is sound; the petitioner presented, in support of its request that the award be reopened, no new fact nor any circumstance unknown to the Commission when it acted on July 23, 1942. Petitioner's plea was simply this: reconsider and correct your decision. If, therefore, the statement which the Commission quotes from Merritt-Chapman & Scott Corp. v. Ind. Acc. Comm., 1936, 6 Cal.2d 314, 57 P. 2d 501, is to be given its face value, the order denying the petition to reopen was the only one that could properly have been made. The statement referred to is this (page 316 of 6 Cal.2d, page 502 of 57 P.2d): "It is self-evident, we think, that, if the words, 'good cause appearing' are to have any place or purpose in said statutory provision, the power of the commission to change its former orders or awards may not be predicated upon a mere change of opinion by the commission as to the correctness of its original decision, but there must exist some good ground, not within the knowledge of the commission at the time of making the former award or orders, which renders said original award or orders inequitable. In the absence of any such circumstance justifying a re-examination of the controversy, the commission is powerless to act, and the former award or orders are final and invulnerable." If Merritt-Chapman & Scott Corp. v. Ind. Acc. Comm. has the effect of overruling Bartlett Hayward Co. v. Ind. Acc. Comm., 1928, 203 Cal. 522, 265 P. 195, then the order under review is unquestionably valid. There is no express overruling of the earlier case, however; indeed it is referred to as "[t]he leading case." Perhaps the Merritt-Chapman & Scott case is to be understood as applying its rule only in cases where the Commission is asked to change its opinion as to a finding of fact. If so, then the Bartlett Hayward Co. case continues to control where the Commission is asked, as it was in this case, to change its opinion as to the law which it should apply. See Colonial Mutual Comp. Ins. Co. v. Ind. Acc. Comm., 1941, 47 Cal.App.2d 487, 118 P.2d 361. In the Bartlett Hayward Co. case [203 Cal. 522, 265 P. 199] the Commission came to the conclusion, four years after it had made an award, that it had, through "mistake or inadvertence," followed the wrong rule of law, and corrected its award to avoid the mistake. See Standard S. Mfg. Co. v. Ind. Acc. Comm., 1929, 208 Cal. 532, 536, 282 P. 948, and Sale v. Railroad Commission, 1940, 15 Cal.2d 612, 616, 104 P.2d 38, 41.

[1] We are of the opinion that whichever case is controlling we should not, in this proceeding, annul the order denying the petition to reopen. If the only course the Commission could properly take was to deny the petition, the order of denial was of course proper. If, on the other hand, it should be held that the Commission, under its continuing jurisdiction, could have made an order reopening the case to correct the award because of an error of law, nevertheless the petitioner is in no position to complain to us that the Commission exceeded its jurisdiction in not exercising it in his favor.

These provisions of the Labor Code are pertinent to our consideration of the conclusion just expressed: "Sec. 5302. All orders, rules, findings, decisions, and awards of the commission shall be prima facie lawful and conclusively presumed to be reasonable and lawful, until and unless they are modified or set aside by the commission or upon a review by the courts within the time and in the manner specified in this division." St.1937, p. 291. "Sec. 5900. Any person aggrieved directly or indirectly by any final order, decision, or award of the commission, made or entered under any provision contained in this division, may petition the commission for a rehearing in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for rehearing. Such petition shall be made only within the time and in the manner specified in this chapter." St.1937, p. 302. "Sec. 5901. No cause of action arising out of any final order, decision, or award shall accrue in any court to any person until and unless such person files a petition for rehearing, and such petition is granted or denied. * * *" St.1937, p. 302. "Sec. 5903. At any time within twenty days after the service of any final order, decision or award of the commission granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for a rehearing upon one or more of the following grounds and no other: (a) That the commission acted without or in excess of its powers. * * * (c) That the evidence does not justify the findings of fact. * * * (e) That the findings of fact do not support the order, decision, or award. * * *" St.1937, p. 303. "Sec. 5904. The petitioner for rehearing shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the manner [?] upon which the rehearing is sought other than those set forth in the petition for rehearing." St. 1937, p. 303. "Sec. 5906. Upon filing of a petition for a rehearing, if the issues raised thereby have theretofore been adequately considered by the commission, it may determine the same by confirming without hearing its previous determination. If a rehearing is necessary to determine any of the issues raised, the commission shall order a rehearing and consider and determine the matter or matters raised by such application. * * *" St.1937, p. 303. "Sec. 5907. If at the time of granting a rehearing, it appears to the satisfaction of the commission that no sufficient reason exists for taking further testimony, the commission may reconsider and redetermine the original cause without setting a time and place for further rehearing." St.1937, p. 303. "Sec. 5908. If after rehearing and a consideration of all the facts, including those arising since the making of the order, decision, or award involved, the commission is of the opinion that the original order, decision, or award, or any part thereof, is in any respect unjust or unwarranted, or should be changed, the commission may rescind, alter or amend it. * * *" St.1937, p. 304. "Sec. 5950. Within thirty days after the petition for a rehearing is denied * * * any person affected thereby may apply to the Supreme Court or to the district court of appeal of the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award * * *." St.1937, p. 304.

We have stated that petitioner is in no position to have us review the award of July 23, 1942. His position is very much like that of a party who, having failed to take a timely appeal from a judgment, moves to set the judgment aside and then appeals from the order denying his motion. His appeal being from a special order made after judgment is apparently authorized. Code Civ.Proc. sec. 963. But, it is generally held and for the purposes of the analogy we need not be more precise, if the grounds of the motion would have appeared in the record on an appeal from the judgment, an appeal from the order denying the motion will not be entertained. Home Owners' Loan Corp. v. En-

gelbertson, 1942, 54 Cal.App.2d 46, 48, 128 P.2d 424, and cases cited. The action of the Commission with which the petitioner finds fault is embodied in the findings and award of July 23, 1942. Had he petitioned for and been denied a rehearing of that action, he could have brought the findings and award before us for review. Having failed to apply for a rehearing within the time limit fixed by the Code he cannot accomplish the same purpose by a petition to reopen, that petition differing in form only, not in its substance, from a petition for a rehearing.

Our conclusion, that we may not review the findings and award of July 23, 1942, in this proceeding, is supported not only by the analogy to which we have referred, but by expressions of judicial opinion. In Kennedy v. Ind. Acc. Comm., 1920, 50 Cal. App. 184, 187, 188, 195 P. 267, 268, 269, we find these thoughts expressed as the court was painstakingly considering the scope of the provisions of the Workmen's Compensation Act as revised in 1917 (Stats.1917, p. 874):

"Sections 64 and 65 of the Workmen's Compensation Act relate to the matter of rehearings before the Commission. Section 64 provides that persons aggrieved by any award of the Commission may apply to the Commission for a rehearing in respect to matters determined by it of which they complain. That section likewise prescribes the procedure for making and serving the application for rehearing and for the determination thereof by the Commission. Section 65 states the grounds upon which applications for rehearing may be made, and provides that application for such rehearing by the Commission must be made by the aggrieved party 'at any time within twenty days after service of any final order or decision of the commission awarding or denying compensation, or arising out of or incidental thereto.'

"By section 67 it is provided that 'within thirty days after the application for a rehearing [by the Commission] is denied, or, if the application is granted, within thirty days after the rendition of the decision on the rehearing, any party affected thereby' may apply to the Supreme Court or to a district Court of Appeal for a writ of review to determine the lawfulness of the award or final decision of the Commission.

"By subdivision 'b' of section 55 it is provided that all findings, decisions, and awards of the Commission shall be conclusively presumed to be lawful until and unless they are modified or set aside by the Commission, or upon a review by the courts as in the act specified, 'within the time and in the manner herein specified.'

"As applied to a rehearing by the Commission on the application of an aggrieved party, the foregoing provisions are susceptible of but one construction. From the language of section 65 and subdivision 'b' of section 55 it clearly appears that a party aggrieved by the award or final decision of the Commission, notwithstanding he may have good cause for a rehearing by that body, cannot, as strict matter of right, demand such rehearing unless, within 20 days after service of the decision awarding or denying compensation, he file with the Commission his application for a rehearing. These provisions of the act apply to rehearings that are initiated by a party to the proceeding. Under these provisions the right of a party thus to initiate proceedings for a rehearing is conditioned by his obligation to do so within 20 days after service of the Commission's final decision or award.

"But there are other provisions of the act under which, good cause appearing therefor, the Commission itself, on its own initiative, or on its attention being called to facts showing good cause, and at any time within 245 weeks from the date of the injury, may rescind, alter, or amend any decision or award made by it."

Such limitation upon its approval of these quoted statements as may be found in the Supreme Court's opinion rendered upon a denial of a hearing of the case, was removed by its remarks concerning it in the Bartlett Hayward Co. case, 203 Cal. page 530, 265 P. 195. The significance of the following statement in the Bartlett Hayward Co. opinion, made in the course of the court's reasoning (pages 534, 535 of 203 Cal., page 200 of 265 P.), is apparent when we recognize the "provisions of sections 64 and 65" as being before us in the provisions which we have quoted from the Labor Code: "In view of the foregoing provisions of sections 64 and 65 it is argued by the petitioners that since the employee in the present proceeding made no application for a rehearing before the commission, and by that means did not seek to correct the award and obtain the lawful rating on his total permanent disability, he not only became estopped from seeking redress in the courts, but the power of

the commission to act in the premises was exhausted. It is clear from the terms of subdivision (b) of section 64 that the employee, Slate, was barred from resorting to the courts for redress by his failure to apply for a rehearing, but from that fact it would not follow that the commission was estopped from exercising its continuing jurisdiction when invoked by the employee or on the commission's own motion."

The conclusions of the two courts contained in the quotations just made cannot be disposed of by calling them dicta; dicta or not, the conclusions are sound. The provisions of the Workmen's Compensation Act referred to are now embodied in the Labor Code; former section 55(b) now appearing as section 5302, and former sections 64 and 65 now appearing as sections 5900–5909, St.1937, pp. 302–304. We have, then, these steps provided by statute whereby a judicial review may be obtained of an aggrieving action by the Commission. A petition for a rehearing is authorized, if filed within twenty days of service of the award. If the petition for a rehearing is denied, application to the proper court may be made for a writ of review within thirty days. Nowhere is statutory provision made for a petition to reopen; that is but a practical method whereby a party may call a situation to the attention of the Commission with the expectation that if good cause appears the Commission will exercise its continuing jurisdiction. If the Commission declines to reopen the case, however, the issuance of a writ of review is not authorized. If a basis can be secured for the judicial review of an award by petitioning for a rehearing of a petition to reopen (on no new ground) then the twenty day limitation placed upon the right to petition for a rehearing becomes meaningless, for a petition to reopen where no new factor is presented differs from a petition for a rehearing in name and form only. We are of the opinion that the legislature had no intention of authorizing a judicial review of an award to follow an aggrieved party's petition filed, not within twenty days after service of the award, but possibly years later.

[2] To avoid any possible doubt about the matter, we repeat that we have been considering a case where a petition to reopen an award had been filed in support of which no point was made that could not have been presented upon a petition for a rehearing of the award upon the record upon which the award was based. If a petition to reopen should be made upon the ground that time had demonstrated that facts which had been found to exist, did not exist, or that they had changed, a situation would be presented with which we are not confronted and concerning which we are expressing no opinion.

The petitioner endeavored, in his petition to reopen, to avoid the consequences of the fact that he had not sought a rehearing of the award of July 23, by allegations explaining how the fact came to be. His explanation is that he did not feel aggrieved by the award, when made, because he believed, from a letter written by the Commission in May, 1942, that they were going to hold a hearing to determine who, if anyone, was responsible for the half of the disability for which no allowance was made. Whatever else may be said about this explanation, we are of the opinion that it cannot be given the effect of substituting the petition to reopen in the place of the absent petition for a rehearing, so as to authorize us to review the findings and award by which petitioner now finds himself to be aggrieved.

The order is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



63 Cal.App.2d 390

PEOPLE v. JACQUAINO.

Cr. 477.

District Court of Appeal, Fourth District, California.

March 21, 1944.

Hearing Denied April 20, 1944.

1. Gaming ⇐98(3)

Whether there is sufficient evidence to support conviction of receiving money to be used as a wager on result of a horse race depends on circumstances of particular case. Pen.Code, § 337a, subd. 3.

2. Gaming ⇐98(3)

Evidence was sufficient to sustain conviction for receiving money to be used as

a wager on result of a horse race. Pen. Code, § 337a, subd. 3.

3. Gaming ⇐98(3)

Where police officer positively testified that he placed bets with defendant on a named horse "to win" and that money for bets was paid to defendant, it was not necessary to introduce evidence showing meaning of symbols on scratch sheets used by defendant or to explain meaning of various terms used in conversation between parties to sustain conviction of receiving money to be used as a wager on result of a horse race. Pen.Code, § 337a, subd. 3.

4. Criminal law ⇐1169(2)

In prosecution for receiving money to be used as wager on result of a horse race, permitting police officer, who testified to having placed bets with defendant, to testify that on a certain occasion he saw defendant accept a bet from another person, if error, was not prejudicial, where such person testified directly that on three separate occasions he had made such bets with defendant. Pen.Code, § 337a, subd. 3.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Raymond Jacquaino was convicted of violating Penal Code, § 337a, subd. 3, making it a crime to receive, hold or forward any money bet or to be bet upon the result or purported result of a horse race, and from the judgment of conviction, and from an order denying his motion for a new trial, he appeals.

Affirmed.

Edward L. Davin, of San Diego, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in three separate counts with violations of subdivision 3 of section 337a of the Penal Code which, so far as material here, makes it a crime to receive, hold or forward any money bet or to be bet upon the result or purported result of a horse race. A jury found him guilty and the court sentenced him to thirty days in the county jail on each count, with sentences to run consecutively. He has appealed from the judgment and from an order denying his motion for a new trial.

The main contention is that the evidence is not sufficient to sustain the verdict and judgment. The three counts on which he was convicted relate to three bets allegedly placed with the defendant by a police officer of the city of San Diego on December 26, 1942, January 4, 1943 and January 8, 1943, respectively.

With respect to these three transactions this officer testified as follows: On December 26, 1942, he entered the Ritz Cafe which was run by a man named Dobie. He approached the defendant and told him that he had been told he could find him there, and that he would like to make a bet on a horse that day. The defendant replied: "Well, I don't believe I know you. Do you have any sort of identification?" The officer showed the defendant a pass to the destroyer base, where he had formerly been employed, which contained his picture. The defendant looked at the pass and told the officer to wait a minute. He walked outside and returned in a few minutes saying "I guess its O.K." The defendant then asked the officer what horse he would like to bet on and the officer replied that he wanted to bet on "Workshop" for the eighth race at Fairgrounds Park and that he would like to play that race $2 to win. The defendant asked the officer for his initials and was told that they were "M.C." The officer then gave the defendant two one-dollar bills which the defendant put in his pocket. When the defendant took the money he wrote something on a small scratch pad which the officer was not able to see. While this transaction was in progress there was a Metropolitan Scratch Sheet laying on the bar and the officer had a similar scratch sheet in his hand and the defendant made a comparison between the two sheets.

On January 4, 1943, this officer visited another place called "Cecil's Grill" and found the defendant seated at the bar. He then told the defendant that he would like to bet on another horse that day and the defendant asked "What is it?", to which the officer replied: "'Quakertown' in the sixth race at Tropic Park." The defendant inquired how he wanted to play the horse and the officer replied that he wanted to play the horse to win. He gave the defendant his initials and handed him a

one-dollars bill. The defendant replied: "Well, I will protect that" and placed the dollar bill in his pocket.

On January 8, 1943, this officer again entered the Ritz Cafe and had a conversation with the defendant. After the officer had looked at a scratch sheet for four or five minutes the defendant asked him what bet he would like to make that day. The officer told him it was on the horse "'Catapault' in the first race at the Fairgrounds Park, one dollar to win under my initials." The defendant relayed this bet by word of mouth to Mr. Dobie and then said: "We are going to hold this bet, the odds are pretty big which you know are not so favorable and, we won't have to telephone this one. We can hold that ourselves." While the defendant relayed this bet to Mr. Dobie he put the dollar which had been given him by the officer in his pocket.

While the defendant denied most of the officer's testimony he admitted that the officer had shown him the pass to the destroyer base and testified that he had met the officer only on January 4, 1943. He said this was in the Ritz Cafe. A part of his testimony is rather significant. When asked if he had accepted any bet from this officer at the Ritz Cafe on January 4, he replied: "Not that I recall."

While the appellant concedes that it is not necessary in such a case to establish the fact that races upon which bets were being taken were actually being run (People v. Sutherland, 59 Cal.App. 462, 210 P. 965), he argues that there must be some evidence that a bet was actually made upon a race or purported race; that the words "Metropolitan Scratch Sheet" and "National Scratch Sheet" are not words of common knowledge and some evidence of their meaning is required; that it cannot be told that the words "Quakertown", "Catapault" and "Workshop" relate to a horse or that "Fairgrounds Park" and "Tropic Park" relate, as a matter of common knowledge, to places where such contests as horse races take place; and that in the absence of evidence as to what these words really mean and in the absence of the introduction into evidence of one of the scratch sheets referred to, with an explanation of the meaning of the symbols thereon, there was no evidence which would justify the inference that the money received by the appellant on these three occasions was bet or wagered upon a horse race.

The appellant cites People v. Bateman, 57 Cal.App.2d 585, 135 P.2d 192; People v. Rabalete, 28 Cal.App.2d 480, 82 P.2d 707; People v. Banks, 39 Cal.App.2d 164, 102 P.2d 818, and similar cases, and argues that in all of these cases either the judgment of conviction was reversed or, when it was affirmed, there was testimony of expert witnesses as to the meaning of the numbers, letters and symbols appearing on scratch sheets which had been admitted in evidence.

[1-3] It would serve no useful purpose to review these cases here. As was said in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 781, "the decision whether there is sufficient evidence to support the judgment of conviction must depend upon the circumstances of each case." The overhearing of a scrap of conversation like "242 to show" may not be sufficient to justify an inference of all the facts necessary to a conviction, as was held in People v. Rabalete, supra, where the court said that it could not rely on a mere suspicion that perhaps one of the men had said "I would like to place a bet on 242 to show." And doubtless there are cases where scratch sheets are introduced in evidence and where the circumstances are such as to call for an explanation of the symbols found thereon. But, in this case, the material evidence was furnished by the man who placed the bet on each occasion. The testimony of what was said by this person and by the appellant, in each instance, shows that a bet was made, that the money was paid to and received by the appellant, and that the bet was placed on a horse. In each instance, the bet was on a named horse "to win." A horse could not win if there was no race or contest. Reference was also made to Fairgrounds Park and Tropic Park, and that horse races are sometimes held at such places is not altogether foreign to common knowledge or experience. The testimony as to what was said and done in connection with these three transactions, with the reasonable inferences therefrom, is sufficient to support a finding that all of the material elements of the crime charged were present, and the evidence supports the judgment. People v. Newland, supra; People v. Cacioppo, 34 Cal.App.2d 108, 93 P.2d 194; People v.

Taylor, 40 Cal.App.2d 324, 104 P.2d 846; People v. Harris, 40 Cal.App.2d 129, 104 P.2d 529.

[4] The only other point raised is that the court erred in denying a motion to strike a statement made by the police officer while on the stand to the effect that on one of the occasions in question he saw the appellant "accept a dollar bet from another man who was seated next to him." It is argued that this was prejudicial in that, being proof that he had thus taken a bet, it created an inference that he had done the same thing on the occasions here in question. If we assume that this ruling was erroneous no prejudice appears since this same witness directly testified that on three separate occasions he had made such a bet with the appellant.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concur.



63 Cal.App.2d 295

In re TIERNEY'S ESTATE.

SCRIBNER v. YOUNG et al.

Civ. 14395.

District Court of Appeal, Second District, Division 1, California.

March 15, 1944.

1. Appeal and error ⇐781(5)

Questions raised by successor trustee's appeal from order requiring that address of surviving trustee's office appear as address of trust estate in title to trust assets and that all documents of estate be executed by surviving trustee and successor trustee or in lieu thereof by corporate trustee became "moot" so as to require dismissal of appeal when corporate trustee resigned and appointment of successor trustee was suspended and full power to transact all business of estate was vested in surviving trustee. St. 1943, p. 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

2. Appeal and error ⇐781(1)

An appellate court will not review questions which are moot and only of academic importance, or undertake to determine abstract questions of law at request of party who shows that no substantial right can be affected by decision.

3. Appeal and error ⇐781(1)

If all questions involved in an appeal become moot, the appeal will be dismissed.

4. Appeal and error ⇐781(1)

Questions involved in appeal may become moot and abstract by reason of some act of the parties, an act of the court, lapse of time, act of the Legislature, or act of God.

5. Appeal and error ⇐781(1)

Where, pending appeal and without any fault of defendant, an event occurs which renders it impossible for appellate court, should it decide case in favor of plaintiff, to grant him any effectual relief, appellate court will dismiss appeal without proceeding to formal judgment.

6. Appeal and error ⇐799

Occurrence of event rendering it impossible for appellate court to grant successful party effectual relief, if not appearing on the record, may be proved by extrinsic evidence.

7. Courts 202(5)

Orders appointing testamentary trustees and testamentary guardians though made by a judge of superior court sitting in a department of that court other than one regularly handling probate matters, are "probate orders" and not "judgments" which must be entered in judgment book before period allowed for filing notice of appeal will commence to run. Code Civ. Proc. §§ 664, 668, 939; Probate Code, §§ 1240, 1630.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Probate Order".

8. Courts ⇐50

The division of superior court into departments is simply for convenience and expedition of business and the court is the same court whether sitting in probate, cases of equity, or special proceedings.

9. Courts ⇐202(5)

The filing of a signed probate decree is equivalent to "entry" at length in minute book of court within meaning of statute

requiring appeal to be taken within 60 days from entry of judgment or order. Code Civ.Proc. § 939; Probate Code, §§ 1221, 1233; Rules on Appeal, rule 2(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Entry".

10. Trusts ⇐160(3)

Where notice of appeal from order appointing testamentary trustees was not filed until 61 days after entry of order, District Court of Appeal had no jurisdiction but could only dismiss appeal. Code Civ.Proc. § 939; Probate Code, §§ 1221, 1233, 1240, 1630; Rules on Appeal, rule 2(b).

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding in the matter of the estate of Helen I. Tierney, deceased, upon the petition of Frederick Scribner for confirmation of his nomination and appointment as co-trustee under the will of decedent which was opposed by Lyndol L. Young, surviving trustee. The Farmers & Merchants National Bank of Los Angeles filed its petition for appointment as a third trustee. From an order appointing both petitioners as trustees, to act with the surviving trustee, the surviving trustee appeals and from a part of such order, Frederick Scribner appeals. On motion of Lyndol L. Young to dismiss the appeal of Frederick Scribner and on motion of Frederick Scribner to dismiss the appeal of Lyndol L. Young.

Appeals dismissed.

Lillick, Geary, McHose & Adams, A. F. Mack, Jr. and Donn B. Tatum, all of Los Angeles, and W. C. Black, of San Francisco, for petitioner Scribner.

Forrest F. Murray and Lyndol L. Young, in pro. per., both of Los Angeles, for contestant Young.

YORK, Presiding Justice.

Helen Iten Tierney died testate on February 12, 1938. Her will was probated and distribution of her estate was ordered December 14, 1938, to Katherine C. Iten and Lyndol L. Young, as trustees, pursuant to paragraph 14 of said will:

"I hereby nominate and appoint as guardians of the estate of my three children, and as executors and trustees of this, my Last Will and Testament, Katherine C. Iten and Lyndol L. Young. Upon the death, disqualification or resignation of any one of the said persons hereinabove named as guardians, trustees and executors, I direct that the following persons be appointed in his or her place as guardians of the estate of my three children and as executor and trustee of my estate, in the following order: Frederick Scribner, William Iten, it being my intention that there shall always be two guardians of the estate of my children and two executors and two trustees of my said estate; that when the natural persons hereinabove appointed to act as such guardian, executor and trustee are reduced to one person, either by death, disqualification, resignation or otherwise, then and in that event the Farmers and Merchants National Bank of Los Angeles shall be appointed as co-trustee to act jointly with the other trustee so surviving, as provided in Paragraph Seventh hereof, and as joint guardians of the estate of my three children * * * I hereby direct that none of the persons hereinabove named as executors, guardians and trustees be required to give any bond for the faithful performance of their duties as such."

Katherine C. Iten died on February 6, 1943, whereupon Frederick Scribner filed his petition for confirmation of his nomination and appointment as co-trustee under the terms of the hereinbefore quoted paragraph fourteenth of the will of Helen Iten Tierney, deceased. Lyndol L. Young, as surviving trustee, contested said appointment by filing his answer and cross-petition and the matter was set for hearing on March 2, 1943. On that date the hearing was continued to March 17, 1943, to permit the Farmers & Merchants National Bank of Los Angeles to file a petition for its appointment as a third trustee. Both of said petitions were granted and on April 9, 1943, an order appointing Frederick Scribner and the Farmers & Merchants National Bank of Los Angeles as trustees under the will of Helen I. Tierney, deceased, "to act as such with Lyndol L. Young, the surviving trustee", was signed and filed.

Lyndol L. Young appealed from such order of appointment, and Frederick Scribner appealed from that portion of said order which reads as follows:

"It is hereby further ordered that all real estate, registered bonds, stocks, notes, contracts, leases and all other documents per-

taining to the above estate of Helen Iten Tierney, deceased, shall appear in the following title, to-wit:

"Estate of Helen Iten Tierney, Dec'd.
"453 South Spring Street
"Los Angeles, California

"It is further ordered that all checks, registered bonds and all other documents, including deeds, leases, and/or contracts, shall be executed on behalf of said estate as follows, to-wit:

"Estate of Helen Iten Tierney, Dec'd.,

"By Lyndol L. Young, Surviving Trustee and

"By Frederick Scribner, Successor Trustee, or in lieu thereof

"The Farmers and Merchants National Bank of Los Angeles."

Lyndol L. Young, as surviving trustee, has moved this court to dismiss the appeal of co-trustee Scribner "upon the ground that the part of the order appealed from is not appealable, and that the questions involved in said appeal have become moot and abstract", because of two subsequent orders of the Superior Court of Los Angeles County, (1) accepting the voluntary resignation of the Farmers & Merchants National Bank as trustee; and (2) suspending the appointment of Frederick Scribner as co-trustee under the provisions of the Fiduciaries' Wartime Substitution Act, adopted by the California Legislature at its 1943 session as an emergency measure. Stats. 1943, p. 161.

Frederick Scribner has also made a motion to dismiss the appeal of Lyndol L. Young upon the ground that said appeal was filed after the time allowed by law, and is therefore ineffectual for any purpose. To this latter motion Lyndol L. Young has filed written opposition.

Frederick Scribner by his appeal seeks to have stricken from the order of April 9, 1943, the last two paragraphs thereof which require (1) that the title and address of the trust estate be shown in a certain manner and at a particular place (the latter being the address of surviving trustee Young's law office); and (2) that all documents of the trust estate be executed by Lyndol L. Young, the surviving trustee, and Frederick Scribner, successor trustee, or in lieu thereof, the Farmers & Merchants National Bank of Los Angeles.

Appellant Scribner's contention is that the part of the order from which he appeals does not conform to the findings of fact, for the reason that the only issue framed by the pleadings and supported by the evidence was the appointment of said Scribner and the Farmers & Merchants National Bank as co-trustees; that the findings of fact and conclusions of law were made respecting such issue alone and contained no mention of the matters covered by the last two paragraphs of the order.

Lyndol L. Young's motion to dismiss the Scribner appeal is supported by his affidavit containing, among others, the following averments:

(1) That on June 7, 1943, Judge William R. McKay, presiding in Department 25 of the Superior Court of Los Angeles County, denied a petition of the Farmers & Merchants National Bank of Los Angeles for instructions of the court to direct and instruct Lyndol L. Young, as surviving trustee, to deliver the assets and records of the trust estate to said bank;

(2) That on October 8, 1943, said bank filed its petition of resignation of such appointment as trustee under the order of April 9, 1943, and such resignation was accepted by Judge McKay at a hearing thereon had on November 1, 1943;

(3) That on November 2, 1943, Lyndol L. Young, as surviving trustee, filed a petition pursuant to the provisions of the Fiduciaries' Wartime Substitution Act of California, Stats.1943, p. 161, to suspend the appointment of Frederick Scribner as co-trustee under said order of April 9, 1943, and to vest the power and authority of said Frederick Scribner, co-trustee, in Lyndol L. Young, surviving trustee. An order granting said petition was signed by Judge McKay on December 13, 1943.

Certified copies of the order suspending appointment of co-trustee Scribner, and of the order accepting the resignation of the Farmers & Merchants National Bank as trustee, have been filed in this court in support of Lyndol L. Young's motion to dismiss the appeal of Frederick Scribner.

[1] It would appear that through the granting of the two orders herein last-above mentioned, the questions raised by the Scribner appeal have become moot, for the reason that by the resignation of the corporate trustee together with the fact that Lyndol L. Young, as surviving trustee, is vested with full power and authority to transact all business of the trust estate, the directions contained in the order

of April 9, 1943, respecting the address of the trust estate and the execution of documents appertaining thereto, have become meaningless.

[2, 3] "An appellate court will not review questions which are moot and which are only of academic importance. It will not undertake to determine abstract questions of law at the request of a party who shows that no substantial right can be affected by the decision either way. * * * If all the questions involved in an appeal become moot, the appeal will be dismissed." 2 Cal.Jur. 803 and authorities there cited.

[4-6] See, also, California Pacific Title & Trust Co. v. California Mining & Dredging Syndicate, 17 Cal.App.2d 353, 354, 61 P.2d 1181, 1182, wherein it is stated: "It is settled law that 'the questions involved in an appeal may become moot and abstract, by reason of some act of the parties, an act of the court, by lapse of time, by act of the legislature, by act of God, and perhaps in other ways. * * *' 2 Cal.Jur. 125, § 13. * * * 'when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.'" See, also, Keefer v. Keefer, 31 Cal.App.2d 335, 337, 87 P.2d 856; Hindman v. Owl Drug Co., 4 Cal.2d 451, 456, 50 P.2d 438.

From the foregoing it is clear that the motion of Lyndol L. Young to dismiss the appeal of Frederick Scribner from that portion of the order of April 9, 1943, hereinbefore recited, should be granted.

With reference to the appeal of Lyndol L. Young from the order of April 9, 1943, as to which the co-trustee Scribner has moved to dismiss on the ground that it was not perfected within the time allowed by law, it appears from the record herein that the notice of appeal therein was not filed until June 9, 1943, which was sixty-one days after the signing and filing of the order appealed from. In his opposition to this motion, appellant Young contends that the order of April 9, 1943, is not a probate order but is a judgment made "under the general law and equity jurisdiction of the superior court"; that it should have been entered in the judgment book pursuant to sections 664 and 668 of the Code of Civil Procedure, and that since it has never been so entered, the time within which notice of appeal therefrom should be filed has never commenced, citing section 939 of the Code of Civil Procedure.

[7, 8] The orders appealed from in this, as well as in the companion case In the Matter of the Guardianships of Tierney, Cal.App., 146 P.2d 704, viz: (1) appointing testamentary trustees, and (2) appointing testamentary guardians, are included in the list of appealable orders enumerated in sections 1240 and 1630 of the Probate Code, and of necessity must be considered to be probate orders even though made by a judge of the superior court sitting in a department of said court other than one regularly handling probate matters. The division of the superior court into departments is simply for convenience and the expedition of business; the court is the same court whether it is sitting in probate, in cases of equity, or in special proceedings. 11a Cal.Jur. 83, and authorities there cited.

Section 939 of the Code of Civil Procedure, which is made applicable to probate appeals by section 1233 of the Probate Code, provides that "an appeal may be taken from any judgment or order of a superior court from which an appeal lies * * * within sixty days from the entry of said judgment or order." Section 1221 of the Probate Code requires that "All orders and decrees of the court or judge must be entered at length in the minute-book of the court, or else signed by the judge and filed * * *."

[9] The order here under consideration was signed and filed on April 9, 1943, but the record does not disclose that it was ever entered in the minute-book of the court, or the date of such entry. However, in both the Estate of Hanley, Cal. Sup., 142 P.2d 423, and in the Estate of Murphy, 36 Cal.App.2d 653, 655, 98 P.2d 523, 524, it was held that "The filing of a signed decree is equivalent to entry 'at length in the minute-book of the court'. Prob.Code, sec. 1221." Moreover, the new "Rules on Appeal" which became effective shortly after the instant appeals were perfected, define in Rule 2(b) what constitutes entry, as follows: "(3) The date of entry of an order which is not entered in the minutes shall be the date of filing of the order signed by the court."

[10] As heretofore stated, the notice of appeal was not filed by Lyndol L. Young until June 9, 1943, which was sixty-one days after entry of the order. Therefore, on the authority of Estate of Hanley, supra, which holds that when the appeal is not taken within the 60-day period required, the court has no discretion, but must dismiss the appeal of its own motion even if no objection is made,—the motion of Frederick Scribner to dismiss the appeal of Lyndol L. Young must be granted.

For the reasons stated, the two motions to dismiss are granted and the appeals are dismissed.

DORAN and WHITE JJ., concur.



63 Cal.App.2d 839

In the Matter of the ESTATES and GUARDIANSHIPS of Mary Jane TIERNEY, Joan Katherine Tierney and John Allen Tierney, Minors.

Frederick SCRIBNER, Petitioner, Co-guardian, Appellant and Respondent, v. Lyndol L. YOUNG, Contestant, Surviving Trustee, Respondent and Appellant, The Farmers & Merchants National Bank of Los Angeles, Petitioner and Co-guardian.

Civ. 14396.

District Court of Appeal, Second District, Division 1, California.

March 15, 1944.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Lillick, Geary, McHose & Adams, A. F. Mack, Jr., and Donn B. Tatum, all of Los Angeles, and W. C. Black, of San Francisco, for petitioner Scribner.

Forrest F. Murray and Lyndol L. Young, in pro. per., both of Los Angeles, for contestant Young.

YORK, Presiding Justice.

This is a companion case to the case of In the Matter of the Estate of Helen I. Tierney, Deceased, Cal.App., 146 P.2d 700, and involves the same questions of fact and the same principles of law, except that the instant case has reference to the appointment of testamentary guardians of the minor children of decedent, while the companion case involves issues respecting the testamentary trust created for the benefit of said children.

In the instant case appeals were taken by Frederick Scribner, as co-guardian, and by Lyndol L. Young, as surviving guardian, from the order of April 9, 1943, appointing Frederick Scribner and the Farmers & Merchants National Bank of Los Angeles as guardians under the will of Helen I. Tierney, deceased, and the matter is now before this court upon motions to dismiss said appeals.

For the reasons stated in the companion case of Estate of Tierney, supra, the motions are granted and the appeals are dismissed.

DORAN and WHITE, JJ., concur.



63 Cal.App.2d 278

SHERMAN et al. v. FRANK.

Civ. 14294.

District Court of Appeal, Second District, Division 2, California.

March 14, 1944.

1. Automobiles ⇐245(38, 42)

Whether motorist was negligent in driving automobile with tire, tread of which was only partly visible, at 70 miles an hour in temperature in excess of 90 degrees was for jury, in action by other motorists injured in head-on collision when tire of defendant's automobile burst.

2. Automobiles ⇐148, 156

Mere inability of operator by reason of defective wheels, tires or machinery to control his automobile on highway is not a complete defense in the event that he injures the property or life or limb of another.

3. Automobiles ⇐156

A motorist is free from negligence in respect of condition of automobile only in

event that he exercises the care which an ordinarily prudent man would exercise to maintain his automobile in a reasonably safe running condition.

4. Automobiles ⇐156

Motorist who fails to exercise care which an ordinarily prudent man would exercise to maintain his automobile in a reasonably safe running condition is liable for any loss suffered by victim of his negligence if such negligence proximately contributes to the happening of the accident.

5. Automobiles ⇐148

It is the duty of the driver of a motor car to see that it is so equipped that it may at all times be under control and not become a menace to other traffic.

6. Automobiles ⇐245(2)

It is the function of the jury to determine whether the operator of an automobile has exercised reasonable care in order to ascertain its defective condition.

7. Automobiles ⇐245(2, 38)

Whether motorist had exercised reasonable care in watching after condition of his tires and the machinery of his automobile was for jury.

8. Automobiles ⇐168(1, 3)

It is the duty of every motorist to drive his vehicle upon the highway at a speed no greater than is reasonable or prudent, having due regard for the traffic, the surface and width of the highway, and in no event at a speed which is dangerous to safety of persons or property.

9. Automobiles ⇐245(40, 41)

Whether speed at which defendant motorist was driving his automobile, in view of the surface of highway, the age of his tires, and the heat was negligent was for jury.

10. Appeal and error ⇐996

Appellate court will not interfere with verdict if there is evidence in the record of circumstances from which reasonable inferences may be drawn to support verdict, irrespective of testimony of appellant.

11. Damages ⇐208(1)

Whether sprained ankle is worth $200 or $2,000 is to be determined by the jury according to the circumstances and proof in each case.

12. Evidence ⇐14

It is common knowledge that a sprained ankle may cause more pain and loss of time than a broken leg.

13. Damages ⇐53

In addition to physical injuries sustained in automobile collision, plaintiff was entitled to recover for the shock of the collision and for the anxiety throughout the weeks that followed.

14. Appeal and error ⇐1004(1)
Damages ⇐208(1)

Amount of damages for injuries sustained in automobile collision was for jury, and verdict could not be disturbed in absence of showing of passion or prejudice.

15. Appeal and error ⇐930(1), 1003

It is not the function of appellate court to weigh the evidence, but court must view the evidence most favorably to respondent.

16. Appeal and error ⇐996

Appellate court may determine whether implied findings of jury are based upon reasonable inferences from the established facts.

17. Damages ⇐131(1)

$855.25 for general damages and $1,644.75 for special damages sustained in automobile collision which resulted in sprained ankle, bruised hand, cuts to both knees and bruises around the abdomen were not excessive.

18. Damages ⇐130(3)

$2,500 for injuries received in automobile collision which caused intense pain in back, neck and shoulders by woman who also suffered painful bruise at base of spine, and who remained in bed for 6 weeks, was not so excessive as to show that jury was animated by passion or prejudice.

19. Trial ⇐260(1)

The rejection of an instruction which was a correct presentation of a sound method for jury to follow in their attempt to determine the specified issues, but containing no legal principles, was not error, where it was a duplication of matter included in other instructions.

20. Damages ⇐26, 157(1)

Under the Civil Code, recovery for physical and mental pain and anguish is limited to damages alleged in the pleadings

and the damages for consequences which have occurred up to the time of the trial and consequences which it is reasonably certain under the evidence will follow in the future. Civ.Code, § 3283.

21. Damages ⇨26

Under the Civil Code to justify a recovery for apprehended future consequences there must be evidence of such degree of probability of occurrence as amounts to a reasonable certainty that they will result from the injuries alleged. Civ. Code, § 3283.

22. Damages ⇨216(7)

In action for damages resulting from automobile collision, giving of instruction permitting recovery for such pain, discomfort and anxiety as plaintiff was reasonably certain to suffer in the future from injuries sustained was proper under the evidence. Civ.Code, § 3283.

23. Appeal and error ⇨1068(4)
Damages ⇨216(7)

In action for injuries sustained in automobile collision where plaintiff's proof was undisputed that he had recovered from injuries sustained, instruction permitting recovery for future pain and suffering was erroneous, but not prejudicial, in view of damages allowed by jury. Civ.Code, § 3283; Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by M. L. Sherman and Betty Sherman against Dr. C. B. Frank for damages resulting from collision of automobiles on public highway. From a judgment for $2,500 for each plaintiff, the defendant appeals.

Judgment affirmed.

Nourse & Jones, of Los Angeles, for appellant.

Tudor Gairdner, of Los Angeles, for respondents.

MOORE, Presiding Justice

Respondents sued appellant for damages resulting from a collision of their automobiles on a public highway. By the verdict they were awarded $2,500 each by the jury. After his motion for a new trial had been denied defendant brought the matter here. By his appeal, appellant denies the sufficiency of the evidence, asserts excessive damages and assigns as errors the giving and refusal of requested instructions.

The Proof Is Sufficient.

The claim of insufficiency of the proof to support the verdict is predicated upon the theory that the collision of the two cars was the result of an inevitable accident. While the facts present an issue which could have been judicially decided in favor of defendant, we have concluded that there is sufficient evidence to support the judgment.

Both parties were proceeding on U. S. Highway 66 about 17 miles west of Seligman, Arizona. Respondents were driving easterly in their Plymouth Coupe; appellant was driving westerly in his Studebaker sedan. In the vicinity of their collision the highway is a smooth, black top, oily gravel construction about 20 feet in width with a gravel shoulder of about 2½ feet on each side. Paralleling the highway was a ditch five feet in depth. The temperature was in excess of 90 degrees. When respondents first observed the approach of the Studebaker they were travelling at about 40 to 45 miles per hour; the Studebaker was proceeding at 65 to 70 miles per hour. When it reached a point about 700 or 800 feet from the coupe, the Studebaker began to swerve over into plaintiffs' lane of travel. Thereupon Mr. Sherman, operating the coupe, drove onto the right shoulder in order to avoid the oncoming sedan. He went so far that his left front wheel was entirely off the pavement and his speed was reduced to about 30 miles an hour. The coupe was given a side swipe by the Studebaker going at about 50 to 55 miles per hour, and was turned over into the ditch. When it came to a standstill it was headed in a direction opposite to its course of travel. The Studebaker turned over on its side, then onto its top and continued down the road to a point about 240 feet west of the locus of the impact. Just prior to the moment when the Studebaker began to swerve to the left of the center of the pavement, the left front tire had blown out, leaving a jagged cut from the tread towards the rim.

[1] Appellant testified that his Studebaker had been driven only 19,000 miles; that he had rotated his five tires every 5,000 miles; that he had inspected the tires at Gallup and again at Flagstaff, the latter place being 50 to 70 miles from the scene

of the accident. But there was no proof as to the amount of air in the tire at the point of collision or at Seligman. If the blown tire had been continuously on the Studebaker from the date of its purchase by appellant, as it might reasonably have been, it had been worn far more than the other three tires on the automobile and could therefore carry less pressure. By changing the tires every 5,000 miles, one of them would have been in continuous use for the 19,000 miles the sedan had gone. This inference becomes more nearly a fact in the light of Mr. Sherman's observation that the spare tire had never been used while the tread of the blown tire was but partly visible. To drive such a car with tires so used on a road so hot at a speed of 70 miles per hour were, in themselves, facts from which negligence might reasonably have been inferred.

[2-6] But appellant was, under the implied findings, negligent on another score. Under the evidence the jury might justifiably have found that appellant had been negligent in watching after the condition of his tires and the machinery of his automobile. Merely because the operator is unable to control his automobile on the highway, by reason of defective wheels, tires, or machinery, is not a complete defense in the event that he should injure the property or life or limb of another. He is free from negligence only in the event he may have exercised the care which an ordinarily prudent man would have exercised to maintain his automobile in a reasonably safe running condition. If he fails to exercise such care and if such failure proximately contributes to the happening of an accident, the operator of the car is liable for such loss as may be suffered by the victim of his negligence. Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 282 P. 1009. It is the duty of the driver of a motor car to see that it is so equipped that it may at all times be under control and not become a menace to other traffic. It is the function of the jury to determine whether the operator of an automobile has exercised reasonable care in order to ascertain its defective condition. Whitechat v. Guyette, 19 Cal.2d 428, 122 P. 2d 47.

[7-10] It is the duty of every motorist to drive his vehicle upon the highway at a speed no greater than is reasonable or prudent, having due regard for the traffic, the surface and the width of the highway, and in no event at a speed which endangers the safety of persons or property. Maus v. Scavenger Protective Ass'n, 2 Cal.App.2d 624, 627, 39 P.2d 209. In view of appellant's obligation to travel with care, by reason of the heat, the surface of the highway, the age of his tires, the jury had abundant evidence from which they might reasonably determine that the speed at which appellant was driving was itself negligence. Irrespective of the testimony of the appellant the reviewing court will not interfere with a verdict if there is evidence in the record consisting of circumstances from which reasonable inferences may be drawn to support the judgment. Coppock v. Pacific Gas & Electric Co., 137 Cal.App. 80, 88, 30 P.2d 549. The circumstances of the collision near Seligman afford inferences to uphold the judgment.

The Damages Are Not Excessive

[11-17] The damages allowed Mr. Sherman were not excessive. Only $855.25 was allowed him for general damages. The remaining $1,644.75 was special damages. The proof was that he had sustained a sprained ankle, a bruised hand, cuts to both knees and bruises around the abdomen. Whether a sprained ankle is worth $200 or $2,000 is to be determined by the jury according to the circumstances and proof in each case. It is a matter of common knowledge that a sprained ankle may cause more pain and loss of time than a broken leg. In addition to such physical injuries, Mr. Sherman was entitled to recover for the shock of the collision and for the anxiety throughout the weeks that followed. The determination of the amount of the award was for the jury and it cannot be disturbed in the absence of a showing of passion or prejudice. Coppock v. Pacific Gas & Electric, supra. It is not the function of this court to weigh the evidence but it must view the evidence most favorably to the respondent. People v. Dukes, 90 Cal.App. 657, 266 P. 558. And it may determine whether the implied findings of the jury are based upon reasonable inferences from the established facts. Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753.

[18] The damages awarded to Mrs. Sherman are not so much in amount as to cause us to suspect that the jury were animated by passion or prejudice. She was very much upset. She suffered intense pain in her back, neck, and shoulders; suffered a painful bruise at the base of her spine; her foot was swollen and discolored

throughout the ankle section and through the instep and could bear no weight upon it. She ached all over; the cuts and bruises burned and smarted. She did not sleep the night following the accident and for two days and nights on her return to Kansas she was sleepless and suffered pain. She could not walk without limping; remained in bed for six weeks, during which time she suffered pains through her spine and it was necessary to use an electric heating pad to obtain relief. She was unable to do any of her house work for six weeks and it was necessary for her to have treatments by a physician. Under the evidence it cannot be said that the jury, in assessing the damage, moved from an area of dispassionate deliberation into a state of passion or prejudice.

The Jury Was Fairly Instructed

[19] (a) Appellant assigns the rejection of one of his offered instructions as materially prejudicial. It is taken from "California Jury Instructions Civil." In substance it requires the jury to determine: (1) Was defendant negligent? (2) Was such negligence a proximate cause of plaintiffs' injuries? (3) Was plaintiff negligent? (4) If so, did such negligence contribute in any degree to a proximate cause of the accident? If so the jury must find for defendant; if not they must find for plaintiffs if they have previously found that defendant's negligence proximately caused plaintiffs' injuries, and must fix the amount of the damages in their verdict. The instruction is a correct presentation of a sound method for the jury to follow in their attempt to determine the specified issues. But the court was not required to use it at all, and certainly not if it was a duplication of matter included in other instructions. Such was the fact. Under the instructions on negligence, contributory negligence, ordinary care, proximate cause, and unavoidable accident, all legal principles suggested in the rejected instruction were defined. Moreover, the refused instruction is merely a method of approach which might be known to a jury without hearing it read by the court. Such method may be readily derived from the evidence, the arguments, the rulings and the instructions. No individual has a monopoly upon the processes of analysis. The rejected instruction contains no legal principles. It is no indispensable formula for a jury's guidance.

[20, 21] (b) The instruction given with respect to the items of damage to be awarded plaintiffs in event of recovery contained the following with reference to future consequences of the injuries suffered, towit: "Such sum as will compensate said plaintiffs reasonably for any pain, discomfort and anxiety suffered by them and proximately resulting from the injury in question, *and for such pain, discomfort and anxiety, if any, as they are reasonably certain to suffer in the future from the same cause.*" By such instruction appellant claims to have been aggrieved. Section 3283, Civil Code, provides that damages may be awarded for detriment resulting after action has been instituted or certain to result in the future. The section limits recovery for physical and mental pain and anguish to (1) the damages alleged in the pleading, (2) the damages for "the consequences which have occurred up to the time of the trial," (3) the consequences which it is reasonably certain under the evidence will follow in the future. Bellman v. San Francisco H. S. Dist., 11 Cal. 2d 576, 588, 81 P.2d 894; Melone v. Sierra R. Co., 151 Cal. 113, 91 P. 522. To justify a recovery for apprehended future consequences there must be evidence of such a degree of probability of occurrence as amounts to a reasonable certainty that they will result from the injuries alleged. Silvester v. Scanlan, 136 Cal.App. 107, 28 P.2d 97.

[22] The evidence bearing upon the injuries of Mrs. Sherman is such that the jury was warranted in finding that she would be certain to suffer to some degree in the future. She testified that the cut above her left shoulder blade left a scar. She continued to suffer the nervous condition caused by her neck injury until the trial and was then still unable to do her own laundry work by reason of the pain in her head, back and neck, notwithstanding medical and massage treatments she had intermittently received. From her condition shown to exist at the time of the trial the jury might reasonably infer that the same state of bodily feeling would certainly continue in a greater or lesser degree. Expert proof was not essential to such a deduction, although Doctor Kerley did testify that the scar tissue would be permanent. From all the evidence the jury might fairly have determined that the young lady was reasonably certain to suffer in the future. This justified the italicised

clause of the instruction with reference to her damages.

[23] In the case of Mr. Sherman, his testimony that he had recovered is not contradicted. It follows that insofar as the instruction on damages related to Mr. Sherman, the italicized language should have been omitted and his recoverable damages should have been confined to the detriment arising from such pain, discomfort and anxiety as he may have suffered prior to the time of trial. But after an examination of the entire cause, including the evidence, we are of the opinion that the award of $855.25 for Mr. Sherman's sprained ankle and bruised body was not a miscarriage of justice. For that reason we shall not reverse the judgment for a retrial of the amount of Mr. Sherman's damages. Sec. 4½, Art. VI, Constitution.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.



63 Cal.App.2d 429

BRINER v. BRINER.

Civ. 6973.

District Court of Appeal, Third District, California.

March 23, 1944.

Rehearing Denied April 18, 1944.

Hearing Denied May 19, 1944.

1. Husband and wife ⇐278(2)

"Public Policy" does not prevent spouses, who have separated because of vicious conduct of one of them, without the other's inducement or fault, from entering into property settlement contract to become effective only if one of them obtains a divorce, in absence of fraud, collusion or imposition on court, though such contract may be a factor in persuading spouse having good cause for divorce to proceed to establish it. Civ.Code, §§ 159, 160.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Husband and wife ⇐278(2)

A separation agreement, reciting that marital difficulties, making separation desirable, had arisen between parties and providing for payment of stated sums to wife by husband and division of property between them, was not illegal as made for purpose of facilitating the securing of divorce by wife, in absence of evidence that either party conditioned settlement on divorce or vice versa or contention that wife had no ground for divorce. Civ.Code, §§ 159, 160.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Action by Monica S. Briner against her husband, C. Conrad Briner, for performance of a separation agreement, in which defendant filed a cross-complaint for reformation of the agreement. Judgment for defendant, and plaintiff appeals.

Reversed and remanded with directions.

See, also, 140 P.2d 995.

James J. Arditto, of Sacramento, and Emory Mitchell, of Eureka, for appellant.

T. L. Chamberlain and Gussie A. Stewart, both of Auburn, for respondent.

ADAMS, Presiding Justice.

Plaintiff, appellant herein, brought this action to compel performance of a separation agreement entered into between the parties on September 22, 1937, wherein defendant, respondent herein, agreed to pay to plaintiff the sum of $100 per month for her individual maintenance, care and support, while she remained single, and also agreed to pay her $7,000 in semi-annual installments of $1,000 each. It was alleged by plaintiff that defendant had not made the monthly payment of $100 for certain months, and that he had also failed to pay $500 due on account of the $7,000 payment.

Defendant filed an answer and cross-complaint in which he denied that he had ever failed or refused to carry out the terms of the contract, alleged that the separation of the parties was agreed upon because of "irreconcilable marital differences," admitted the execution of the separation agreement, but contended that through inadvertence and mistake of counsel who drafted same the agreement as written did not embody all of the terms previously agreed to orally, one of which terms being that plaintiff would not engage in her profession as a physician and surgeon, with which provision, he alleged, she had failed to comply. He prayed that the agreement be re-

formed so as to include conditions alleged to have been so omitted. Plaintiff, as cross-defendant, denied these allegations. A trial of the issues was had and the cause submitted. Approximately a year later, the cause being still undecided, plaintiff was granted leave to file a supplemental complaint setting up failure of defendant to pay subsequent delinquencies. Defendant, over plaintiff's objection, was then allowed to file an amended answer and an amended cross-complaint. In this amended cross-complaint defendant set up that "during the month of August, 1937, cross-defendant and cross-plaintiff agreed that cross-defendant would secure a divorce from the cross-plaintiff and that for that purpose, and conditioned thereon, and in contemplation thereof, and to facilitate the securing of said divorce," the parties agreed substantially as alleged in the original cross-complaint. To this cross-complaint cross-defendant answered and denied the foregoing allegation.

After the taking of further testimony in the case the trial court made findings to the effect (Finding VI) that about September 1, 1937, the parties entered into an oral agreement "conditioned upon the plaintiff's securing a divorce from the defendant and in contemplation of such a divorce being secured and to facilitate the securing of said divorce"; that a written agreement was executed about September 22, 1937, and (Finding X) that the execution and delivery of same were "conditioned upon and in contemplation of plaintiff's securing a divorce from defendant, and the thereby promoting of an immediate or forthwith dissolution of the marriage then existing between plaintiff and defendant, and said contract had for its object the dissolution of the marriage contract of said parties and the facilitating of that result by the securing of such a divorce." It also found (Finding XII) that "said oral and written agreements so made in contemplation and furtherance of divorce proceedings between plaintiff and defendant, and for the purpose of facilitating the securing of a divorce by plaintiff," were illegal and void, and (Finding XXIII) that plaintiff did not desire to secure a divorce from defendant and would not have secured said divorce except for the agreements between plaintiff and defendant. It did find, however, that defendant had not paid plaintiff the amounts which in her complaint she alleged to be due her; but in its judgment it denied recovery of any sum whatsoever.

On this appeal it is contended that there is no evidence to sustain the findings aforesaid to the effect that the agreement relied upon by plaintiff is illegal and void as made for the purpose of obtaining a divorce.

Considering first the contract itself which is dated September 22, 1937, it recites that "marital difficulties have arisen between the parties hereto which make a separation of the said parties to be desirable," and that "said parties have agreed to separate." Then follow the provision for the payment of $100 per month for the support of the wife and the additional sum of $7,000, a provision for the custody and support of two children of the parties, a provision for the wife to have one of the two automobiles belonging to them and certain household effects, all other property of the parties, real and personal, to go to the husband, the wife agreeing to execute deeds to three pieces of real property, and any other necessary instruments. The form thereof is that commonly used in such cases, and it contains, in itself, nothing tending to support the findings of the court that it is invalid for the reasons therein stated. Section 159 of the Civil Code provides that a husband and wife may agree in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation; and (sec. 160, C. C.) the mutual consent of the parties is a sufficient consideration for such an agreement.

Turning then to the testimony in the case, it shows a long period of domestic infelicity between the parties who were both doctors of medicine. Respondent himself testified that preceding the making of the agreement there had been "many and various marital difficulties"; that in 1933 there had been a divorce action and an interlocutory decree, at which time the parties were separated, but that they subsequently agreed to stay together because of their children; that that was "all we ever stayed together for after 1933"; that they had had a "turbulent marital history from at least 1933 on"; that they had had "many, many marital difficulties." He further testified that in 1937 plaintiff and defendant and their two children went to the Klamath River, returning the end of August; that two or three days after their return "I told plaintiff that I—that we couldn't go on any longer, and that we would have to get a divorce and separate"; that she agreed that it was necessary, "we were not getting along," but that before she would do that she insisted

upon a property settlement; that they agreed she would need $175 per month for herself and the boys, and that in addition to that "I offered her $7,000 property settlement, which was to be paid, a thousand dollars every six months"; that that was satisfactory and agreed; that she wanted the thing written out—she insisted upon being protected; that it was agreed they could not both stay in Auburn; that they went to an attorney, Mr. Lowell, and after that plaintiff went to Carmel where she stayed about three weeks, returning just before the agreement was signed; that she then went to Reno and got the divorce; that there had been several discussions about divorce between 1933 and 1937, and the only reason they stayed together was because of the children.

Plaintiff herself testified that defendant stated, on their return from Klamath River, "I must have a divorce"; that she asked him why, and he said "he couldn't stand me any longer"; that she asked for time to think it over, and went away; that there had been some discussion about her keeping the home, but defendant said he would not allow that and she must leave town; that he said he would pay her $200 per month, and an additional sum for the children; that she did not then say she would get a divorce but did so on her return; that they then went to the attorney's office and signed the agreement, after which she went to Reno.

Neither party testified that either of them conditioned the property settlement upon the divorce, or the divorce upon the settlement, and we find no evidence that if no divorce was to be had there was to be no contract or that if there was no contract there would be no divorce.

It is not contended that plaintiff did not have ground for a divorce, and certainly when defendant told her he could not stand her any longer and insisted that she must leave Auburn she had such grounds; and there was no impropriety in her desiring that a settlement of their property rights and provision for the support of plaintiff and the children should be made. The parties were doing just what section 159 of the Civil Code provides they may do—agree to an immediate separation and make provision for the support of either of them or their children during such separation.

Respondent, in support of the judgment of the trial court, cites but two cases, to wit: Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352, 353, and McCahan v. McCahan, 47 Cal.App. 173, 190 P. 458. In the former case the trial court found, regarding a separation agreement entered into between the parties, "that the execution and delivery of said instrument at that time and date was conditioned upon, and in contemplation of, the thereby promoting of an immediate or forthwith dissolution of the marriage then existing between plaintiff and defendant"; and it was held that the agreement was void, so far as it obligated the defendant to make certain installment payments provided therein to be made to the wife by the husband; but it was found that there was ample consideration for the promise of the husband to pay the sum of $12,500 also provided for in said agreement. The appellate court said, page 367 of 8 Cal.App.2d, page 353 of 47 P.2d:

"We are of the opinion that the above findings do not support the judgment in plaintiff's favor. Where a husband and wife agree that a divorce shall be obtained by one or the other, and adjust their affairs *in contemplation of a divorce* by entering into a settlement conditioned thereon, of their property rights and make promises of an executory nature pertaining thereto, and such facts are established in a subsequent action on the contract, they have no right to receive the aid of the court in the enforcement of their agreement, which the law condemns as a violation of the policy of the state. If, as the court found, it was of the essence of the agreement, although not stated therein, that plaintiff should obtain a divorce from the defendant, and the promises of the defendant *were made in contemplation of and to facilitate, and conditioned upon, a dissolution of the marriage,* that fact bars a recovery by plaintiff in a suit based on the contract." (Italics ours.)

What facts the court there relied upon as showing that the execution and delivery of the agreement were conditioned upon and in contemplation of a divorce does not appear in the opinion. It is obvious from the somewhat peculiar wording of the court's finding X in this case, that it was following the language of the finding in the Brown case, and that it relied upon that case in rendering its decision.

In McCahan v. McCahan, supra, the question before the court was whether a provision in a separation agreement that if a divorce action should ever be instituted between the parties defendant would pay plaintiff $100 in full settlement of her

claims for counsel fees and costs, was enforceable. A divorce decree having been granted in favor of the husband, the wife appealed, and sought and was granted an order of court for counsel fees on said appeal, over the objection of plaintiff that the contract limited the amount she was entitled to from him for such fees. It was held that the agreement to pay such fees was contra bonos mores and void. But plaintiff's right to counsel fees is not in controversy in this case, and it is interesting to note that the same court that decided the foregoing controversy, and on the same date, sustained the validity of the same separation agreement, except as to attorney's fees, stating that there was no evidence that same was entered into with the object of dissolving the marriage contract or facilitating that result. It said, 47 Cal.App. 176, pages 182, 183, 190 P. 460, page 463:

"Under our Code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. Civ.Code, § 158. They may also agree, in writing, to immediate separation, and may make provision for the support of either of them, and of their children during such separation. Civ.Code, § 159. The agreement in question was apparently drawn pursuant to the authority thus given, and was one which the parties had the right to enter into. Pereira v. Pereira, 156 Cal. 1, 4, 103 P. 488, 23 L.R.A., N.S., 880, 134 Am.St.Rep. 107; Walker v. Walker, 14 Cal.App. 487, 493, 112 P. 479. Although that portion of the agreement, providing for the payment of an attorney fee to the wife in the event that either of the parties should ever institute a divorce action against the other, is void (McCahan v. McCahan, 47 Cal.App. 173, [190 P. 458]), it relates to a different subject, *and is entirely distinct, disconnected, and separable from, and does not invalidate, the valid provisions of the contract.* [In re] Estate of Sloan, 179 Cal. 393–397, 177 P. 150; Mack v. Jastro, 126 Cal. 130, 134, 58 P. 372; Beard v. Beard, 65 Cal. 354, 356, 4 P. 229." (Italics ours.)

[1] However, since the decision of the trial court in the case before us, the Supreme Court has rendered its decision in Hill v. Hill, Cal.Sup., 142 P.2d 417, which disapproves the Brown case, and, we believe, necessitates a reversal in the case before us. In the Hill case it appears that the parties separated in 1926 and the husband commenced an action for divorce in which the wife filed a cross-complaint for separate maintenance. Two years later, while this action was still pending, the wife called upon the husband's attorney, Mr. Horton, and stated that while she had grounds for divorce she did not desire to commence an action therefor, but would think the matter over, and, if she decided to get one, it would have to be on her terms. The husband then advised the wife that if she did not give him a divorce he would quit the practice of medicine, in which event he would not have enough to pay her anything. There was another conference between the wife and Mr. Horton, at which the matter of support for the wife and the children was discussed. Subsequently the wife employed an attorney, Mr. Haas, whereupon Mr. Horton prepared and sent to Mr. Haas a proposed settlement agreement which provided that it should not become effective until or unless the wife obtained a divorce. Mr. Haas returned this agreement, together with one prepared by him from which the foregoing condition was omitted. The husband finally signed the latter agreement but it was returned to Mr. Haas with a letter by Mr. Horton, in which it was said that the agreement was to be held by Mr. Haas and not used except in the event of the securing of a divorce. The wife, in August, 1928, filed suit for divorce and the husband answered, both parties requesting the court's approval of the settlement agreement. At the hearing the husband's attorney took no part in the proceedings, the divorce was granted to the wife, and the settlement approved. The husband failed to live up to the agreement, whereupon the wife sued to recover payments due thereunder. The husband then sought to have the agreement declared void on the ground that it was against public policy; and the trial court and the district court of appeal (133 P.2d 445) sustained this contention, the latter court saying that a property settlement conditioned upon and made in contemplation that one of the parties should secure a dissolution of the marriage by divorce is against public policy and void. Hearing by the Supreme Court was granted, and that court unanimously reversed the judgment. It said that the evidence clearly showed that the agreement was made in contemplation of divorce and conditioned thereon, but that it is now well settled that a husband and wife may agree to an immediate separation, and *having so agreed, or* having actually sep-

arated, may enter into contracts adjusting their property rights; that by the great weight of modern authority property settlements are upheld even though made in contemplation of divorce; that, as stated in 17 Am.Jur., § 499, p. 408, the validity of such agreements depends on whether there is an attempt to obtain a divorce not *justified by the real facts,* and thus to practice a fraud upon the court; but that where a separation of the parties has been induced by vicious conduct of one of the parties without inducement or fault of the other, a contract looking to a settlement of property rights and a proper maintenance of the one not in fault is in no sense repugnant to public policy; also that it has been said in this state that property settlements are highly favored in the law, and that most property settlement agreements are incidental to or conditioned upon divorce, since they are the means employed in the disposition of property upon divorce, and they are also promotive of divorce in the sense that an amicable adjustment of property rights facilitates the completion of contemplated divorce proceedings; that in the absence of fraud, collusion or imposition upon the court, public policy does not prevent parties who have separated from entering into a contract disposing of their property rights which shall become effective only in the event one of the parties obtains a divorce, even though such contract may be a factor in persuading a party who has a good cause for divorce to proceed to establish it.

[2] Applying the principles of the foregoing case to the case before us, it must follow that the separation agreement in controversy should be upheld.

Respondent seeks to differentiate this case by arguing that here plaintiff and defendant agreed that a divorce was to be obtained by plaintiff, and that they adjusted their affairs in contemplation thereof. But so did the parties in Hill v. Hill. He also argues that the parties were living together when the agreement was executed. But the evidence does not so show. They separated when the wife left Auburn about September 1st, after the husband had told her that he couldn't stand her any longer and that she would have to get a divorce; and there is no evidence that they lived together thereafter.

It is also contended that in the Hill case no evidence was offered tending to show that defendant agreed not to defend an action or to do anything to facilitate the granting of a divorce, while here the evidence shows that the husband did not oppose the divorce and signed whatever papers were requested so that an immediate trial could be had. Obviously the same procedure was followed in the Hill case.

The Hill case is also sought to be distinguished on the ground that the wife did not there agree to get a divorce, while here when the husband demanded that a divorce be had, she agreed to get one. We do not consider this important since the court held in the Hill case that a settlement may be made legally, though made in contemplation of divorce and conditioned thereon. Here, as in that case, there is no evidence that the divorce was secured by collusion, and it is, in fact, agreed that it was not. Defendant in his answer alleged that the separation of the parties was agreed upon because of "irreconcilable marital difficulties"; and the contract itself recited that marital difficulties had arisen between the parties which made a separation desirable.

The equities of the case before us do not call for any especial consideration for defendant. He has accepted the benefits of the agreement. His own testimony shows that he was the one who desired the divorce and demanded that his wife leave the family home and the city of their residence; that the terms of the agreement were those which he himself proposed, and that, in reliance upon said agreement, plaintiff secured a divorce without having provision made in the decree for either support or a division of community property. Respondent does not contend that the divorce was invalid by reason of collusion, and, in fact, his counsel, in argument before this court, stated that no such contention was made. Obviously, he is in no position to so contend since his testimony shows that within eight months after the divorce he married his office nurse. Furthermore, the idea that the agreement might be set aside as violative of public policy was an eleventh hour idea, and was pleaded in his amended cross-complaint nearly five years after the execution of the agreement and more than a year after he had submitted his original defense and cross-complaint wherein he had appealed to the equity side of the court for reformation of the agreement.

The judgment is reversed and the cause is remanded with directions to the trial court to enter judgment in behalf of plaintiff as prayed.

PEEK and THOMPSON, JJ., concur.

63 Cal.App.2d 240

PUCCETTI v. GIROLA et al.

No. 12590.

District Court of Appeal, First District, Division 2, California.

March 9, 1944.

1. Corporations ⇐548(9)

Evidence in suit to quiet title to land sold on execution pursuant to judgment against corporation theretofore conveying land to director, to effect that all directors joining in conveyance including grantee knew of insolvent condition of corporation and impending suits against it, justified finding of actual fraud in transaction. Civ. Code, § 3439.

2. Limitation of actions ⇐37(2), 44(4)

Creditor's cause of action to quiet title to property purchased at execution sale by removing clouds upon title resulting from void deed made with intent to defraud creditor did not accrue prior to sale and mere fact that clouds had their inception in fraud did not render applicable the three year statute relating to actions for relief on ground of fraud. Code Civ.Proc. § 338, subd. 4.

3. Adverse possession ⇐63(5)

Fraudulent grantee could not in creditor's action to quiet title to property purchased on execution sale avail of five year statute of limitations based on possession prior to execution sale. Code Civ.Proc. §§ 318, 319, 322.

4. Appeal and error ⇐762

Reviewing court is not required to act upon a claim raised for the first time in reply brief.

5. Execution ⇐283

Action to quiet title by creditor purchasing property on execution sale commenced after execution and recording of sheriff's certificate of sale but before execution and recordation of sheriff's deed was not premature.

6. Fraudulent conveyances ⇐184(1)

Fraudulent grantee failing to show that amount spent for principal, interest, taxes, insurance and upkeep of property were not paid out of rents and profits would not be entitled to a prior lien as against purchaser of property on execution sale for moneys so paid out.

7. Fraudulent conveyances ⇐184(1)

Statute covering right of ordinary purchaser on execution sale to rents or value of use of property was not applicable in respect of right of fraudulent grantee to allowance for rents as against creditor who was purchaser on execution sale and thereafter secured judgment quieting title to premises without recovery of any rents. Code Civ.Proc. § 707.

8. Fraudulent conveyances ⇐184(1)

In determining equitable lien of fraudulent grantee for expenditures made after date of fraudulent conveyance, the reasonable value of use of premises during period when fraudulent grantee was in possession should be offset against such expenditures.

9. Fraudulent conveyances ⇐188

Where actual fraud in conveyance of real estate was established, judgment declaring deed void was supported, regardless of whether there was evidence to support finding that there was no consideration for the deed.

10. Fraudulent conveyances ⇐187

Even though agreement by fraudulent grantee to guarantee indebtedness on property conveyed would constitute consideration for conveyance, it would not constitute the giving or payment of "value" sufficient to support claim of fraudulent grantee that would take priority over rights of creditor as purchaser at execution sale.

See Words and Phrases, Permanent Edition, for all other definitions of "Value".

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Alberto Puccetti, for whom Gemma Puccetti, as administratrix of the estate of Alberto Puccetti, deceased, was substituted against Madeline Girola and others to quiet title to certain land wherein defendant named filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

William Steinberg, of San Francisco, for appellants.

Jesse G. Benson, of Oakland, for respondent.

SPENCE, Justice.

This action was filed by plaintiff Alberto Puccetti, now deceased, who was the pur-

chaser of certain real property upon an execution sale. Said sale had been held as the result of an action in which plaintiff Alberto Puccetti had recovered a judgment against defendants Girola Bros., a corporation, and Henry Girola, which judgment was based upon the fraudulent sale by defendants Girola Bros. and Henry Girola to plaintiff of stock in a subsidiary corporation. Plaintiff sought in the present action to quiet his title to the real property so purchased, to have certain deeds thereto from defendant Girola Bros. to defendant Madeline Girola declared void and to eject defendants from the premises. The first trial of this action resulted in a judgment in favor of defendants, which judgment was reversed on appeal. Puccetti v. Girola, 20 Cal.2d 574, 128 P.2d 13. Plaintiff Alberto Puccetti died during the pendency of the first appeal and the administratrix of his estate was substituted in his stead. For the sake of convenience, the word "plaintiff" will be used herein to designate either the deceased or his administratrix. Upon the second trial of the action, plaintiff recovered judgment against defendants, and from said judgment, defendants have appealed. Defendant Madeline Girola is the real party in interest among the defendants and is the only defendant on whose behalf briefs have been filed. Wherever the word "defendant" may be used herein without naming a particular defendant, said word will be used to designate defendant Madeline Girola.

One of the contentions of defendant on this appeal is that the evidence was insufficient to sustain the findings of the trial court relating to the alleged fraudulent conveyances of the real property from defendant Girola Bros. to defendant Madeline Girola. The question of fraud was not discussed in the opinion on the first appeal as the conveyances were there declared inoperative to pass legal title because of the failure of the grantor to comply with the mandatory provisions of section 1096 of the Civil Code. But fraud had been pleaded by plaintiff with respect to said conveyances and the trial court found upon the second trial that the conveyances were fraudulent. These findings, if supported by the evidence, are material in connection with the consideration of other contentions made by said defendant and we shall therefore discuss said findings and the evidence produced in support thereof.

We have heretofore referred to Girola Bros., a corporation, but the grantor named in said conveyances was Madaly, Inc. Said corporation was originally named Girola Bros., and the name was later changed to Madaly, Inc., and was still later changed to Inter-City Realty Company. The real property was originally conveyed to the corporation while named Girola Bros. and the conveyances from Madaly, Inc., to Madeline Girola, which were made in April, 1932, failed to set forth the name in which the corporation had acquired title. On the second trial, the trial court found as follows:

"XII. That it is true that said three purported deeds from defendant Inter-City Realty Company, then known as Madaly, Inc., formerly Girola Bros., a California corporation, were made with the purpose and intent of said corporation and its officers, Henry Girola and Josephine Girola, and on the part of Madeline Girola, the intended grantee, of defrauding Alberto Puccetti and of hindering, delaying and preventing him from collecting his said judgment above referred to."

"XXVIII. That defendant and cross-complainant Madeline Girola was an active participant in the fraudulent attempt and design on the part of defendants herein to defraud Alberto Puccetti by preventing him from collecting his said judgment. That upon April 29, 1932, the date of said attempted transfer of said real property to Madeline Girola she was a director of the grantor corporation and as such director passed upon and approved the transfer by said corporation to herself of said real property without any consideration therefor with full knowledge that said attempted transfer if carried out would render said grantor corporation insolvent and prevent Alberto Puccetti from collecting his said judgment."

There was a large amount of evidence produced, including numerous exhibits, to support the allegations upon which said findings were based. This evidence shows many significant facts in connection with the numerous business ventures and manipulations of the Girola family. The family engaged among other things in the business of selling and financing automotive equipment including trucks, trailers and the like. Their several ventures were carried on largely through corporations, the stock of which corporations was in some instances issued in its entirety to one or more members of the family with other members of the family serving as directors. In other

instances one or more members of the family controlled the corporation with other members serving as directors but the stock was sold at least in part to the public. Among the several corporations was the corporation known as Girola Bros., later known as Madaly, Inc., and later known as Inter-City Realty Company. There were also Capital Credit Company, Continental Seaboard Corporation, Continental Equities and others. Throughout this discussion we will refer to Girola Bros. by that name regardless of the subsequent changes of its name.

The family consisted of the father Frank Girola, now deceased, the mother Madeline Girola, and the adult sons and daughter, Henry Girola, Joseph Girola, Josephine Girola and Armand Girola. Henry Girola was the sole stockholder in Girola Bros. from 1927 until the forefeiture of its charter in 1933. Madeline Girola was the sole stockholder in Capital Credit Company at all times up to the time of the filing of this action. The remaining corporations were controlled by Henry Girola but stock was sold to the public. Henry Girola was the president and Josephine Girola was the secretary of Girola Bros. and the same was true of all, or practically all, of said corporations. Madeline Girola was a director of Girola Bros. but was not a director of the above named corporations which had sold stock to the public.

Shortly before the disputed conveyances were made in April, 1932, there were numerous actions filed against the various corporations and some of the members of the Girola family. The former action brought by plaintiff, based upon the alleged fraudulent sale of stock, was then pending and thereafter a default judgment was entered in 1933 against Girola Bros. and Henry Girola. Other persons had brought similar actions based upon alleged fraudulent sales of stock and said actions were pending at the time the disputed conveyances were made. In certain other actions, instituted in early 1932, stockholders in the corporations in which stock had been sold to the public sought to take the control of these corporations from Henry Girola and the Girola family. In these actions, the members of the Girola family, other than Madeline Girola, who was not a director in the last mentioned corporations, were charged with fraud, mismanagement, making of false statements, taking secret profits and drawing exhorbitant salaries when the corporations were on the verge of bankruptcy. The funds withdrawn from these corporations had been turned into the treasury of Girola Bros. and reference thereto will be found in the opinion on the first appeal. One of the last mentioned actions was filed two days before the disputed conveyances were made. These conveyances were made on April 29, 1932, and were recorded the following day. Twelve days later Henry Girola entered into an agreement to turn over control of the Continental Seaboard Corporation to the stockholders and on May 17, 1932, all the Girolas who were directors thereof filed resignations which were accepted on May 19, 1932. Shortly thereafter Continental Seaboard Corporation was adjudicated a bankrupt and the creditors finally received but seven-tenths of one per cent on their claims. At about the same time, Seaboard Equities was likewise adjudicated a bankrupt.

The Girola family had previously taken what appeared to them to be some appropriate steps with respect to Girola Bros. in view of the impending financial collapse of all corporations controlled by Henry Girola and in view of the pending actions against Girola Bros. and Henry Girola. The books of said corporation show that on or about January 1, 1932, all accounts had been closed and all assets had been removed from said corporation with the exception of the real property which was the subject of the disputed conveyances. Under date of April 29, 1932, Henry Girola, Joseph Girola, Josephine Girola and Armand Girola, who were all directors of the Girola Bros., executed purported assignments to Madeline Girola of all sums claimed to be due to them from Girola Bros. These accounts had been marked as closed as of January 1, 1932, on the books of the corporation. There was no consideration for said assignments to Madeline Girola, who was also a director of Girola Bros. In this connection it is significant to note that Madeline Girola was the only one of the group who was not a director in the corporations which had sold stock to the public. On the same day, Madeline Girola made a written offer to Girola Bros. to accept the three parcels of real property which were the subject of the disputed conveyances "subject to the encumbrances * * * in full payment" of the assigned claims. The offer was immediately accepted and the conveyances were executed on said April 29, 1932. On the first appeal, it was held under this state of facts that the trial court's finding "that the deeds

to Madeline Girola were not entirely voluntary is without support in the evidence, which presents no conflict." Puccetti v. Girola, 20 Cal.2d 574, 578, 128 P.2d 13, 15.

After plaintiff obtained his default judgment against Girola Bros. and Henry Girola in the former action in 1933, he caused five executions to be issued during the years 1934 to 1937, all of which executions were returned wholly unsatisfied. The final execution under which the execution sale was made was issued in 1937 and the sheriff's sale of the real property in question was made to plaintiff on November 8, 1937. Plaintiff commenced this action on December 1, 1937.

[1] Defendant contends that the evidence was insufficient to sustain either the above quoted findings relating to actual fraud (see Civil Code, section 3439, prior to the 1939 amendment thereof) or other findings relating to constructive fraud. (See Civil Code, section 3442, prior to the 1939 amendment thereof.) We find no merit in this contention. The trial court was entirely justified in inferring that all the directors, including Madeline Girola, knew of the condition of the affairs of Girola Bros. and in further inferring that the disputed conveyances were made with an actual intent on the part of all, including Madeline Girola, to defraud plaintiff as a creditor of Girola Bros. and Henry Girola. This inference was strengthened by the evidence of Madeline Girola and Josephine Girola offered by defendants on the second trial, some of which testimony was conclusively shown by documentary evidence to be false in its material aspects and much of which appeared to be evasive and unsatisfactory. Having concluded that the evidence was sufficient to sustain the above mentioned findings relating to actual fraud, it would serve no useful purpose to discuss the question of whether the evidence was sufficient to sustain the findings relating to constructive fraud.

We now turn to the contentions of defendant with respect to the defense of the statute of limitations. After the first appeal, defendants placed their principal reliance upon that defense. Defendant Madeline Girola now contends that plaintiff's alleged causes of action were barred by the provisions of section 318, 319 and 338, subdivision 4 of the Code of Civil Procedure; that she acquired title by prescription by virtue of the provisions of section 322 of the Code of Civil Procedure; and that the trial court's findings to the contrary are not sustained by the evidence. In this connection, it is conceded by all that Madeline Girola went into possession in 1932 and continued to occupy a portion of the premises, to lease the remaining portions thereof, to collect the rents and to pay the taxes until the commencement of this action on December 1, 1937.

[2, 3] In our opinion, defendant's last mentioned contentions are based in part upon a misconception of the nature of plaintiff's action. Said action was primarily and essentially one brought by a creditor who was the purchaser at an execution sale to quiet his title to the property purchased by removing the clouds upon the title resulting from void deeds which had been made with an actual intent, on the part of the grantor and grantee, to defraud said creditor. Plaintiff's cause of action to quiet title did not accrue prior to the sale and the mere fact that the clouds had their inception in fraud did not render applicable the three year statute relating to actions for relief on the ground of fraud. Code of Civil Procedure, section 338, sub. 4. As was said in the early case of Stewart v. Thompson, 32 Cal. 260, at page 263, "It is true that the clouds in question have their inception in fraud; but fraud is not a universal characteristic of the cause of action, and cannot, therefore, be adopted as a test of the true nature of the action, when its position in the various categories presented by the Statute of Limitations comes to be considered." See also Scholle v. Finnell, 166 Cal. 546, 137 P. 241; Hager v. Shindler, 29 Cal. 47. Having concluded that the three year statute was inapplicable the question arises as to whether defendant could avail herself of the five year statutes (Code of Civil Procedure, sections 318, 319, 322) for the purpose of defeating plaintiff's action. We believe the answer to this question is found in the concurring opinion of Mr. Justice Sawyer in Stewart v. Thompson, 32 Cal. 260, at page 265, where he said, "As to the creditor, the fraudulent conveyance was void. Notwithstanding this conveyance, therefore, so far as the rights of the creditor are concerned, the title never passed to the grantee of the debtor until the sale under execution and the making of the sheriff's deed under which the plaintiff claims. Until that time, as to the creditor, the title must be regarded as remaining in the debtor; and his grantee, who participated in the fraud,

must be regarded as being in possession with the debtor's assent, and not adversely to the creditor, his right being subject to be divested by a sale under execution against his grantor in favor of the creditor defrauded." This reasoning was approved in the latter case of Scholle v. Finnell, 166 Cal. 546, 137 P. 241. The rule thus established leads to the conclusion that in this action to quiet title, brought by the defrauded creditor who was the purchaser at the execution sale, the law will not treat as adverse, for the purpose of the fraudulent grantee's defense of the statute of limitations or for the purpose of the fraudulent grantee's claim of title by prescription, any possession by the fraudulent grantee prior to the execution sale. We are therefore of the opinion that the trial court correctly concluded that none of the above mentioned code sections barred plaintiff's action.

[4, 5] In the reply brief, defendant recognizes the force of the foregoing authorities and makes a complete shift in the theory of her defense. The cause was tried in the trial court and argued in the opening brief upon theory that plaintiff's action was commenced too late and was therefore barred. In the reply brief defendant argues for the first time that plaintiff's action was commenced prematurely rather than too late. As this point is raised for the first time in the reply brief, it would be a sufficient answer to say that we are not required to act upon it. Truelsen v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996; Tagus Ranch Co. v. First National Bank, 7 Cal.App.2d 457, 46 P.2d 809; Lady v. Palen, 12 Cal.App.2d 3, 54 P.2d 1134; Lotts v. Board of Park Com'rs, 13 Cal.App.2d 625, 57 P.2d 215. We may state, however, that we do not believe that there is any merit in the point. The sheriff's sale was held on November 8, 1937, and the sheriff's certificate of sale was recorded on the same day. This action was commenced on December 1, 1937. The sheriff's deed to plaintiff was executed and recorded on December 9, 1938. While the action was commenced after the execution and recordation of the sheriff's certificate of sale but before the execution and recordation of the sheriff's deed, we do not believe the action was prematurely brought. Defendant relies upon certain language used in the cases cited above but in none of said cases was the claim of premature commencement of the action raised or involved. The claim of premature commencement was raised and decided adversely to the contention made in defendant's reply brief in Truelsen v. Nelson, 42 Cal.App.2d 750, 109 P.2d 996.

[6] Defendant further contends that even assuming that the conveyances were fraudulent, defendant "would be entitled to a prior lien on the real property for monies paid out for principal, interest, taxes, insurance and upkeep." There appears to be some conflict of authority regarding the right, if any, which a grantee who is guilty of actual fraud may have to reimbursement for various expenditures made in connection with the property fraudulently conveyed. Compare McMillan v. O'Brien, 219 Cal. 775, 29 P.2d 183, 91 A.L.R. 383; Ackerman v. Merle, 137 Cal. 169, 69 P. 983; Butler v. San Francisco Gas & Electric Co., 168 Cal. 32, 141 P. 818; and authorities cited in note in 8 A.L.R. 527. But the answer to defendants' contention here is found in the findings of the trial court as follows:

"XXIX. Cross-complainant Madeline Girola has not sustained her burden of proving that any sums that she may have spent for principal and interest on the said deed of trust against said property and for insurance, taxes and repairs on the said real property were not paid out of the rents and profits of the property itself."

"XXX. The reasonable rental value of the said real property from the date of said fraudulent conveyance to the date of judgment herein has exceeded the expenses of interest, principal, taxes, repairs and insurance upon said real property."

[7, 8] Contrary to the claim of defendant, there was ample evidence to justify finding XXIX. There was a conflict as to the nature of the business of, and the amount of space occupied by, Capital Credit Company on the premises. That company was wholly owned by defendant. There was also a conflict regarding the rents received. Reference has heretofore been made to the false, evasive and unsatisfactory evidence offered by defendants and the trial court was entirely justified in making finding XXIX in view of the nature of that testimony. Defendant apparently concedes that the evidence was sufficient to support finding XXX but as we understand defendant's reply brief, she claims that she would only "be liable" for the reasonable rental value of the premises from and after

November 8, 1937, the date of the sheriff's sale, and not from and after April 29, 1932, the date of the fraudulent conveyances. Defendant cites and relies upon section 707 of the Code of Civil Procedure. In our opinion, said section is not applicable to the situation presented on this appeal. It specifies that "from the time of the sale until a redemption" the purchaser at the execution sale "is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof." This section covers the right of the ordinary purchaser on the ordinary execution sale to the rents or value of the use of the property from and after the time of the sale. The judgment in the present case allowed plaintiff no recovery of any rents. The question arises here upon defendant's claim that she was entitled to an equitable lien against the property for all expenditures made by her from and after April 29, 1932, the date of the fraudulent conveyances. In determining such claim to an equitable lien for all expenditures made by the fraudulent grantor during that entire period, the most elementary principles of equity require that the reasonable value of the use of the premises during the entire period should be offset against such expenditures. Such was the conclusion of the trial court and we are entirely in accord. Any other conclusion would result in permitting defendant to derive an advantage from her own fraudulent acts. Bump, Fraudulent Conveyances, 2d Ed., 593.

[9, 10] Defendant includes a heading in her brief which reads "Madeline Girola gave adequate consideration for the real property in question." In view of our conclusion that there was ample evidence to sustain the findings of actual fraud on the part of defendant, the judgment declaring the deeds void is supported regardless of whether there was sufficient evidence to support the finding that there was no consideration for the deeds. Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004; Abbey v. Zimmerman, 12 Cal.App.2d 311, 55 P.2d 903. But under this heading, defendant quotes from the opinion on the first appeal as follows: "Had Madeline Girola paid value for the conveyance, she would have an equity in the land that would take priority over the rights of a subsequent purchaser at an execution sale with notice of her interest." Puccetti v. Girola, 20 Cal.2d 574, 577, 128 P.2d 13, 15. It therefore appears that defendant may be making this point in connection with her claim to an equitable lien. The court further said, however, on the first appeal, "The presence of a colorable consideration does not alter the nature of the transaction or the fact that Madeline Girola failed to give value for the deeds." Puccetti v. Girola, 20 Cal.2d 574, 578, 128 P.2d 13, 16. On the second trial and after the Supreme Court had decided on the first appeal that the evidence on the first trial was insufficient to support the finding that the conveyances were not entirely voluntary, defendant introduced evidence to show that on April 30, 1932, being the day after the execution of the disputed conveyances, defendant executed to the bank a written guarantee of the payment of the encumbrance on the premises. This evidence constitutes the sole basis for defendant's claim on this appeal that she gave adequate consideration for the conveyances. If the record before us showed that defendant had agreed to guaranty the payment of the encumbrance on the premises conveyed in consideration of the conveyances, a question would be presented upon which neither side has presented any authority directly in point. Assuming that such agreement to guaranty the indebtedness on the property conveyed would constitute "consideration" for the conveyances, we are satisfied that it would not constitute the giving or the payment of "value" within the meaning of the decision on the first appeal so as to support defendant's claim to a so-called "equity" or "equitable lien" that would take priority over the rights of plaintiff as the purchaser at the execution sale. But in any event, the record before us fails to show that there was any agreement made by defendant to guaranty the encumbrance in consideration of the conveyances. The written offer of defendant to Girola Bros. showed that she merely agreed to accept the conveyances "subject to the encumbrances" upon a purported consideration of the cancellation of certain assigned claims, which cancellation was held on the first appeal to constitute no consideration. The mere showing that after the execution of the conveyances, defendant did guaranty to the bank the payment of the encumbrances on the property conveyed did not compel a finding by the trial court that there was consideration for the conveyances.

A review of the record convinces us that there was ample evidence to sustain all of the material findings and that said findings support the judgment entered.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.



63 Cal.App.2d 230

BURKHARDT v. LOFTON et al.

BURKMAN et al. v. LIDDY et al.

SAME v. LAWS et al.

Civ. 14117.

District Court of Appeal, Second District, Division 3, California.

March 8, 1944.

Rehearing Denied April 3, 1944.

1. Covenants ⇐1

Provisions of deed restricting use of premises to persons of the Caucasian race were not rendered invalid by provision reserving to grantor the right to modify any restrictions, where no attempt to alter restrictions had been made. Civ.Code, §§ 711, 715.

2. Covenants ⇐1

Provisions of deed restricting use of premises to persons of the Caucasian race, but which did not attempt to restrict the transfer or ownership of such property, were not rendered invalid because unlimited as to time. Civ.Code, §§ 711, 715.

3. Covenants ⇐1

To successfully challenge deed restrictions against use and occupancy of property as unjust and unreasonable, and therefore unenforceable because unlimited as to time, the unreasonableness must appear as a reality rather than as a mere possibility.

4. Injunction ⇐128

In action to enjoin occupancy of premises in violation of deed provisions restricting use thereof to persons of the Caucasian race, evidence supported finding against defendant's contention that a change of conditions in the district had occurred and would render enforcement of restrictions unjust and unreasonable. Civ.Code, §§ 711, 715.

5. Injunction ⇐128

Evidence sustained finding that defendants were promptly notified that their occupancy of premises constituted violation of provisions restricting use thereof to persons of the Caucasian race, and that plaintiffs were not guilty of laches in enforcing restrictions. Civ.Code, §§ 711, 715.

6. Parties ⇐84(5)

In action to enjoin occupancy of premises in violation of provisions restricting use thereof to persons of the Caucasian race, the objection of defect of parties, in that other lot owners in the affected area were not made parties, was waived when not raised by demurrer or answer. Code Civ.Proc. §§ 430, 433, 434.

7. Injunction ⇐114(3)

In action to enjoin occupancy of premises in violation of provisions restricting use of premises to persons of the Caucasian race, plaintiffs were not required to bring in other lot owners in the affected area against whom no relief was sought. Code Civ. Proc. §§ 430, 433, 434.

8. Covenants ⇐72

Where lot restrictions were of record, quitclaim deeds, reciting that conveyances were made "subject to any and all matters of record", did not convey free from restrictions on ground that they did not specifically set forth the restrictions.

9. Constitutional law ⇐278(1)

Provisions restricting the use of certain lots to persons of the Caucasian race were not invalid, as to defendants who acquired lots with knowledge thereof, on ground that it constituted the taking of property without "due process of law". Civ.Code, §§ 711, 715; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

10. Constitutional law ⇐205(1)

Provisions restricting the use of certain lots to persons of the Caucasian race were not invalid as denying "equal privileges and immunities" guaranteed by the State Constitution, but were valid within the right of citizens to contract with relation to their own property. Civ.Code, §§ 711, 715; Const. art. 1, §§ 1, 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Privileges and Immunities".

11. Covenants ⇐1

Provisions restricting the use of property to persons of the Caucasian race were not invalid as against "public policy" of the state and nation. Civ.Code, §§ 51, 711, 715.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Actions by Christine Burkhardt against Lee Lofton and others, and by Dole M. Burkman and others against Mae Liddy and others, and by Dole M. Burkman and others against Henry Laws and others to enjoin defendants Lofton and Laws from using or occupying certain lots in violation of restrictions limiting the use of the premises to persons of the Caucasian race. The cases were consolidated for trial, and from the judgment entered, the defendants appeal.

Affirmed. Appeals from orders denying motions for new trials dismissed.

Thomas L. Griffith, Jr., and Loren Miller, both of Los Angeles, for appellants.

William C. Bartlett, of Los Angeles, for respondents.

SHINN, Justice.

A judgment was rendered in three actions, consolidated for trial, enjoining defendants Lofton and Laws from using or occupying two lots in Tract 7421, in the County of Los Angeles, of which they are the respective owners. All of Tract 7421, consisting of some 500 lots, is subject to a restriction that the premises shall not be leased, sold or conveyed to, or used or occupied by, any person not of the Caucasian race. All of the above named defendants are Negroes and they have appealed from the consolidated judgment. In one case Christine Burkhardt was plaintiff; in each of the other two cases 24 other persons were plaintiffs, all of them being owners of lots in the tract.

Before any of the lots in the tract were offered for sale, the owner, Bank of Italy, recorded a document declaring the property to be subject to certain restrictions, including that heretofore stated, and declaring that it "hereby certifies and declares that it has established and does hereby establish a general plan for the improvement and development of said Tract, and does hereby establish the provisions, conditions, restrictions and covenants upon and subject to which all lots and portions of lots in said Tract, herein referred to as 'said property,' shall be improved or sold and conveyed by it as such owner, each and all of which is and are for the benefit of each owner of land in said property, or any interest therein, and shall inure to and pass with each and every parcel of said property and shall apply to and bind the respective successors in interest of the principal owner or owners thereof, and are and each thereof is imposed upon said property as a servitude in favor of each and every such parcel of land therein as the dominant tenement or tenements." The restrictions were conditions subsequent, for breach of which title was to revert to the bank and its successors in interest of the reversion. The document further provided that "The Bank of Italy hereby reserves the right to modify at its discretion the provisions, conditions, restrictions and covenants herein contained." It is not contended that the Bank of Italy ever modified any of said provisions, conditions, restrictions and covenants, nor is it contended that any lots were sold or conveyed except subject to the restrictions.

The validity of this type of restrictions has frequently been upheld in California. Los Angeles Investment Co. v. Gary, 1919, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115; Janss Investment Co. v. Walden, 1925, 196 Cal. 753, 239 P. 34.

[1] Defendants' first contention is that the restrictions were not binding upon the grantees because of the right reserved by the bank to modify them. No authority is cited which supports the proposition that such reserved right rendered the restrictions wholly inoperative. No modifications were attempted, and it is unnecessary to consider whether any could have been made after the sale of lots had commenced. Uniformity in the development and use of the lots in the tract was of the essence of the plan, and it is scarcely to be supposed that the reservation was understood by the bank and the purchasers as reserving to the bank the right to defeat that primary purpose. As we have seen, the lots were agreed to be sold and they were sold subject to the restrictions and the restrictions have been observed in all instances except in the cases of the appellants and in the case of another owner who was named as a defendant but

as to whom the case was not tried. Under these circumstances it is immaterial that the grantor inserted in the document which imposed the restrictions the reservation in question. Its meaning is open to question but it certainly cannot be said that by reason of it the plan of development was defeated. In any event, the restrictions were good in their original form unless and until an effort should be made to alter them and they were effective to create an equitable servitude in favor of the owners of the several lots in the tract. In that respect the case differs factually from Wing v. Forest Lawn Cemetery Ass'n, 1940, 15 Cal.2d 472, 101 P.2d 1099, 130 A.L.R. 120, relied upon by appellants, and in which no equitable servitude had been created.

[2] A further argument is that the restrictions were void because they were not limited as to time, and upon this point defendants rely upon certain statements made in Foster v. Stewart, 1933, 134 Cal.App. 482, 25 P.2d 497. Appellants misconstrue the holding in that case. The agreement there under consideration had been signed by some of the owners of lots in the tract and not by others and the court had found that it was not intended to go into effect until all had signed. The agreement sought to impose restraints upon ownership as well as upon use, and the court construed the agreement as an unlimited restraint of alienation as to time because no time was specified, and held that there could be "no segregation of the reasons or inducements for the signing thereof by the respective lot owners." We understand that by this the court meant that the agreement that there should be no ownership by any person not of the Caucasian race and no use or occupancy by such person constituted the entire consideration which induced the owners to enter into the agreement and that the agreement, being ineffective to prevent ownership by Negroes, could not be held valid as an agreement of the parties to restrict the use of the property. Sections 711 and 715 of the Civil Code, and Title Guarantee & Trust Co. v. Garrott, 1919, 42 Cal. App. 152, 183 P. 470, were cited only in support of the statement that a restriction against ownership or transfer is in restraint of alienation, for in the cited case it was said (at page 162 of 42 Cal.App., at page 474 of 183 P.): "Certain it is that a restriction upon use only is not within the letter or spirit of section 711 of the Civil Code, or of the common-law doctrine of which that section is a codification." If we were in agreement with what was said in Foster v. Stewart respecting the reasons and inducements which led the lot owners to sign the agreement, we would hold it inapplicable to the act of the bank in placing restrictions upon the lots in Tract 7421.

[3] If the restriction against use and occupancy is challenged as unjust and unreasonable and therefore unenforcible in equity, because unlimited as to time, the unreasonableness must appear as a reality, rather than as a mere possibility. If it was a just and reasonable restriction and one which would have been enforced under the conditions that existed at the time the development of the tract was undertaken, it would continue to be just and reasonable as long as those conditions remained substantially unchanged.

[4] Appellants alleged in their answers, and endeavored to prove at the trial, that because of the increase in Negro population the community in which the tract is situated and the tract itself have changed in character so that it would be unjust and inequitable both to plaintiffs and defendants to enforce the racial restrictions. It was alleged that the property in the tract no longer had any "reasonable or adequate sale or rental value to persons of the Caucasian race and that a reasonable and adequate sale or rental value can be secured only through its sale or rental for use and occupancy to persons other than those of the Caucasian race." The findings, which were comprehensive and explicit, fully negatived the facts alleged by defendants by reason of which they claimed that because of changed conditions it would be inequitable to enforce the restrictions. Among the findings on that issue was the following:

"The Court further finds with reference to the issues raised by said special defense, and by the special defenses in other answers in said consolidated actions, that said Tract No. 7421 contains nearly 500 lots, that it is eight blocks long from north to south, and two long blocks in width from east to west; that it is bounded on the north by Firestone Boulevard, on the east by Zamora Street, on the south by East 92nd Street, and on the west by Central Avenue; that said tract contains no property occupied by persons who are non-Caucasians except the three lots which are the subject of the within consolidated actions, to wit, Lot 374 occupied by defend-

ant Vincent Tenchavez, a Filipino, Lot 498 occupied by defendants Lee S. Lofton and Jennie P. Lofton, who are Negroes, and Lot 500 occupied by defendants Henry Laws, Anna Laws and Pauletta Laws who are Negroes; that none of the adjoining tracts of land are used or occupied by others than those of the Caucasian race, except the Pardee Tract which adjoins the southerly portion of the Easterly boundary of the tract in question and the Central Gardens Tract which adjoins the easterly half of the southerly boundary of the tract here involved. There is some evidence that a small tract, No. 7593, adjoining the remaining half of the southerly boundary of Tract No. 7421 is used for business and by other than those of the Caucasian race, and the Court so finds. The Court further finds that said Pardee Tract and said Central Gardens Tract were subdivided and on the market before Tract No. 7421, and neither of said tracts was ever restricted as to racial use; that before Tract No. 7421 was so subdivided, these other three tracts were very sparsely settled, but even then a portion of the occupants of each was of other than the Caucasian race; that this was all known to the persons who placed Tract No. 7421 on the market.

"The Court further finds that all of the tracts in the community in which Tract No. 7421 is situated are occupied almost exclusively by residences of modest cost; that throughout this entire section of the County the population has increased very greatly since said Tract No. 7421 was placed on the market in 1923; that while for a time in the three tracts adjacent to said Tract No. 7421 above mentioned the colored population gained over the white, nevertheless, for the past five years the tendency has been definitely reversed. That there is no evidence that there has been any change in the conditions surrounding the subject tract, unless an increase in population in general, including Caucasians as well as non-Caucasians in the three above mentioned tracts adjacent to said Tract No. 7421 is called a changed condition, and the Court expressly finds that such is not a changed condition when applied to a restriction as to racial occupancy."

These findings are amply supported by the evidence, and in fact contrary findings would have been unwarranted. The most that is claimed by appellants is that the evidence upon the issue of changed conditions preponderated in their favor, and this, of course, if true, would not be enough to overturn the findings, which were based upon an abundance of substantial evidence.

[5] Another pleaded defense was that plaintiffs were guilty of laches in failing to promptly assert their rights after knowledge of the purchases and occupancy of lots by appellants. As to this defense the finding of the court was as follows: "The Court further finds, with reference to the issues raised by said special defense of laches in said Fifth separate and affirmative defense in said answer any in other answers in said consolidated actions, that none of the plaintiffs in said actions is chargeable with laches and the special defense of laches in said actions is untenable. In that behalf the Court finds that all of said plaintiffs and various other owners of lots in said Tract No. 7421 were very active in the defense of their restrictions; meetings were held every two weeks and upon discovery of their entry into said tract as users or occupants, defendants Vincent Tenchavez, Lee S. Lofton, Jennie P. Lofton, Henry Laws and Pauletta Laws were each, respectively, notified promptly that they were violating the said restrictions and that enforcement measures would be taken and defendants Mae Liddy and Bertha Tenchavez were likewise so advised. That each of said defendants knew of and accepted the risk involved in what they did in violating or permitting the violation of said restriction as to occupancy by others than those of the Caucasian race. That none of the defendants in any of said actions is in a position to say that he or she was misled or lulled into a sense of security with reference to the enforcement of said restriction." This finding also is supported by the evidence, which shows that the lot owners of the tract were reasonably vigilant and alert in taking action to prevent the violation of the restriction in question.

[6, 7] The defendants made a motion to require the bringing in as parties defendant of each and every lot owner in Tract 7421, some 346 in number, upon the ground that they were necessary parties to a complete determination of the controversy. This motion was denied and the ruling is assigned as error. Defendants did not by demurrer or answer plead that there was a defect of parties in that the owners of all of the other lots in the tract were not joined as plaintiffs in the action. Consequently the objection was waived. Secs. 430, 433, 434, Code of Civ.Proc. But aside

from that fact, the plaintiffs had a complete right and cause of action in each case the determination of which did not necessitate the bringing in of the other lot owners. Plaintiffs were seeking no relief either for or against them. If defendants had sought a declaration of their rights as against the other owners there was other procedure by which that could have been accomplished.

[8] Appellants make the further claim that they were not bound by the restrictions because the Bank of Italy, after it closed the trust, reconveyed some of the lots to the original trustors, from whom appellants purchased their lots, and it is contended that because these deeds did not specifically set forth the restrictions, the lots were conveyed free from restrictions. But the deeds from the bank to the original trustors were quitclaim deeds and they recited that the conveyances were made "subject to any and all matters of record." Defendants Lofton were shown to have had actual knowledge of the restrictions before they made their purchase. The other defendants admittedly had constructive knowledge of the restrictions, which were of record, and they were bound equally with those who had both constructive and actual knowledge.

[9] The further contention is made that the restriction in question deprives defendants of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. The arguments advanced do not differ from those which have many times been held untenable. Los Angeles Investment Co. v. Gary, supra, 181 Cal. page 681, 186 P. 596, 9 A.L.R. 115; Corrigan v. Buckley, 1925, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969. See also National Federation of Ry. Workers v. National Mediation Board, 1940, 71 App.D.C. 266, 110 F.2d 529.

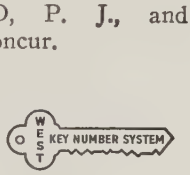
[10] It is also claimed that defendants have been denied equal privileges and immunities which are guaranteed to them by sections 1 and 21, Article I, of the Constitution of California. The cases which defendants rely upon are not in point. Stone v. Board of Directors of Pasadena, 1941, 47 Cal.App.2d 749, 118 P.2d 866, sustains the right of Negroes to use a municipal swimming pool. Piper v. Big Pine School Dist., 1924, 193 Cal. 664, 226 P. 926, and Ward v. Flood, 1874, 48 Cal. 36, 17 Am.Rep. 405, upheld the right of Indian and Negro children to attend public schools. Sacramento Orphanage, etc., Home v. Chambers, 1914, 25 Cal.App. 536, 144 P. 317, held invalid the provision of section 2289 of the Political Code, as amended in 1913, which undertook to deny admittance to and support by an orphanage of children who were citizens but whose parents were aliens, while granting those privileges to other citizens. No question as to the right of citizens to contract with each other with relation to their own property was involved in any of the cited cases, and that right should not be confused with the power to legislate which is possessed by municipal and state governments. The decree of the trial court in the instant case was not, within constitutional principles, action by the state through its judicial department. Plaintiffs' rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties. The decree appealed from created no rights in plaintiffs; it only declared what they are and provided for their enforcement. If the contract is valid it cannot be nullified under any theory that courts are without the power to enforce it.

[11] Defendants further argue that racial restrictions are against "the present public policy of the nation and of this state." They quote section 51 of the Civil Code as supporting this argument. This section guarantees to all citizens equal accommodations of inns and certain other public establishments, subject to conditions applicable alike to all citizens. This, of course, establishes the policy of the state as far as it goes but no further than that. Limitations upon the use of real property such as the one under consideration have never been declared to be against public policy by legislative authority, so far as we are advised, and they have been uniformly upheld by the courts. Racial restrictions have been employed in the development of countless residential communities and have very generally been considered essential to the maintenance and stability of property values. Non-Caucasians are and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been. The fact that the members of the Caucasian race have freely availed themselves of this right throughout the nation, even though those of the non-Caucasian races have not, is the most satisfactory proof of the public policy of the nation with respect to this phase of the right to contract. No doubt public policy changes and de-

velops with the times, but these changes must have their sources in the citizenry and not in the decisions of courts or the pronouncements of publicists and politicians. The right to contract with reference to their own property is one that is preserved to all citizens and, except where restricted by law, is a right which the peoples of all races may exercise freely. It cannot be denied by the courts to those who make use of it in certain situations because others similarly situated may choose not to avail themselves of it. The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the "present" public policy on the subject or of personal belief that the consequences would be for the general good. The desirability of a more understanding and harmonious relationship among the many races of our nation is something no one will deny, but it will come only with time and experience and it is a matter in which public thought and conscience cannot be directed or controlled by the courts through the uprooting of firmly established precedent. The appeals from orders denying motions for new trial are dismissed.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



In re HEARD'S ESTATE.

HEARD v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.*

Civ. 3308.

District Court of Appeal, Fourth District, California.

March 21, 1944.

Hearing Granted May 18, 1944.

1. Wills ⇐439, 440, 470

A will must be construed according to testator's intention as gathered from language of entire will.

2. Wills ⇐448

Intestacy must be avoided where and to extent testator's expressed intention makes such possible.

3. Wills ⇐671

The validity of a testamentary trust does not depend upon complete disposal of remainder after termination of the trust since the two matters are usually separable.

4. Wills ⇐478

Bequests by implication are sustained where no direct language in will is found to support them, where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest.

5. Wills ⇐440

Although testator's intention is to be reached from what he has said, it includes not only a determination of what he meant by explicit use of language but also the necessary implication arising from language which he has employed, though less explicit.

6. Perpetuities ⇐4(10)

Provision in will devising remainder of testamentary trust to heirs of lawful issue of testatrix' son who at time of testatrix' death had no children was void as violative of rule against perpetuities.

7. Wills ⇐473

Provision in will devising remainder of testamentary trust to heirs of lawful issue of testatrix' son, which was void as violative of rule against perpetuities, was separable, and subsequent provision devising property to certain institutions if there should be no lawful issue of testatrix' son living at termination of trust would be construed as making a complete disposition of the remainder upon prior provision being declared void, as against contention that testatrix died intestate as to portion of estate that she attempted to dispose of through testamentary trust.

8. Wills ⇐473

Where there are valid and invalid clauses in a will, question whether valid clauses can stand depends upon whether invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing main scheme of testatrix.

* Subsequent opinion 153 P.2d 553.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the estate of Emma C. Heard, deceased. John W. Heard, Jr., filed a petition against the Bank of America National Trust & Savings Association and others for construction of will and a determination as to persons entitled to distribution. From a judgment in favor of the plaintiff, the defendants appeal.

Reversed, with directions.

A. H. Conard and Calkins, Hall, Linforth & Conard, all of San Francisco, and Harry M. Conron, Borton, Petrini, Conron & Borton, and Calvin H. Conron, all of Bakersfield, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order construing a will and determining the persons entitled to distribution thereunder.

Emma C. Heard, a widow, died on November 23, 1939, leaving an estate valued at about $200,000. Her only close relatives were a brother and a son, John W. Heard, Jr. At that time this son was 42 years old, his wife was 36 years old, and they had no children.

Mrs. Heard left a will and a codicil, which were admitted to probate. There is nothing in the codicil which is material here. Of the seven sections of the will, the only controversy is with regard to the provisions of section IV. In section III, she made several small bequests which are not questioned, including one of five dollars "and no more" to her brother. In section IV, which is here in question, she gave the bulk of her estate to the Bank of America in trust for the purposes therein named. After defining the powers and duties of the trustee and providing for its compensation section IV contains fifteen numbered paragraphs relating to what shall be done with the net income from the trust estate, to the termination of the trust and to the disposition of the remainder. Briefly summarized, the first eleven paragraphs provide for the following payments from the income: $200 a month to her son, John W. Heard, Jr., as long as he lives; $50 a month to a Mrs. Cummings as long as she lives; $25 a month to a Mr. Rice as long as he lives; $50 a month to a servant as long as she lives; $25 a month for the care of her dog as long as it lives; and the rest of the net income to her son, if living, otherwise to his lawful issue, if any, and otherwise to the lawful issue of Mrs. Cummings. It was also provided that if the net income was insufficient to cover all of these monthly payments it should first be used to pay the monthly allowance of $200 to her son or in case of his death to his lawful issue, and the balance prorated among the other beneficiaries; and that the trustee might at any time use the principal of the trust for the care and support of her son or of his lawful issue, if in its discretion this appeared necessary.

Paragraph 15 contains a spendthrift clause relating to each beneficiary under the trust. Paragraphs 12, 13 and 14 read as follows:

"12. This trust shall terminate upon the death of the last survivor of all of the persons named or designated as follows:

"(a) Such of the children of said May Durham Cummings as may be living at the time of my demise.

"(b) Said G. Stanley Rice.

"(c) Said Eulalia Bethel, if she be in my employ at the time of my demise, otherwise her death shall not be so taken into consideration.

"(d) My said son, John W. Heard, Jr.

"(e) The lawful issue, if any of my said son John W. Heard, Jr., who may be living at the time of my demise.

"13. Upon the termination of said trust as hereinabove provided under Paragraph 12 hereof, the whole of my said estate then remaining in the hands of my said trustee shall be forthwith and outright paid over and delivered to the heirs of the lawful issue of my son, John W. Heard, Jr.

"14. If, at the termination of said trust as hereinabove provided, there should not then be living any lawful issue of my said son John W. Heard, Jr. then the whole of the residue of my estate shall be forthwith paid over and distributed as follows:" (Here follow provisions that $5000 shall go to the Grand Lodge of Masons of this state, $5000 to Bakersfield Lodge 224 of Masons, and the residue of the estate to the University of California.)

In due course, the son, John W. Heard, Jr., filed a petition under section 1080 of the Probate Code for a construction of this will and a determination as to the per-

sons entitled to distribution. Answers and statements of their rights were filed by the trustee, the University of California and the lodge organizations. After a trial of the issues thus presented the court made findings and conclusions of law to the effect that, while the remainder of the will is valid and effective, all of the provisions of section IV are invalid and inoperative since they "violate the rule against perpetuities * * * and violate the statutes of" this state; that the testatrix died intestate as to that portion of her estate which she attempted to dispose of through the provisions of section IV; and that all of that portion of her estate should be distributed to her son John W. Heard, Jr., as her sole heir at law. An order was entered accordingly and this appeal followed.

The respondent's contention, which was accepted by the trial court, is that paragraphs 13 and 14 are void upon their face because they express the possibility that there will be living issue of the respondent at the time of his death; that the term "issue" includes descendants of any degree; that if any issue of the respondent survived him paragraph 13 could not become operative to effect distribution until all issue of the respondent had died, making possible the identification of the heirs of such issue; and that the will clearly discloses that the main intent and purpose of the testatrix was to provide for the maternal heirs of any issue of the respondent, or that the provisions of paragraph 14 should apply in the event there never was such issue. It is further argued that the attempt to carry out this paramount intention of the testatrix is abortive since paragraphs 13 and 14 are void; that paragraph 13 cannot be separated from the remainder of section IV without destroying the main intention of the testatrix to give the residue to the maternal and other heirs of the issue if such heirs existed; that for this reason all of section IV and all of the trust provisions are void; and that it follows that the testatrix died intestate insofar as any property affected by section IV is concerned. It will be noted that while the respondent contends that both paragraphs 13 and 14 are void the objections raised are addressed only to paragraph 13 and that what is claimed to be the main intention of the testatrix, to which everything else must give way, is drawn from paragraph 13 rather than from an examination of the entire will.

On the other hand, the appellants contend that the clear intention of the testatrix, as gathered from the entire will, is that on the termination of the trust the residue shall vest in the lawful issue of the respondent, if any are then living, and otherwise in the University and lodge organizations as provided for in paragraph 14; that paragraph 13 should be construed to effectuate this intention if possible; that if such construction is not possible paragraph 13 alone should be declared invalid in which event, by express language and by necessary implication, paragraph 14 provides a complete distribution of the trust estate on its termination, in conformity with the intention of the testatrix; and that if neither of those constructions is possible paragraph 13 should be held invalid but separable from the other provisions of section IV, in which event the main intention of the testatrix would be more nearly carried out by continuing the trust until the termination provided for, and by allowing the residue to pass to any living lawful issue of the respondent under the laws of intestate succession or, if there be no such issue, to the institutions named in paragraph 14.

[1, 2] Under our statutes and decisions a will must be construed according to the intention of the testator as gathered from the language used in the entire will, effect must be given to the expressed intention so far as possible and intestacy must be avoided where and to the extent the expressed intention makes this possible.

Examining this will in its entirety it clearly appears, with respect to that portion of her estate which she attempted to dispose of through section IV, that the testatrix had the firm intention to provide for the respondent and for certain others, during their lifetime, and that the principal of the fund should not go directly to the respondent. The trust is to terminate absolutely on the death of the last survivor of certain lives in being. It also rather clearly appears that the testatrix intended to make provision for the lawful issue of her son if there should be any. She refers to such lawful issue at least eleven times in the will. In section III, in giving certain personal property to the respondent, she provides that it shall go to his lawful issue if he is not living at the time of her

death. In section IV, in giving certain advisory powers in connection with the management of the trust to the respondent, she gives the same powers after his death to such of his lawful issue as may survive him. In each of the provisions for the payment of a portion of the income from the trust, or at the discretion of the trustee a portion of the principal, to the respondent she includes a similar provision for payment to his lawful issue in case any survives him. In the event of the respondent's death without lawful issue, the income which would otherwise go to him is to go to Mrs. Cummings. The lawful issue of the respondent is also referred to in paragraphs 12, 13 and 14. The only reference to "the heirs of" the lawful issue of the respondent is the one in section 13, which gives rise to this controversy.

Insofar as disclosed by the language used in the entire will, the main intention of the testatrix appears to be to provide for the respondent and for his lawful issue, if any there be. The expressed intent seems to be to provide an income for her son during his life and thereafter to provide for rather than to disinherit any possible grandchildren. In view of this intention of the testatrix, which is rather clearly disclosed, it seems obvious that had she realized its effect she would not have used the precise language found in paragraph 13. That language is so inconsistent with her disclosed intent and with her general testamentary plan, as uniformly evidenced by the other parts of her will, as to suggest that it was used inadvertently; it has the effect of disinheriting any grandchildren, the natural objects of her bounty and for whom she makes provision in all other parts of section IV; and finally, it does not accomplish a valid disposition even to such heirs.

The language used in paragraph 13 expresses something which is different from the general intention which seems to be expressed by other language repeatedly used in other parts of the will. Obviously, a mistake was made in drafting either paragraph 13 or paragraph 14. Paragraph 14 gives the remainder to the organizations named in the event no lawful issue of the respondent are living at the termination of the trust, while under the same situation paragraph 13 would give this remainder to the heirs of any lawful issue. Paragraph 13 is inconsistent for this reason as well as for the reasons above noted.

[3] If we could disregard the words "the heirs of" in paragraph 13 or regard them as synonymous with the words "lawful issue" in that paragraph, the will would be complete, the trust would be good and the disposition of the remainder would be clear. On the other hand, if we cannot disregard the words "the heirs of" and must take the language of that paragraph as adopted by the testatrix that paragraph is void as unduly suspending the power of alienation. It does not necessarily follow, however, that all of section IV, including the entire trust provision, is void, or that there is not a sufficient disposition of the corpus of the trust estate. Insofar as the trust itself is concerned it has usually been held that the validity of such a trust does not depend upon the complete disposal of the remainder after the termination of the trust since the two matters are usually separable. Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St.Rep. 227; In re Estate of Troy, 214 Cal. 53, 3 P.2d 930; In re Estate of Murphy, 104 Cal. 554, 38 P. 543.

[4, 5] If paragraph 13 is void and is eliminated from the will paragraph 14, which still remains, provides that if there should not be any lawful issue of the respondent living at the time fixed for the termination of the trust the entire residue of the estate shall forthwith go to the organization named therein. The thing that would prevent such a result would be the fact that lawful issue of the respondent were then living. There is a natural implication from this provision that if there be such lawful issue living at that time the property is to go to that issue. In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Atkinson, 110 Cal.App. 499, 294 P. 425; In re Estate of Franck, 190 Cal. 28, 210 P. 417. In the Blake case [157 Cal. 448, 108 P. 297] the court quoted with approval:

"'If property is given to A for life, and if he shall die without issue, then over to B, the issue of A are the persons whose existence is to prevent the property from going over to B; and the just inference is, that the 'issue,' without further description, are intended to take.'"

The court also said:

"Bequests by implication have from remote times been sustained where no di-

rect language in a will is found to support them, but where from informal language used such reasonable construction can be placed on it as implies an intention to make a bequest. * * *

"While, of course, conjecture and speculation cannot be indulged in to import into the will of a testator something which no language used by him warrants simply because he seems to have omitted something which it is reasonable to assume should have been provided for, still, when he has used language which can be reasonably interpreted to raise a devise, it should be so construed. * * *

"While the intention of the testator is to be reached from what he has said, this includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from language which he has employed, though less explicit."

Such an implication is especially strong here since the provisions for the termination of the trust and the immediate delivery and payment of the trust estate to someone are so definite, and since it corresponds exactly with the intention so clearly disclosed by all of the will except that part of paragraph 13 which provides for something the testatrix either did not intend to or could not do.

[6, 7] We think that this is the proper construction of this will, that paragraph 13 is void and that paragraph 14 makes a complete disposition of the remainder of the estate to the living lawful issue of the respondent, if any, and otherwise to the organizations named therein. This view not only gives effect to the intentions of the testatrix, as rather clearly expressed in the will, including the trust provisions, but carries out her probable intentions relating to a possible contingency, which are less clearly expressed, and does away with the conflict between paragraphs 13 and 14 which was probably not intended by the testatrix.

[8] In our opinion, there is no doubt that the void provisions of paragraph 13 are entirely separable from the other provisions of section IV, and that these other provisions can and should be given effect as a part of the will of the deceased. In re Estate of Troy, 214 Cal. 53, 3 P.2d 930, 933. In that case, in applying the general rules for determining the question of severability, one of which is "'where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator,'" the court held that an invalid clause, the elimination of which would result in intestacy, was nevertheless severable since, as the court said:

"Our conclusion does not result in a disposition of the estate so different from what the testator contemplated nor so unreasonable that it must be presumed that the testator would not have made the valid provisions had he been aware of the invalidity of the others; it does not work injustice among the beneficiaries, nor defeat the dominant scheme and purpose of the testator in the disposition of his property; nor does it cause any important practical change in the testator's general scheme or result in any possibility that the property will go to others than those he intended; but, on the contrary, those whom the testator intended should benefit and whom he cherished will take by the plan which he devised."

The remaining provisions of section IV of the will here in question substantially, and possibly completely, carry out the intentions of the testatrix and they are not so inseparably woven with the provisions of paragraph 13 that they must also be declared void, leading to a result which is the one thing that the testatrix most clearly intended to avoid and prevent. This interpretation carries out the dominant scheme and purpose of the testatrix as expressed in her will and not only avoids existing conflicts between portions of the will but protects the main intentions of the testatrix from being nullified by a few words which are not only inconsistent with the rest of the will but which are void and ineffective as a matter of law.

For the reasons given, the order appealed from is reversed with directions to the probate court to enter its order upholding the provisions of section IV of this will, with the exception of paragraph 13 thereof, and providing for distribution of the residue of said estate at the proper time to the trustee named in section IV of the will, and with such other provisions for the ultimate distribution of said residue

or the remainder thereof as are proper and appropriate and not inconsistent with the views herein expressed.

MARKS and GRIFFIN, JJ., concur.



63 Cal.App.2d 267

HUSTON v. SCHOHR.

3 Civ. 6992.

District Court of Appeal, Third District, California.

March 13, 1944.

Rehearing Denied April 11, 1944.

Hearing Denied May 11, 1944.

1. Appeal and error ⇐1061(3)

Where motion for nonsuit is denied and the trial proceeds and judgment is entered, any error in denying motion for nonsuit is cured if all of the relevant evidence introduced supports the judgment.

2. Appeal and error ⇐930(1), 989

Before an appellate court is justified in reversing a judgment upon ground of insufficiency of evidence, it must appear from the record that, accepting the full force of the evidence adduced together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, the law precludes prevailing party from recovering.

3. Attorney and client ⇐124

Evidence supported judgment for plaintiff in action on note given for legal services performed for defendant, as against defendant's contention that there was partial failure of consideration because of attorneys' failure to obtain a loan for defendant.

4. Attorney and client ⇐124

In attorney's action against client on a note, where court instructed that the highest degree of fairness and good faith was required of attorneys in dealing with their clients and in securing the note sued upon, it was not necessary to go further and advise jury that the courts view transactions between attorney and client with suspicion.

5. Attorney and client ⇐124

In attorney's action against client on a note executed for attorney's fee, trial court fully and fairly instructed jury upon all issues involved and particularly upon question of transactions between attorneys and client.

6. Trial ⇐260(1)

A court is not required to give all instructions requested by the parties, but is only required to instruct the jury fully and fairly as to the law applicable to the case.

Appeal from Superior Court, Colusa County; Warren Steel, Judge.

Action by Robert W. Huston against Elna Browning Schohr on a note. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mento & Read, Emerson W. Read, and Joseph W. Mento, all of Sacramento, for appellant.

Huston, Huston & Huston, Robert W. Huston, and Percy Napton, all of Woodland, for respondent.

SHOTTKY, Justice pro tem.

Plaintiff and respondent commenced an action against defendant and appellant upon a promissory note in the principal sum of $15,000, executed on December 29, 1941, in favor of the law firm of Huston, Huston & Huston, and assigned by said firm to respondent.

Appellant filed an answer setting forth that said law firm of Huston, Huston & Huston had been her attorneys for more than six years prior to the date of the execution of said promissory note; that the services rendered by them were of a value not in excess of $3000; that respondent Robert W. Huston, acting for said firm, and while the confidential relation of attorney and client existed, shortly prior to the date of the execution of said note, promised, agreed and represented to appellant that he had obtained for her a loan for $65,000, to be secured by a mortgage or deed of trust upon her lands; and that said respondent attorney demanded that appellant sign said note in sum of $15,000, in consideration of his securing said loan, and that she, reposing confidence and trust in said attorneys, and believing that said loan had been obtained, signed said note; that said note

was signed by her to settle all past claims of said law firm, which did not exceed $3000, and for securing said loan, which services in obtaining said loan were worth to appellant the sum of $12,000, had said loan been obtained, but that said loan was never obtained and that there was a partial failure of consideration as to the sum of $12,000.

Appellant set forth the further defense that at the time she signed said note she relied upon the fiduciary trust relations existing between respondent and respondent's assignors and appellant, and that respondent and respondent's assignors obtained a personal advantage over appellant in that there was not sufficient consideration for said promissory note and that said promissory note was secured by undue influence.

Appellant set forth the additional defense that in the year 1941 she was badly in need of moneys to manage her properties, that said fact was known to respondent, and that respondent agreed to obtain for appellant a loan of $65,000, upon her promise to pay him reasonable compensation therefor; that on or about the date of said note, respondent reported to appellant that he had secured a definite lender who would lend her said sum of $65,000, and stated to appellant that if she would sign said note for $15,000, said law firm would consummate said loan; and that appellant, relying on said promises and reposing confidence in said attorneys, signed said promissory note; that respondent and respondent's assignors had not obtained said loan and did not obtain same, and that the signing of said note was secured by the undue influence of respondent in violation of the fiduciary and trust relations existing between them.

Upon the trial respondent testified that said promissory note had been delivered to him in Colusa by appellant in payment of the attorneys' fees of the law firm of Huston, Huston & Huston to December 29, 1941; that the amount had been agreed upon in his office in Woodland a few days prior to its execution in the presence of appellant and her husband; that the note was given in satisfaction of the legal services of said firm to appellant; that said note had been assigned by said firm to him and that no payments had been made thereon. The note was then introduced in evidence and plaintiff and respondent rested.

Appellant then moved for a nonsuit, contending that inasmuch as the relation of attorney and client existed between respondent and appellant it was incumbent upon respondent to show in his prima facie case that no advantage was taken of appellant, that she had been fully advised as to the transaction, and that the amount in the note was a fair price. The court denied the motion for a nonsuit.

Appellant thereupon testified substantially in accordance with the allegations of her answer hereinbefore set forth, also giving in detail her version of the various items of legal and other services rendered for her by respondent and respondent's assignors. She also testified that she had first employed Arthur C. Huston, Sr., in 1935 to look after her legal business at an agreed annual retainer of $250.

N. P. Schohr, husband of appellant, was then called as a witness by appellant and testified that he was present in the lobby of the hotel at Colusa when respondent "came over with a ready made note for her to sign"; that respondent stated that he wanted the note signed so it could be included in that year's income taxes, and that he had secured the loan for the $65,000; that appellant had agreed to pay respondent the $15,000 out of the proceeds of this loan and that respondent stated if the loan was not secured he would destroy the note.

The appellant thereupon rested her case. Respondent in rebuttal testified:

"Mr. and Mrs. Schohr were in my office in Woodland and the matter of how much fees we were going to charge came up and I told them I didn't know, I hadn't discussed the matter with my father. About three or four days before the note was signed, they were in my office and I told them then I had discussed the matter with father and that in our discussion we had agreed we would charge Seventeen hundred and fifty and this fifteen thousand dollars and Mr. Schohr says, 'That is reasonable enough,' and Mrs. Schohr says, 'Fine'. I said, 'All right, we will let it go,' I said, 'The reason we want a note is so we can turn it in on this year's income tax and not the following year.' About three or four days later I was coming to Colusa and made an appointment to meet them in the Riverside Hotel at Colusa. They signed the note and gave it to me, without attorney's fees and without interest. That was the reason the note was given."

Respondent denied that anything was said at any time as to the payment of the $15,000 being contingent upon the securing

of the loan, and stated that the amount of the note was what he and Arthur Huston, Sr., had concluded was due them for services rendered over the seven year period, and that the amount was agreed to by both appellant and her husband. Respondent also testified in much detail as to the various legal matters attended to by said law firm, and the various services rendered during a period of nearly seven years. These services included, among other things, the representing of appellant in protecting her interest as an heir of the Browning estate and as an owner of one-third interest in the Browning Company and the estate, and the settlement of various tax matters connected therewith, at the conclusion of which liquidation appellant received as her individual share, free and clear of incumbrances, property of the approximate value of three hundred thousand dollars ($300,000).

The deposition of Arthur C. Huston, Sr., was then offered by appellant. In said deposition the said witness testified that appellant had employed his firm on June 16, 1935, to look after her legal affairs; that there was never any discussion or agreement with him as to attorneys' fees or compensation. He then detailed the various services rendered by him up to the time of his illness in April, 1941.

Plaintiff and respondent then rested, and appellant, in sur-rebuttal, testified that respondent had stated at the time the note was given that the said law firm would charge the sum of $15,000 to cover their past services plus the securing of a loan on the Gridley ranch of $65,000. Appellant thereupon rested and the court asked: "No more sur-rebuttal?" Counsel for appellant answered: "That is all."

After the arguments of respective counsel and the instructions of the court, the jury rendered a verdict in favor of plaintiff and respondent in the sum of $15,000, and this appeal is from the judgment entered upon said verdict, and from the order denying appellant's motion for a new trial.

Appellant makes a vigorous attack upon the judgment and urges three grounds for the reversal of the judgment and order. These are: 1. The court erred in denying appellant's motion for a nonsuit. 2. The evidence was insufficient to justify the verdict in favor of respondent. 3. The court erred in refusing certain instructions offered by appellant and in giving certain instructions to the jury. We shall discuss these contentions in the order of their statement.

[1] As to the motion for a nonsuit, it is a well established rule that when a motion for a nonsuit is denied and the trial proceeds and a judgment is entered, the error, if any, in denying the motion for a nonsuit is cured if all of the relevant evidence introduced in the case supports the judgment. That such should be the rule requires no argument because the law and the courts are more concerned with the disposition of litigation upon its merits than upon technical rules of procedure or order of proof.

In Peters v. Southern Pacific Company, 160 Cal. 48, 52, 53, 116 P. 400, 402, the court said:

"We shall not examine into the correctness of the ruling of the court in denying the motion for a nonsuit. After the order made, the defendant introduced evidence on its defense. It is well settled that an order denying a motion for a nonsuit will not be disturbed, although the evidence at the close of plaintiff's case was so weak that it might properly have been granted, if, upon the trial, the defect is overcome by evidence subsequently introduced. If, upon the conclusion of the whole case, there is evidence upon the material issues warranting the submission of the cause to the jury, the question of whether the court erred in denying a nonsuit becomes of no consequence. Lowe v. San Francisco Ry. Co., 154 Cal. 573–576, 98 P. 678, and cases therein cited."

In the case of Parra v. Cleaver, 110 Cal. App. 168, at page 170, 294 P. 6, at page 7, in which case a hearing was denied by the Supreme Court, it was said:

"The denial of a motion for a nonsuit is not prejudicial error where facts sufficient to support the judgment are in evidence either before or after the denial of the motion. Cosby v. Cline, 186 Cal. 698, 200 P. 801. Whether or not denial of this motion was prejudicial error must depend upon our conclusions as to whether there was sufficient evidence to sustain the judgment."

In Long Beach Brick Company v. de Dodson, 104 Cal.App. 99, at page 104, 285 P. 382, at page 384, in which a hearing by the Supreme Court was likewise denied, the court said:

"The denial of the motion for a nonsuit at the close of respondent's case need not

be considered because the question of whether or not the court erred in denying a nonsuit becomes of no consequence if, upon a conclusion of the whole case, there is evidence sufficient to support a judgment. Peters v. Southern Pac. Co., 160 Cal. 48, 52, 53, 116 P. 400; Cosby v. Cline, 186 Cal. 698, 702, 200 P. 801; County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 175, 200 P. 27; Raddant v. Watson, 89 Cal.App. 103, 106, 264 P. 589. What has been said disposes of the alleged error in denying a nonsuit at the close of all the evidence."

Also see Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 575, 576, 98 P. 678; Eason v. General Mortgage Co., 101 Cal. App. 186, 192, 281 P. 514; Coats v. Hathorn, 121 Cal.App. 257, 259, 8 P.2d 1038; Farrell v. Miramar Hotel Co., Ltd., 125 Cal.App. 623, 631, 13 P.2d 945; Burrows v. Burrows, 136 Cal.App. 323, 325, 28 P.2d 1072.

[2, 3] The issue before us then becomes one as to whether or not the evidence supports the judgment. It is a well established rule of law that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. Having in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel in arguing conflicting evidence before an appellate tribunal, we are convinced that the judgment in the instant case finds ample support in the record.

As hereinbefore set forth, respondent testified as to the conversations with appellant preceding the execution of the note, and that the amount of the note was what he and his father, Arthur C. Huston, Sr., considered was due them for services performed during the period of approximately seven years. Respondent in his testimony, and Arthur C. Huston, Sr., in his deposition, detailed the services rendered. There was, of course, contradictory evidence given by appellant and her husband, but no evidence was introduced that the sum of $15,000, the amount of said note, was an unreasonable, excessive, or unjust fee for said services. The verdict of the jury in favor of respondent carries with it the implied finding that the payment of the promissory note was not contingent upon the securing of a loan for appellant by respondent, and also that the jury accepted and believed the testimony of respondent and his father and rejected any contrary testimony of appellant and her husband. Appellant had ample opportunity to produce, if she could, expert testimony of other attorneys to offset the testimony of respondent as to the value of the legal services, and the fact that she did not do so would indicate either that she could not produce such testimony or that she chose to rely upon her testimony and that of her husband as to the agreement and understanding as to the conditions upon which the note was executed and delivered. Considering the magnitude of the interests involved and the time that apparently was expended by the law firm of Huston, Huston & Huston, we deem it proper to state that the sum of $15,000 does not appear to us to be an unreasonable charge for the services rendered.

What we have already stated disposes of the contention of appellant that the evidence is insufficient to justify the verdict.

[4] Appellant requested the following instruction:

"I instruct you that if you find that at the time the document in question was executed, and secured by Messrs. Huston, Huston and Huston from the defendant, they were acting in any matter or matters as her attorneys and counselors at law, then the highest degree of fairness and good faith is required of them as attorneys in dealing with their client in securing such document, and the Courts view all transactions between attorneys and clients wherein any advantage is secured by the attorneys with suspicion, and examine them with utmost scrutiny."

The court modified said instruction by striking out: "and the Courts view all transactions between attorneys and client wherein any advantage is secured by the attorneys with suspicion, and examine them with utmost scrutiny," and appellant contends that in so doing the court committed prejudicial error.

We do not believe that either reason or authority requires that when a court instructs a jury that in all dealings between attorney and client the highest degree of fairness and good faith is required of the attorneys in dealing with their client in

securing the document, it is also necessary to go further and advise the jury that the courts view such transactions with suspicion.

Among the instructions given by the trial court were the following:

"You are instructed that attorneys at law, in dealing with their clients, are required to exercise the highest order of good faith and to disclose to clients all information in their possession as to the material facts of the matters and transactions out of which the relation of attorney and client arose, which would or might influence the client in entering into or refusing to execute any contract entered into between them."

"I instruct you that if you find that at the time the document in question was executed, and secured by Messrs. Huston, Huston & Huston from the defendant, they were acting in any matter or matters as her attorneys and counselors at law then the highest degree of fairness and good faith is required of them as attorneys in dealing with their client in securing such document."

"If you find from the evidence in this case that at the time Elna Browning Schohr signed the document in evidence here dated December 29, 1941, for $15,000.00, the payee therein, Messrs. Huston, Huston and Huston, were representing her as her attorneys at law in any matters and as such then bore to said Elna Browning Schohr the relation of attorney and client in connection with the transactions then pending, then in the transaction in this case involving the signing of said document by Elna Browning Schohr, Messrs. Huston, Huston and Huston, and each of them, in securing of and execution of said document, could take no advantage of their relations to the defendant as her attorneys, and if you find that undue influence was used by the said attorneys or any of them in the securing of said document, said note is invalid and is not inforcible against the defendant, and your verdict would be for the defendant."

"Undue influence is defined as the use, by one in whom a confidence is reposed by another, of such confidence for the purpose of obtaining an unfair advantage over that other one, and is also defined as the taking of a grossly oppressive and unfair advantage of another's necessities or distress."

"If you find from all the evidence in this case that one of the members of the law firm of Messrs. Huston, Huston and Huston, at a time while the members of said law firm were representing or acting for the defendant as her attorneys at law, or on a retainer as her attorneys at law, advised or stated to the defendant that they had secured for the defendant a loan of moneys on her properties, and if you find that such statements or representations were not true, and if you find that such statement or representations were made by such one of said members of said law firm who then did not believe said statements or representations to be true, by reason of which statements or representations Mrs. Schohr was induced to make the promissory note in question in this case, then, I instruct you, if the said note was so obtained and secured from the defendant then your verdict in this case should be for the defendant."

"If you find from the evidence that at the time defendant signed said document here in question, plaintiff, Robert W. Huston, was a member of the law firm of Huston, Huston and Huston, and that said law firm was then acting and representing her as attorneys at law in an effort to secure for the defendant a loan on Mrs. Schohr's real property from a lender or lenders, and if you find that said Robert W. Huston at the time said note was signed by Mrs. Schohr, to induce and persuade Mrs. Schohr to sign said promissory note, stated to and represented to Mrs. Schohr that he had secured a loan for $65,000.00 for her on her properties from a lender, with the purpose and intention that Mrs. Schohr should rely on such statement and representation, and thereby induced Mrs. Schohr to sign said promissory note relying on such statement and representation, and if you find in connection therewith that said statement or representation was not true, and that Mr. Robert W. Huston had not found or secured such loan, or lender or lenders, at that time, and if in connection therewith you find that said Robert W. Huston knew at the time the statement or representation was made, if you find it was made, that the same was not true, and that he knew he had not found or secured the loan, or did not believe he had found or secured such loan, then plaintiff cannot recover on said promissory note and your verdict should be for the defendant."

"You are instructed that if you find from the evidence that the law firm of Huston,

Huston and Huston, performed legal services for the defendant and that at the time of the making and delivery of the note, sued upon, to said firm by said firm by said defendant, that the said defendant was indebted to the said law firm, for said legal services, in the amount of the said note then plaintiff is entitled to recover the amount due upon said note."

[5, 6] From a reading of the above instructions and others given by the court it is apparent to us that the trial court fully and fairly instructed the jury upon all of the issues involved, and particularly upon the question of transactions between attorneys and client. We find no merit in the attack of appellant upon either the instructions given or the instructions refused. A court is not required to give all instructions requested by the parties, but is only required to instruct the jury fully and fairly as to the law applicable to the case. This, we are convinced, the trial court did in the instant case.

In view of the foregoing the judgment and order of the trial court should be and hereby are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.



63 Cal.App.2d Supp. 846

JONES et al. v. SHIELDS et al.

No. C. A. 5705.

Appellate Department, Superior Court, Los Angeles County, California.

March 2, 1944.

Landlord and tenant ⇐291(12)
War ⇐4

In unlawful detainer action by parties acquiring title to leased residential premises after effective date of Office of Price Administration's rent regulation, under which such Office issued eviction certificate to plaintiffs, municipal court properly excluded defendants' proffered evidence on questions of plaintiffs' good faith and defendants' family status, since such court is without jurisdiction under statute to review facts on which Administrator acted in issuing the certificate. Emergency Price Control Act of 1942, §§ 1 et seq., 2, 204(d), 50 U.S.C.A.Appendix, §§ 901 et seq., 902, 924(d).

Appeal from Municipal Court of Long Beach; Wilbur F. Downs, Judge.

Action in unlawful detainer by Percy R. Jones and another against F. E. Shields and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Hugh G. Maddox, of Long Beach, for appellants.

Mary Swift Atkinson, of Long Beach, for respondents.

Stanley Howell, Chief Rent Atty., and Philip A. Loomis, Jr., Rent. Atty., both of Los Angeles, amici curiae for Office of Price Administration.

KINCAID, Judge.

This appeal is from a judgment in unlawful detainer ordering the possession of the residential premises involved to be restored to the plaintiff owners by the defendant tenants. Plaintiffs purchased and became the owners of the property on April 26, 1943. At the time of such acquisition, defendants were in possession thereof on a month-to-month tenancy, at $67 per month, payable in advance, on the 25th day of each month.

Plaintiffs applied for, and on June 25, 1943 there was issued to them, by the Office of Price Administration, a Certificate Relating to Eviction, granted under Section 6(b) (2) of the Rent Regulation for Housing (8 Federal Register 7322, issued pursuant to the Emergency Price Control Act of 1942, Pub.L.No.421, 77th Cong., 2nd Sess. c. 26, 56 Stat. 23, 50 U.S.C.A.Appendix, § 901 et seq.). On August 24, 1943, plaintiffs caused to be served on defendants a written notice advising them of the issuance of such certificate and terminating said month-to-month tenancy on September 25, 1943. More than three months elapsed following the issuance of said certificate, and more than one month elapsed since the service of the notice terminating the tenancy, but defendants continued in possession notwithstanding.

The defendants complain of the refusal of the trial court to receive evidence by way of defense concerning the questions:

(1) as to whether or not the plaintiff purchasers seek in good faith to recover possession of the premises for their immediate use and occupancy as a dwelling, and (2) the defendants' circumstances as to the size and status of their family, and their inability to find a place to which to move. The court properly sustained the objections of plaintiffs to such evidence as being irrelevant to the issues presented by these proceedings.

The said Rent Regulation in providing for the removal of a tenant, and the recovery by the owner of possession of the real property for his own occupancy, sets up two entirely different procedures. The procedure to be followed depends on whether or not the owner took title to the premises prior or subsequent to the effective date of the Regulation, which in this jurisdiction was November 1, 1942. If prior to such date, Section 6(a) (6), of said Regulation, is to be followed and the final decision as to whether the landlord seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself, rests with the local courts and not with the Office of Price Administration. Bumgarner v. Orton, Cal.Super.1944, 146 P.2d 67, is such a case. If, as in the case at bar, the acquisition was subsequent to November 1, 1942, Section 6(b) (2) of said Regulation applies, which, so far as material here, is as follows: "(2) Occupancy by purchaser. Removal or eviction of a tenant of the vendor, for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after the effective date of regulation * * * [November 1, 1942] * * * is inconsistent with the purposes of the Act and this regulation and would be likely to result in the circumvention or evasion thereof, unless (i) the payment or payments of principal made by the purchaser, excluding any payments made from funds borrowed for the purpose of making such principal payments, aggregate 20% or more of the purchase price, and (ii) a period of three months has elapsed after the issuance of a certificate by the Administrator as hereinafter provided. * * * If the Administrator finds that the required payments of principal have been made, he shall, on petition of either the vendor or purchaser, issue a certificate authorizing the vendor or purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law at the expiration of three months after the date of issuance of such certificate."

The trial court, having found that plaintiffs became the owners of the property after November 1, 1942, and that they had complied with all of the requirements of the said Section 6(b) (2), and with the laws of the State of California concerning notice, correctly ordered possession of the premises to be restored to plaintiffs. In offering the defense evidence relating to the questions of the plaintiffs' good faith and the family status of defendants, the latter were, in effect, seeking to have the trial court review, or act as a court of appeal from the action of the Administrator in applying the Regulation to the facts in this case. The court was without jurisdiction to so do, and the proffered evidence was properly rejected.

The said Rent Regulation makes no provision for such a review. The first sentence of Section 6(b) provides as follows: "No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law." The effect of this provision is that no tenant shall be removed, with exceptions not here material, unless the Administrator has certified that the landlord may pursue his remedies in accordance with the requirements of the local law. Such certification having been made in our case, the prohibition contained in Section 6(b) no longer applies, and the tenant may be evicted under local law procedure. The Regulation reserves to the Area Rent Director the quasi judicial power of passing upon the sufficiency of the landlord's application, and no court is authorized to review, reverse or modify the decision of such Director on this subject, excepting those specifically designated by Section 204(d) of the Emergency Price Control Act. The Congress has there provided that, with the exception of review in the Emergency Court of Appeals, and the Supreme Court of the United States, "* * * no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule." The words, "such regulation, order, or price schedule" in this provision, refer to regulations and orders issued under Section 2 of the Act.

The constitutional validity of the said Section 204(d) has been upheld by the Supreme Court of the United States, in Lockerty v. Phillips, 1943, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1338, and by the United States Circuit Court of Appeals, in Rottenburg v. United States, 1 Cir., 1943, 137 F.2d 850. See also Miller v. Municipal Court, 1943, 22 Cal.2d 818, 142 P.2d 297. In Rottenburg v. United States, supra, it was held that the above section precluded the United States District Court from considering defenses based on the alleged invalidity of the regulation. This was a case wherein the defendants were being prosecuted for violating the Act, and a regulation made thereunder, by making sales at prices in excess of those prescribed by the applicable price regulation. Evidence by way of defense for the purpose of showing that such regulation was arbitrary, capricious and failed to provide a fair and equitable margin of profit was held to be inadmissible, as being irrelevant and immaterial to the issues properly before the court.

If the Municipal Court of the City of Long Beach had accepted defendants' proffered evidence, it would, by so doing, have assumed the prerogative of reviewing the facts on which the Administrator issued his certificate. It would have been required "to consider the validity" of such order. Jurisdiction to do this having been withdrawn by a valid act of Congress, the trial court properly rejected such evidence.

The judgment is affirmed, respondents to recover their costs of appeal.

SHAW, P. J., and FOX, J., concur.

23 Cal.2d 754

TOMAIER v. TOMAIER.

L. A. No. 18606.

Supreme Court of California.

March 2, 1944.

1. Appeal and error ⇐1097(1)

The dicta do not become the "law of the case".

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Appeal and error ⇐1099(3)

Where issue raised on first appeal was merely whether trial court could divide as community property land acquired through deeds purporting to create a joint tenancy, in absence of evidence of any intention to make it community property, and District Court of Appeal stated that trial court had no power to divide property held in joint tenancy as though it were in fact community property, it was not the "law of the case" that evidence could not be admitted to show that it was intended that the land remain community property despite form of the deeds.

3. Evidence ⇐426

Evidence may be admitted to establish that realty is community property, even though title has been acquired under deed executed in form that ordinarily creates in the grantee a common-law estate with incidents unlike those under the law of community property.

4. Evidence ⇐426

Land may be shown to be community property even though it is granted to one spouse alone as his or her property in fee simple.

5. Evidence ⇐426, 461(4)

Evidence may be admitted to establish that husband and wife intended to take property as community property even though they accepted deed drawn to them as tenants in common or as joint tenants.

6. Husband and wife ⇐249, 266

Property may be converted into community property at any time by oral agreement between the spouses, and an agreement at the time the property is acquired has the same effect.

7. Husband and wife ⇐249
Joint tenancy ⇐1

Where evidence establishes that property is held as community property, it cannot also be held in joint tenancy.

8. Husband and wife ⇐256

The rule that the use of community funds to purchase property and the taking of title thereto in name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property is controlling only in absence of any evidence of an intent to the contrary.

9. Divorce ⇐249(1)

In divorce proceeding, whether property is joint estate or community property, court has power to divide the property equally.

10. Husband and wife ⇐246

In divorce action, evidence that property in Missouri as well as in California was purchased with community funds with intention that it remain part of community was admissible, since rights of California spouses are protected when community funds are invested in land in another state.

11. Husband and wife ⇐246

Property rights of a spouse are not lost simply because property is transported into another state and exchanged there for other property.

12. Husband and wife ⇐246

The separate property of a nonresident husband and wife invested in California land remains separate property.

13. Husband and wife ⇐246

Rights of California spouses are protected when community funds are invested in land in another state.

14. Divorce ⇐254

A California court having jurisdiction over parties to divorce action could require them to execute conveyances to foreign land to insure complete determination of controversy before court.

15. Appeal and error ⇐205

In divorce action where trial court stated that it would not receive evidence that any of property was community property, a specific offer of proof was not necessary and on appeal it could be claimed that it was error to exclude such evidence.

16. Divorce ⇐253

In divorce action, pleadings which stated that property was community property, but that it was held in joint tenancy, presented issue as to whether property acquired under deeds purporting to create a joint tenancy was community property. Code Civ.Proc. § 452; Civ.Code, § 146.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Charles Tomaier against Mildred Tomaier for divorce and for division of community property. From portion of judgment decreeing that certain property was not community property but was jointly owned by plaintiff and defendant as joint tenants, plaintiff appeals.

Reversed.

Prior opinion, 137 P.2d 26.

Alfred Siemon, of Bakersfield, for appellant.

Edward M. Selby, of Los Angeles, for respondent.

TRAYNOR, Justice.

Early in 1940 plaintiff Charles Tomaier brought suit against defendant Mildred Tomaier, seeking a divorce and an appropriate division of the community property. The complaint listed as community property real estate in Mojave, California, and in Kansas City, Missouri, stating that this land was "held in joint tenancy." Plaintiff was granted the divorce on the ground of extreme cruelty. See Civ.Code, sec. 146. The court found that all of this property was community property and awarded a substantial part of it to plaintiff. The District Court of Appeal reversed that part of the judgment, dividing the property as community property. Tomaier v. Tomaier, 50 Cal.App.2d 516, 123 P.2d 548. On the retrial plaintiff sought to introduce evidence that the California property was acquired with community funds with the intention that it was to remain part of the community. The trial court, excluded this evidence declaring that it would accept no evidence that any of the property was community property, and judgment was rendered holding that the property belonged to plaintiff and defendant as joint tenants. Plaintiff appeals, contending that he should have been permitted to prove that the property was community property even though the deeds named plaintiff and defendant as joint tenants.

[1, 2] Defendant, however, contends that the inadmissibility of such evidence was determined on the first appeal, and that this ruling became the law of the case. The opinion in that case, however, stated that "there is no evidence in the record * * * that the property should be held other than in joint tenancy. * * *" Tomaier v. Tomaier, supra, 50 Cal.App.2d page 519, 123 P.2d page 549. The issue raised on that appeal, therefore, was merely whether the trial court could divide as community property land acquired through deeds purporting to create a joint tenancy, in the absence of evidence of any intention to make it community property. The statement by the court that "the trial court had no power to divide the property held in joint tenancy as though it were in fact community property" is relevant to the determination of this issue, as is the portion of the opinion immediately following, containing a quotation from Siberell v. Siberell, 214 Cal. 767, 773, 7 P.2d 1003, to the effect that the use of community funds to purchase a joint estate is the equivalent of an agreement that such funds pass from the community. Since there was no evidence concerning the intention with which the deed was executed, such language should not be construed as covering the uses that may be made of such evidence. Moreover, if such language were so broadly construed it would extend far beyond the issues before the court, and it is well settled that dicta do not become the law of the case. Millsap v. Balfour, 158 Cal. 711, 714, 112 P. 450, and cases cited; Wixson v. Devine, 80 Cal. 385, 22 P. 224; Mulford v. Estudillo, 32 Cal. 131; Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332; see Cowell v. Snyder, 171 Cal. 291, 298, 165 P. 920. It is not, therefore, the law of the case that evidence may not be admitted to show that it was intended that the land in question remain community property despite the form of the deeds.

[3, 4] It is the general rule that evidence may be admitted to establish that real property is community property, even though title has been acquired under a deed executed in a form that ordinarily creates in the grantee a common law estate with incidents unlike those under the law of community property. Thus land may be shown to be community property even though it is granted to one spouse alone as

his or her property in fee simple. Jaegel v. Johnson, 148 Cal. 695, 84 P. 175; Hammond v. McCollough, 159 Cal. 639, 115 P. 216; Hibernia Sav. & Loan Soc. v. DeRyana, 210 Cal. 532, 292 P. 632; In re Estate of Cronvall, 220 Cal. 503, 31 P.2d 372.

[5] Again, it may be shown that husband and wife intended to take property as community property even though they accepted a deed drawn to them as tenants in common. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Steere v. Barnet, 54 Cal. App. 589, 202 P. 166. It has in fact been held unequivocally that evidence is admissible to show that husband and wife who took property as joint tenants actually intended it to be community property. Hulse v. Lawson, 212 Cal. 614, 299 P. 525; Jansen v. Jansen, 127 Cal.App. 294, 15 P.2d 777; see Minnich v. Minnich, 127 Cal.App. 1, 8, 15 P.2d 804; Horsman v. Maden, 48 Cal.App.2d 635, 640, 120 P.2d 92. Such rulings are designed to prevent the use of common law forms of conveyance to alter the community character of real property contrary to the intention of the parties.

[6, 7] Moreover, it is well settled that property may be converted into community property at any time by oral agreement between the spouses (Kenney v. Kenney, 220 Cal. 134, 30 P.2d 398; In re Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1; Title Insurance, etc., Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214), and an agreement at the time the property is acquired has the same effect. If the evidence establishes that the property is held as community property, however, it cannot also be held in joint tenancy, for certain incidents of the latter would be inconsistent with incidents of community property.

Defendant contends that Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003, establishes that such evidence is inadmissible. In that case property was purchased with community funds and taken in the name of husband and wife as joint tenants. This transaction took place in 1913, and in 1918 the property was granted by the husband to the wife alone. It was contended that the 1913 joint-tenancy deed passed a one-half interest in the property to the wife as her separate property and a one-half interest to the husband as community property, thus entitling the wife to three-fourths of the property. The court rejected this contention, stating that the property could not at once be a joint estate and community property, and that the shares of joint tenants are necessarily equal. It was also contended that the 1918 deed made the entire property the wife's separate property. In response to that argument, the court declared: "The court found that the deed of January 19, 1918, was not made by the defendant with the purpose or intent that the community character of said property should be changed so as to make it the separate property of the plaintiff. It is not disputed that the property was acquired with community funds, and the testimony of the defendant with reference to the circumstances under which the deed of 1918 was executed is sufficient evidence to support the finding that the property was community property. * * * In any state of the case the court had the power to divide the property equally." 214 Cal. 774, 775, 7 P.2d 1006.

[8, 9] The finding of the trial court that the property was community property following the execution of the 1918 deed was thus affirmed. The statement that "The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property * * *." should be understood as stating the applicable rule, only "in the absence of any evidence of an intent to the contrary." Delanoy v. Delanoy, 216 Cal. 23, 26, 13 P.2d 513, 514. In its holding, as distinguished from its language, the Siberell case established only that whether such property is a joint estate or community property the trial court in a divorce proceeding has the power to divide the property equally. In re Kessler, 217 Cal. 32, 17 P.2d 117, was likewise a case where there was no evidence that the property was taken by the spouses as joint tenants with the intention that it remain community property. The case of Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, 907, establishes only that the wife's "hidden intention not disclosed to the other party at the time of the execution of the [instrument]" is not admissible to prove that the parties intended that the property remain community property.

[10-13] The plaintiff should have been permitted to introduce evidence that the property in Missouri, as well as in California, was purchased with community funds

with the intention that it remain part of the community. Property rights are not lost simply because property is transported into another state and exchanged there for other property. See In re Thornton's Estate, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1347; Rest. Conflict of Laws, sec. 260; Goodrich, Conflict of Laws [2d ed.] p. 325. The separate property of a nonresident husband or wife invested in California land remains separate property (In re Estate of Drishaus, 199 Cal. 369, 249 P. 515; In re Estate of Arms, 186 Cal. 554, 199 P. 1053; In re Estate of Frees, 187 Cal. 150, 201 P. 112; Kraemer v. Kraemer, 52 Cal. 302; In re Estate of Niccolls, 164 Cal. 368, 129 P. 278; In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343); conversely, the rights of California spouses are protected when community funds are invested in land in another state. Thus in Depas v. Mayo, 11 Mo. 314, 49 Am.Dec. 88, a husband who took community funds from Louisiana and invested them in Missouri land, taking title in his own name, was compelled to hold the title in trust to protect the wife's interest. Since Missouri would protect the respective interests of a husband and wife if community funds were invested in Missouri land without the wife's consent, it would certainly protect such interests when the Missouri property is acquired pursuant to an agreement between the parties that the property retain its community character.

[14, 15] Defendant contends that California courts lack jurisdiction to render a decree affecting title to land in Missouri. It is well settled, however, that a California court having jurisdiction over the parties can require them to execute conveyances to foreign land to insure a complete determination of the controversy before the court. Title Ins. & Tr. Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542; Promis v. Duke, 208 Cal. 420, 428, 281 P. 613; Tully v. Bailey, 46 Cal.App.2d 195, 115 P.2d 542; see Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65, 23 L.R.A.,N.S., 924, 17 Ann.Cas. 853. Defendant contends further that plaintiff made no appropriate offer of proof that this property was community property. The trial court, however, declared that it would not admit evidence with regard to any of the property involved in the litigation. When the trial court states that it will not receive evidence, a specific offer of proof is not necessary and would be idle under the circumstances, and it therefore may be claimed that it was error to exclude such evidence. Caminetti v. Manierre, 23 Cal.2d 94, 100, 142 P.2d 741.

[16] Defendant contends that the pleadings are insufficient to raise the foregoing issues. The pleadings state not only that this property is community property, but also that it is "held in joint tenancy." They could hardly describe any situation but one where property was acquired under joint tenancy deeds with the intention that it be community property, and they were so understood by the parties and the court. See Code Civ.Proc. sec. 452; Gallagher v. California Pac. T. & T. Co., 13 Cal.App. 2d 482, 485, 57 P.2d 195.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.



CALIFORNIA EMPLOYMENT COMMISSION v. BUTTE COUNTY RICE GROWERS ASS'N.*

Sac. 5530.

Supreme Court of California.

March 2, 1944.

Rehearing Granted April 1, 1944.

1. Statutes ⇐225¾

The interpretation given to a statute by administrative agency entrusted with its administration and authorized to adopt rules to facilitate such administration, followed by amendments to and re-enactments of the statute by Legislature without changing terms used, may be considered in determining meaning of terms intended by Legislature.

2. Statutes ⇐219, 226

In construing meaning of term "agricultural labor" in state Unemployment Insurance Act, significance and weight should be given to federal agencies' definition of term as used in federal Social Security Act, in view of fact that state act was adopted in light of contemplated conform-

* Subsequent opinion 154 P.2d 892.

ity to federal act. Gen.Laws 1937, Act 8780d, § 7; Social Security Act § 907, as amended in 1939, 26 U.S.C.A. Int.Rev. Code, § 1607.

3. Officers ⇐103

An administrative agency may not, under guise of its rule-making power, abridge or enlarge authority or exceed powers given to it by statute, the source of its power.

4. Officers ⇐103

A regulation by an administrative agency must be definitely in excess of scope of authority before it may be declared void.

5. Taxation ⇐37

Rule of California Employment Commission that term "agricultural labor" as used in state Unemployment Insurance Act includes services performed by employee on a farm, and that such services does not constitute agricultural labor unless performed for owner or tenant of farm, is not void on ground that it is an unreasonable restriction of the term as used in the act. Gen.Laws 1937, Act 8780d, §§ 7(a), 75, 90.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

6. Taxation ⇐219

Services performed by employees of a rice growers' co-operative association in handling rice of its members in warehouse maintained by association constituted "agricultural labor", within meaning of Unemployment Insurance Act exempting agricultural labor from operation of the act, even as limited by rule of California Employment Commission restricting term to include only services performed on farms for owner or tenant of farm, since association was nothing more than an instrumentality of owners and tenants of farms. St.1933, pp. 255, 256, §§ 1193, 1195; Gen. Laws 1937, Act 8780d, §§ 7(a), 75, 90.

7. Taxation ⇐204(2)

An exemption from a tax must be strictly construed against the exemption.

In Bank.

Appeal from Superior Court, Butte County; Harry Dierup, Judge.

Action by the California Employment Commission against Butte County Rice Growers Association to recover unemployment insurance contributions and penalties. From a judgment for defendant, the plaintiff appeals.

Affirmed.

Prior opinion 138 P.2d 347.

Robert W. Kenny and Earl Warren, Attys. Gen., Clarence A. Linn and John J. Dailey, Deputy Attys. Gen., and Forrest M. Hill, Ralph R. Planteen, Miriam E. Wolff, Maurice P. McCaffrey, Glen V. Walls, and Leonard M. Friedman, all of Sacramento, for appellant.

Herbert W. Whitten and Ware & Ware, all of Chico, for respondent.

Rogers & Clark and John H. Painter, all of San Francisco, amici curiae on behalf of respondent.

CARTER, Justice.

The controversy presented by this appeal is whether or not the services performed for defendant by its employees constituted agricultural labor and hence were exempt from the contributions provided for under the California Unemployment Insurance Act. Stats., 1935, p. 1226, as amended, Deering's Gen. Laws, 1937, Act 8780d.

In this action plaintiff, California Employment Commission, authorized to administer the act, was unsuccessful in the trial court in its attempt to recover such contributions with interest and penalties alleged to be due from defendant under the act for a portion of the years 1937 and 1939 and all of 1938, it being determined that the services so performed were exempt from such contributions.

Defendant is a cooperative association incorporated in 1914 under the laws providing for the organization of cooperative agricultural associations, not created to make a profit for themselves or their members as such but only for their members as producers. Civ.Code, secs. 653m-653s, added by Stats. 1909, p. 16; now in Agricultural Code, secs. 1191–1221. Under the above cited provisions, persons who are producers may form such a corporation, Agricultural Code, sec. 1193, and may admit as members only persons engaged in the production of products "to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased prem-

ises." Agricultural Code, sec. 1195. Defendant limited its membership to owners or tenants of a minimum quantity of land in Butte County, and all of its members are producers of agricultural products. Its membership certificates are valued at $300 each, there being 48 outstanding at the time in question. There are 25 applicants for membership who have each paid $10 on account.

Defendant owns and operates a warehouse in which it stores grain and rice for its members, including the applicant members, but not others, except sometimes the assignees of members. It does not process or sell rice, grain or other products. At the beginning of the season it fixes a storage charge and makes rebates at the end thereof if the charge is more than the amount necessary to meet the cost of operation. No rebate is made to the applicant members unless they pay the balance due on their membership. Defendant purchased, usually upon order of its members, and sold to its members, merchandise commonly used in farming but made no profit thereon. It made a few sales of merchandise to one of its employees, not one of its members. It is licensed by the State Department of Agriculture to conduct a general warehouse business and authorized to issue negotiable warehouse receipts, Agricultural Code, Secs. 1231–1258, which are sometimes assigned by the members and the assignee pays the storage charges. The storage rates have been fixed by defendant's directors but not by the Railroad Commission. It did not solicit business from nonmembers or permit the public to use the warehouse. However, by reason of having secured a license as a warehouseman from the Department of Agriculture it assumed the following legal duty:

"Every warehouseman conducting a licensed warehouse shall receive for storage therein, so far as its capacity permits, any product of the kind customarily stored therein by him which may be tendered to him in a suitable condition for warehousing in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities." Agricultural Code, sec. 1242.

Defendant's employees consist of seasonal laborers employed when grain or rice is received or is leaving the warehouse, except for a warehouseman and bookkeeper who are employed annually. Defendant carries Workmen's Compensation Insurance on its employees.

Plaintiff commission contends that under the provisions of section 90 of the California Unemployment Insurance Act it adopted certain rules; that its rule 7.1 defining agricultural labor is valid; that under this rule the service performed by defendant's employees did not constitute agricultural labor; and that in any event they were not such under the statute. Defendant takes the contrary view upon all of those questions.

The Unemployment Insurance Act was adopted in 1935. It provides for the payment of contributions to alleviate conditions of unemployment in industry generally, but exceptions from its operation are provided for therein. Section 7(a) reads in part: "The term 'employment' does not include: (a) Agricultural labor; * * *." No definition of that term is given in the act. Plaintiff, California Unemployment Commission is created by the act, sec. 75, and to it is entrusted the enforcement of the act. It is authorized, and it is its duty, to "adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act." Sec. 90(a). Its first rule, and an amplification thereof defining the term "agricultural labor," were effective in 1935. It generally embraced anyone engaged in the art or service of cultivating the ground, the harvesting, or the packing and preparation for market of products where the commodity does not change its original state. The amplification dealt with horticultural products. A rule effective in January, 1936, also exempted from the operation of the act services performed in the packing and preparation for market by growers and nonprofit cooperative marketing associations, where the commodity did not change its original state, and such services were performed exclusively for members and no profit was made.

There is a clear indication in those rules that it was intended that the term "agricultural labor" should embrace more than employment in the mere cultivation and harvesting of products. Packing and preparation for market were also included when done by a nonprofit association, which may imply that services rendered in connection therewith need not be performed upon the land where the commodities were produced or for the actual producer. In the instant case the storage may have been an

incident of the harvesting, packing and preparation of the products for market. The rule (rule 7.1) effective on February 14, 1937, which was in force during the time here involved, stated that:

"The term 'Agricultural Labor' includes all services performed: (1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising feeding, management of live stock, poultry, and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto; (2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.

"As used herein the term 'farm' includes, among others, stock, dairy, poultry, fruit, and truck farms, plantations, ranches, oranges, orchards and vineyards.

"Forestry and lumbering are not included within the exemption of agricultural labor."

The rule adopted in April, 1940, added nothing material to the above-quoted rule 7.1, insofar as the facts in the instant case are concerned.

Defendant contends that rule 7.1 is void and its adoption constituted a usurpation of power on the part of the commission and an unlawful attempt to bring under the jurisdiction of the commission a large number of agricultural laborers that are excluded from the operation of the act under its express terms. In support of the validity of the rule plaintiff contends that it has been ratified by the Legislature, and under settled rules of statutory construction it must be held that the Legislature has approved the definition of agricultural labor contained therein.

During the first session of the Legislature following the adoption of the act (1937), rule 7.1 became effective. At that session section 7 of the act was twice amended, Stats. 1937, pp. 2052, 2057, but the term "agricultural labor" remained the same as it had theretofore existed without amplification. Likewise, in 1939, section 7 was amended but no definition of what constituted agricultural labor was given. Stats. 1939, ch. 628, p. 2048; ch. 1039, p. 2850. At the 1939 session section 90(b) of the act dealing with the authority of the commission to adopt rules and regulations was amended by adding thereto the sentence: "Rules or regulations heretofore adopted shall continue in effect until amended or rescinded in accordance with the procedure prescribed by this section." Stats. 1939, ch. 1083, p. 3006. Also during the 1939 session of the Legislature, amendments to the Federal Social Security Act dealing with unemployment insurance were being considered and such amendments were adopted by Congress on August 10, 1939; they defined agricultural labor in detail and broadly, the term having theretofore been undefined by Congress. It read in part: "The term 'agricultural labor' includes all service performed—(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife. * * * (4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." 26 U.S.C.A., Int.Rev.Code, § 1607. A bill introduced in the Legislature providing for the adoption of the federal definition of the term, whatever it might be did not pass.

However, the 1939 amendment to section 7 of the California Unemployment Insurance Act did add many of the other amendments made by Congress in 1939. At the extra session of the Legislature in 1940, a resolution directing the commission to adopt the definition given to the term by Congress in 1939 did not pass. In 1941, the Legislature again amended several sections of the act but did not amend section 7. A bill was introduced to amend section 7 so as to define the term practically the same as was done by Congress in 1939, but on recommendation of the committee to which it was assigned, the amendment was stricken. In 1943, the Legislature passed a bill amending section 7, giving the definition of the term used by Congress in the 1939 federal statute; it was vetoed by the Governor.

[1] The interpretation given to the terms of a statute by the administrative agency entrusted with its administration and authorized to adopt rules and regulations to facilitate such administration, followed by amendments to and reenactments of the statute by the Legislature without changing the terms used, is a factor that may be considered in determining the meaning of the terms intended by the Legislature. See Federal C. Comm. v. Columbia Broadcasting System, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87; Helvering v. Hallock, 309 U.S. 106, 60 S.Ct. 444, 84 L.Ed. 604, 125 A.L.R. 1368; McGoldrick v. Gulf Oil Corp., 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840; People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Colonial Mutual Compensation Ins. Co., Ltd., v. Mitchell, 140 Cal. App. 651, 36 P.2d 127; Godward v. Board of Trustees, 94 Cal. App. 160, 270 P. 725; Taft v. Commissioner of Internal Rev., 304 U.S. 351, 58 S.Ct. 891, 82 L.Ed. 1393, 116 A.L.R. 346; 54 Harv. L. Rev. 1311; 27 Cal. L. Rev. 578; Sutherland Statutory Construction, 3d Ed., secs. 5109, 6709. In the instant case the persuasiveness of that rule is somewhat weakened by reason of the relatively short period of time the administrative construction embodied in rule 7.1 had prevailed and the fact that different rules existed prior thereto. Still the rule was in effect during the 1939 and part of the 1937 legislative session and when the Legislature amended section 7 of the act without altering or amplifying the term "agricultural labor." Moreover, a bill failed of passage in 1939 which would have adopted the congressional definition of 1939, and at the same session section 90(b) of the act was amended by adding a sentence expressly recognizing the existing rules and regulations of the commission. There followed as heretofore mentioned, the failure of the resolution at the special session in 1940, and at the regular session in 1941, the failure of a bill to adopt the congressional definition of the term although the act was otherwise amended at that session. In 1943, a bill was passed by the Legislature adopting that definition. It was vetoed, but its passage by the Legislature evinces some indication that it believed such an amendment to section 7 was necessary in order to nullify the existing rule 7.1. It must therefore be concluded that there is persuasive indication from the legislative action and nonaction after rule 7.1 became effective that the Legislature intended to have the term so defined and was satisfied with that definition.

[2] There is an additional indication of the legislative intent as to the scope of the term "agricultural labor." Reference has heretofore been made to the adoption by the federal government of the Social Security Act, which was being considered by Congress in 1935 at the same time that our act was before our Legislature. The federal act dealing with relief of unemployment was passed on August 14, 1935. 42 U.S.C.A. § 1101–1110. That act exempted "agricultural labor" by use of that term alone without definition. 42 U.S.C.A. § 1107; transferred in 1939 to Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code § 1607. Pursuant to authority to adopt rules and regulations, 42 U.S.C.A. § 1108, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury adopted in February, 1936, the following definition of the term which, it may be seen, is substantially the same as plaintiff's rule 7.1: "The term 'agricultural labor' includes all services performed—(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding or management of live stock, bees, and poultry; or (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute 'agricultural labor', however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their

raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations." The state act was adopted in the light of contemplated conformity to the federal act. Because of the inter-relation of the acts, the obligations imposed by them, and the necessity for the adoption of an approved state act in order that benefits under the federal act may be enjoyed, there is a strong justification for the policy that they operate uniformly and harmoniously. See Industrial Commission v. Woodlawn Cemetery Ass'n, 232 Wis. 527, 287 N.W. 750; Woods Bros. Const. Co. v. Iowa U. Compensation Comm., 229 Iowa 1171, 296 N.W. 345; Matcovich v. Anglim, 9 Cir., 134 F.2d 834; Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 60 S.Ct. 279, 84 L.Ed. 322. That policy is evinced by the state act. Section 2, St.1939, p. 1968, provides in part: "This act is enacted as a part of a national plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this act set forth in section 1. Therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited." Hence, some significance and weight should be given to the federal agency's definition in construing the state act. See, also, H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23; Woods Bros. Const. Co. v. Iowa U. Compensation Comm., supra; Industrial Commission v. Woodlawn Cemetery Ass'n, supra; Unemployment Comp. Comm. v. Wachovia Bank & T. Co., 215 N.C. 491, 2 S.E.2d 592.

The cases of Stuart v. Kleck, 9 Cir., 129 F.2d 400, and Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, do not repudiate the treasury definition. They held that in its orthodox sense the services performed where a corporation supplied labor to cultivate the soil and do other things on the land for the owners thereof, constituted agricultural labor within paragraph (a) of the treasury regulation, and that the second sentence in paragraph (b) was not intended to qualify paragraph (a). Indeed they applied the regulation.

[3-5] It cannot be said that the definition of agricultural labor stated in rule 7.1 of the California Employment Commission heretofore quoted is unreasonable and beyond the power of the commission granted by the act. It is true that "an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power." California Drive-In Restaurant Ass'n, v. Clark, 22 Cal.2d 287, 302, 140 P.2d 657, 665, 147 A.L.R. 1028. Nevertheless a regulation must be definitely in excess of the scope of authority before it may be declared void. There are several factors pertinent in considering whether that authority was exceeded. As we have seen there is a clear indication that the definition was that intended by the Legislature, the United States Treasury regulation is the same, the endeavor to adopt a different definition, or the 1939 congressional definition, was unsuccessful, and the term itself is uncertain and does not have an unequivocal and positive meaning. In line with Stuart v. Kleck, supra, and Chester C. Fosgate Co. v. United States, supra (see, also, California Employment Comm. v. Bowden, 52 Cal.App.2d Supp. 841, 126 P.2d 972), under the first paragraph of the rule the services may be agricultural labor where the employees are not employed by the owner or tenant of a farm when, however, the services performed are of the character which are clearly acts of farming. When it comes to packing, processing, transporting and storing in a warehouse off the farm we find activities which are in many respects a part of farming operations, and it may be that they are also frequently commercial enterprises. It is not unreasonable to limit such services to those performed by employees of an owner or tenant of the farm on which the products are produced, hence, tying those activities to the farm.

[6] Applying rule 7.1 to the facts in the instant case, it clearly appears that the services performed by defendant's employees constituted agricultural labor as therein defined. True, the employees were not engaged by the farmers or tenants in per-

son, but the activities engaged in by defendant were concerned either with storage of the products of farms owned or operated by its members, or the procurement and handling of merchandise used by its members in farming operations. The corporation, the association, is nothing more than an instrumentality of the owners and tenants of the farms. None but owners or tenants are accepted as members. The corporation is nonprofit and operates for its members thus indicating its noncommercial character and that it is only an instrumentality of the members. This view finds support by implication in the law under which defendant is organized. Section 1213 of the Agricultural Code provides: "* * * any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association." That clause embodies the thought that the association and its members may be treated as one in connection with exemptions in the laws although it refers only to products. Only one instance is shown where a non-member was supplied merchandise. Storage facilities were supplied only to members. The fact that defendant has a license to operate its warehouse and thus has assumed the duty to serve the public is not controlling. More vital is the actual manner in which defendant operates. The services performed are of the character that is common in conducting a farm, and a necessary part thereof, that is, handling and storage of the crops produced and handling and procuring equipment. If a farmer stores his products on his property it would not be doubted that such was a part of his agricultural pursuit. It is not required that such storage be made on his farm. If he or his neighbors form a group to perform the same functions off the farms they are still engaged in agriculture. If it be said that paragraph (1) of rule 7.1 does not embrace the activity here involved because it is not performed on the farm, and that likewise paragraph (2) does not include the activities here involved, then we have an activity which is clearly agricultural in character but which is neither embraced in nor excluded by the rule. However, we believe the storage of materials produced on a farm is included within paragraph (2), and, as we have seen, defendant's employees were in effect the employees of the landowners or tenants, and that the procurement of equipment for use on a farm is a farming activity. There is no commercial aspect to defendant's activity considering the manner in which it is conducted. In arriving at this conclusion we are not disregarding the corporate entity of defendant as that phrase is commonly understood but are merely arriving at a definition of agricultural labor.

The foregoing reasoning finds support in the case of Industrial Commission v. United Fruit Growers, Ass'n, 106 Colo. 223, 103 P.2d 15, 17, where the court said: "Also it is conceded that if an individual farmer member of the association marketed the fruit produced from his orchard, the labor attendant to such marketing operation would enjoy an exempt status under both regulation 6 and statute. The commission contends, however, that a transition from an exempt to a non-exempt position occurs when the association takes over the marketing function, and the labor incident thereto is performed by *its* employees, and not the *farmers*. We cannot agree with this contention. If the labor employed by one individual grower in marketing his crop is within the exception of the statute, as unquestionably is the case, it would seem that if two or more farmers pool their crops and cooperate in marketing them, their situation would not be different from that of the individual grower. It is a matter of common knowledge that all fruit growers do no belong to cooperative associations and that such producers individually, with labor employed by them, attend to their own marketing operations. Thus we can perceive no reason for holding that because a number of fruit farmers cause a cooperative association to be organized for the purpose of facilitating the marketing of their farm products, they should be subject to the terms of a regulatory statute which concededly would not apply to the labor employed by them if acting individually, or by other persons engaged in the same activity who are not members of such an association. * * * The basic conception of an agricultural cooperative association is that of a group of farmers who reside in the same vicinity acting together for their mutual benefit in the cultivating, harvesting and marketing of their agricultural products, and the association itself, with the special powers and

limitations conferred by statute, is merely a convenient instrumentality in the hands of the farmers for carrying on such activities. As is stated in United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 1008, 83 L.Ed. 1446: 'These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock.' In Mountain States Ass'n v. Monroe, 84 Colo. 300, 269 P. 886, we held that the relation between a cooperative marketing association and its members is that existing between a trustee and his beneficiary or a principal and his agent. Under our cooperative marketing law, such associations are given the power 'to act as the agent or representative of any member or members in any of the above mentioned activities' (c. 106, § 19 (c) '35 C.S.A.), which includes 'marketing' (c. 106, § 17, '35 C.S.A.). Section 35 of the Cooperative Marketing Act provides: 'Any provisions of law which are in conflict with this article shall be construed as not applying to the associations herein provided for. Any exemptions whatsoever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its members, in the possession or under the control of the association.' Accordingly, because of the peculiar relationship between the cooperative association and its members, it would seem evident that such of the purely agricultural activities of the producer members as are incidental to his ordinary farming operations remains so whether they are performed by him on his farm or for him through the medium of his cooperative marketing association." The cases of Great Western Mushroom Co. v. Industrial Commission, 103 Colo. 39, 82 P.2d 751; H. Duys & Co. v. Tone, 125 Conn. 300, 5 A.2d 23; Park Floral Co. v. Industrial Commission, 104 Colo. 350, 91 P.2d 492; Christgau v. Woodlawn Cemetery Ass'n, Winona, 208 Minn. 263, 293 N.W. 619; Unemployment Comp. Div., etc., v. Valker's Greenhouses, 70 N.D. 515, 296 N.W. 143; Oak Woods Cemetery Ass'n v. Murphy, 383 Ill. 301, 50 N.E.2d 582, were concerned chiefly with the question of industrial as distinguished from farming activity or that the labor be performed on the farm. Those matters have heretofore been discussed. See St. Louis Rose Co. v. Unemployment Comp. Commission, 348 Mo. 1153, 159 S.W.2d 249. The latter factor is not required by the rule.

These views are not contrary to those expressed in Cowiche Growers v. Bates, 10 Wash.2d 585, 117 P.2d 624. There, although reliance was placed upon North Whittier Heights C. Ass'n v. National Labor Relations Board, 9 Cir., 109 F.2d 76, the state statute required that the services be performed on the farm for the owner or tenant. Also, see Appeal of Wenatchee Beebe Orchard Co., 16 Wash.2d 259, 133 P.2d 283. In North Whittier Heights C. Ass'n v. National Labor Relations Board, supra, the activity had been so large and separate and distinct that it was considered industrial. It would serve no useful purpose to review or attempt to rationalize all of the cases which have considered the definition of agricultural labor as used in unemployment insurance acts or other laws. The situation in each case must be treated alone.

Our attention has just been called to the case of Employment Security Comm. v. Arizona Citrus Growers, Ariz., 144 P. 2d 682, in which case the Supreme Court of Arizona holds that under a rule of the Arizona Employment Security Commission similar to the rule here involved, services rendered by employees of the Arizona Citrus Growers, a corporation organized under the cooperative marketing laws of Arizona in picking, grading, sorting, cleaning, wrapping and boxing fresh citrus fruit for the purpose of preparing the same for market, did not constitute agricultural labor because such services were performed for a separate corporate entity and not for the owner or tenant of the farm on which the crops were grown. While the last cited case has some distinguishing features from the case now before us, we are not disposed, for the reasons above stated, to predicate our conclusion upon the sole factor that the services here involved were performed for a separate corporate entity regardless of the relation of that entity to the farmers who produced the crops in connection with which the services were performed.

[7] Plaintiff invokes the rule that an exemption from a tax must be strictly construed against the exemption. But assuming that rule to be applicable it is of little value, as we believe it is apparent from the foregoing discussion that it would

not alter the conclusion reached. Nor may much help be gleaned from the purported reasons for the exemption of agricultural labor, such as the administrative difficulties in applying the act to farmers, the seasonal character of the labor and the like. The act must be taken as written and to apply the various supposed reasons for the exemption would lead only to confusion.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.



LUND et al. v. PACIFIC ELECTRIC RY CO. et al.*
Civ. 14090.

District Court of Appeal, Second District, Division 3, California.

March 9, 1944.

Hearing Granted May 8, 1944.

1. Railroads ⇐312(10), 327(13)
Street railroads ⇐90(3), 99(10)

Whether motormen of electric interurban cars and drivers of automobiles approaching tracks on which such cars operate are subject to stop, look and listen rule applicable in steam railroad cases or to rules respecting operation of street cars defends principally on character of particular district through which cars travel and whether tracks are laid on thoroughfare adapted to general traffic uses or on private right of way designed and used exclusively for railway purposes.

2. Railroads ⇐351(2)

In action against electric interurban railway company for death of one riding in automobile struck by defendant's electric car at boulevard crossing of defendant's private right of way, separated from adjoining parallel roadways, evidence warranted instruction applying to conduct of motorman and automobile driver the stop, look and listen rule of steam railroad cases, rather than rules respecting operation of street cars.

3. Street railroads ⇐113(2)

Cars and trains, operated by electric interurban railway company on its private right of way crossing city boulevard at which one of such cars struck automobile, were not "street cars" within city ordinance regulating speed of such cars in city, but interurban electric railway trains, so that such ordinance was properly excluded from evidence in action against company for death of passenger in such automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Street Car".

4. Railroads ⇐350(11), 351(10)

In action against electric interurban railway company for death of passenger in automobile struck by defendant's electric car at boulevard crossing of defendant's tracks in city, court properly instructed jury that it was lawful for defendant to operate its cars at any speed it saw fit, consistent with ordinary care, and that it was for jury to determine whether given rate of speed was negligence under all surrounding circumstances, as city ordinance regulating speed of street cars was inapplicable.

5. Railroads ⇐320

The motorman of interurban electric railway car had right to assume, until there was reason to believe contrary, that driver of automobile, approaching electric railway company's tracks at boulevard crossing in city, would drive with ordinary care.

6. Railroads ⇐351(16)

In action against interurban electric railway company for death of passenger in automobile struck by defendant's car at boulevard crossing of defendant's private right of way in city, instructions that automobile driver's failure to stop, look and listen or heed warnings of car's approach would constitute negligence and that evidence that he looked or listened, but did not see what was plainly visible or audible, would show that he was negligently inattentive, were correct and properly given so far as they went.

7. Appeal and error ⇐1067
Negligence ⇐141(12)

In action against interurban electric railway company for death of passenger in

* Subsequent opinion 153 P.2d 705.

automobile struck by defendant's car at boulevard crossing of defendant's private right of way in city, trial court should have given plaintiff's requested instruction that if both automobile driver and defendant were negligent and their combined negligence was sole proximate cause of accident, jury should not compare negligence of one of them with that of the other and should return verdict for plaintiff, but failure to give it was not error warranting reversal of judgment on jury's verdict for defendant.

8. Negligence ⇐141(11)

In action against railway or street railway company by minor children of driver of automobile, struck by defendant's train or street car, for resulting death of plaintiff's mother riding in automobile, instructions to jury should make it clear that driver's negligence may not be imputed to plaintiffs or that plaintiffs are entitled to recover if concurrent negligence of automobile driver and operator of street car or train is found to be proximate cause of accident.

9. Trial ⇐295(1)

In deciding whether there is reason to believe that jury's verdict was reached because of confusion as to determinative issues in case, appellate court must consider trial court's instructions as whole and undisputed evidence in case.

10. Railroads ⇐350(33)

In action against electric interurban railway company for death of passenger in automobile struck by defendant's car at boulevard crossing of defendant's private right of way in city, evidence was insufficient to take to jury question whether motorman had last clear chance to avoid accident.

11. Railroads ⇐338

The "last clear chance" doctrine applies to collisions between railroad trains and automobiles at railway and highway crossings only under unusual circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

12. Appeal and error ⇐1064(1)

In action against interurban electric railway company for death of passenger in automobile struck by defendant's car at boulevard crossing of defendant's private right of way in city, instructions to find for plaintiffs, if defendants were guilty of negligence which was proximate cause of accident or, combined with automobile driver's negligence, one of proximate causes thereof, and that plaintiffs could not recover if accident was caused solely by automobile driver's negligence, were not so inadequate as to give appellate court reason to believe that jury was confused as to governing rules of law in reaching verdict for defendant, in view of evidence warranting such verdict.

13. Appeal and error ⇐201(2)

A complaint of trial judge's misconduct in making improper remarks in jury's presence cannot be raised for first time on appeal from judgment on jury's verdict.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Jeannene Joy Lund and another, minors, against the Pacific Electric Railway Company and others for the death of plaintiff's mother as the result of a collision between an automobile and named defendant's electric car. From a judgment for named defendant, plaintiffs appeal.

Affirmed.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

SHINN, Justice.

Plaintiffs are the minor children of Elmer J. Lund and Florence Boyd Lund; they brought the present action against Pacific Electric Railway Company to recover damages for the death of their mother, who was riding with her husband, father of plaintiffs, in an automobile which was struck by an electric car of the defendant as it was crossing defendant's tracks located on a private right of way at the intersection of Redondo Boulevard, in the City of Los Angeles. Redondo Boulevard extends north and south and is a paved street 50 feet wide, except where it intersects defendant's right of way, which extends east and west, at which point the boulevard is 80 feet wide. Defendant's private right of way is 50 feet wide and runs between two parallel roadways on either side, which are known as San Vicente Boulevard. The railway line

is a double track road. The right of way is used exclusively for railway purposes and is separated from the adjoining roadways, as shown upon a photograph of the location hereinafter appearing. There are, therefore, six entries into the intersection, two on Redondo Boulevard and four on San Vicente. At each of these was a boulevard stop sign; at the northwest corner of the right of way there was a railroad cross-arm sign and there was an automatic signaling device or wigwag at the southeast corner of the right of way at the intersection. The rails of each set of tracks are 5 feet apart. The distance between the east and west bound tracks is 9 feet. At about noon of a clear day Mr. Lund was driving his car westerly on San Vicente, on that part of San Vicente which lay south of the right of way, and within a few feet of the north curb. He made a boulevard stop at Redondo, then turned to the right or north to cross the tracks. His automobile was struck by an interurban car of defendant traveling west on the north set of tracks. After making the boulevard stop Mr. Lund, according to his testimony, started in low gear, had shifted to high, and was going 8 or 10 miles an hour at the time of the accident. He testified that he looked several times to see if cars were approaching on the tracks, saw none, heard no bell or whistle, that while stopped at the intersection he could not see the wigwag overhead, and that he did not hear the bell of the wigwag, although he was listening for it. There was evidence from which it might have been found that the car was traveling at 30 or 35 miles an hour and that the motorman saw the automobile but did not keep his attention on it exclusively after first seeing it and was looking for traffic that might appear from any direction. He testified that he saw it stop at the boulevard stop, watched it for a couple of seconds, took his eyes off it when the electric car was about 100 feet from the crossing, and did not again see it until it was too late to stop the car.

[1, 2] Of the points urged for reversal, we shall give attention first to the claim that the court erred in giving instructions which made applicable to the conduct of the motorman and the driver of the automobile the stop, look and listen rule of the steam railroad cases, instead of the rules which pertain to the operation of street cars. We are unable to find that the court erred in concluding that the evidence made the steam railroad rule applicable. There is no fixed, all-inclusive rule of law by which it can be determined whether a given electric railway falls in one class or the other. In the case of an electric suburban or interurban line the cars, whether operated singly or in groups of two or more, are subject to one rule or the other, depending principally upon the character of the particular district through which they are traveling, and whether the tracks are laid on a thoroughfare adapted to general traffic uses or upon a private right of way designed and used exclusively for railway purposes. The lines of the Pacific Electric Railway radiate in all directions from the City of Los Angeles to surrounding cities. As they leave their several stations in Los Angeles they are in practical effect street cars and to be operated as such. Each interurban car or group of cars at some point or other becomes in effect a train, a term which may be used to identify them with steam or Diesel operated trains of the steam railroads. In cases such as this the court must determine from the facts of each case whether the conditions at the place of the accident call for the application of one rule or the other. Riney v. Pacific Electric R. Co., 1919, 45 Cal.App. 145, 187 P. 50; New York L. Oil Co. v. United Railroads, 1923, 191 Cal. 96, 215 P. 72; and Cash v. Los Angeles Ry. Corp., 1935, 6 Cal.App.2d 738, 45 P.2d 280, were cases in which the steam railway rules were held to apply under conditions quite similar in their essential features to those of our case, in respects in which the railways involved differed from street car lines. Defendant's private right of way on which the accident occurred extends for long distances easterly and westerly from its intersection with Redondo Boulevard. It is an old line, upon which interurban trains have passed for many years. The conditions that existed at the time and place of the accident are well illustrated by photographs, which were in evidence, one of which we have selected for use in this opinion. It is inscribed "Looking easterly, camera 30 feet south from north track." There was a railway cross-arm warning at the intersection and an automatic signaling device, both of which are common forms of warning at railway intersections. The picture speaks for itself and appears to give a fair representation of the scene. We are satisfied that upon the evidence before it, which included numerous pictures, the trial court did not err in applying to

the conduct of the motorman and Mr. Lund the law of the steam railway cases.

in instructing the jury that it was lawful for defendant to operate its cars at any



[3] Plaintiffs offered in evidence an ordinance of the City of Los Angeles regulating the speed of street cars in the city, which provided in part as follows:

"(a) The operator of any street car shall not drive said street car at a speed exceeding the following: [Here certain speeds were enumerated.]

"(b) The provisions of this section shall not apply when a street car is being operated upon a private right-of-way which is effectively protected from vehicular traffic."

The evidence was excluded upon defendant's objection, and the ruling is assigned as error. Defendant's cars and trains operating on its right of way where the accident occurred were not street cars within the meaning of the ordinance but interurban electric railway trains. Simoneau v. Pacific Electric R. Co., 1911, 159 Cal. 494, 115 P. 320. The ordinance was properly excluded. Since section (b) also applies only to street cars, the question is not presented here whether defendant's right of way at the scene of the accident was effectively protected from vehicular traffic.

[4] It follows from the fact that the ordinance regulating the speed of street cars was inapplicable, that the court did not err

speed it saw fit, consistent with ordinary care, and that it was for the jury to determine whether a given rate of speed was a negligent one and that the answer depended upon all of the surrounding circumstances.

[5-8] The jury were instructed fully as to the duties of Mr. Lund in approaching the railway tracks and as to the right of the motorman to assume, until he had reason to believe to the contrary, that Mr. Lund would proceed in the exercise of due care. It was also stated that the failure of Mr. Lund to stop, look and listen or to heed the warnings of the approach of a car or train would constitute negligence upon his part and that if it appeared that he looked and did not see what was in plain sight, or if he listened and did not hear what was plainly to be heard, there would be an irreconcilable conflict, or the evidence would have shown that Mr. Lund was negligently inattentive. The determinative issue in the case was whether Mr. Lund's negligence was the sole proximate cause of the accident. The motorman had a right to assume, until there was reason for him to believe the contrary, that Mr. Lund would drive his car with ordinary care, and it was proper to instruct the jury as to

what would constitute ordinary care upon his part. These instructions stated the law correctly, as far as they went, and it was not improper to give them. But plaintiffs contend that the only purpose for which evidence tending to show Mr. Lund's negligence could be considered was to aid in determining whether the motorman was negligent (Krupp v. Los Angeles Ry. Corp., 1943, 57 Cal.App.2d 695, 135 P.2d 424), and that the court erred in failing to give an instruction that evidence of Mr. Lund's negligence was received for that limited purpose. Plaintiffs also contend that the court erred in failing to instruct the jury that the negligence of Mr. Lund could not be imputed to them. No such instructions were given. Plaintiffs did not request specific instructions stating the foregoing principles, but they did request an instruction, which the court refused to give, that if Mr. Lund was negligent and the railway company was also negligent, and if their combined negligence was the sole proximate cause of the accident, the jury were not to compare the negligence of one with that of the other and should return a verdict for plaintiffs. This instruction should have been given, for reasons stated in Krupp v. Los Angeles Ry. Corp., supra, and Renowden v. Pacific Electric R. Co., 1925, 73 Cal. App. 383, 238 P. 785, but we are of the opinion that the failure to give it was not reversible error. In the Krupp and Renowden cases the plaintiffs were guests of the drivers of the respective automobiles involved in the collisions; here the plaintiffs were the children of the driver. In such cases the instructions should make it clear that the negligence of the driver is not to be imputed to the plaintiffs or, in other words, that the plaintiffs are entitled to recover if concurrent negligence of the driver of the automobile and the operator of the street car or train are found to be proximate causes of the accident. We are in agreement with the holding in the Krupp and Renowden cases, where it was held that the failure to give such instructions tended to confuse the jury as to the purposes for which evidence of the driver's negligence was received and as to the effect of such negligence upon the ultimate outcome of the case. We do not believe that the holding of the court in Ackerman v. Griggs, 1930, 109 Cal.App. 365, 293 P. 115, relied upon by respondent, is in conflict with what was said in the Krupp and Renowden cases. In that case it was held to have been unnecessary for the court to instruct in an automobile collision case that the negligence of plaintiff's father, with whom she was riding, could not be imputed to plaintiff. The stop, look and listen rule was not involved, as it was in the Renowden case, where the emphasis placed upon that rule was held to necessitate a further instruction negating the application of the imputed negligence rule, and in the Ackerman case there was no instruction as to the "mutual fault and negligence of the defendant and of the plaintiffs" such as that given in the Krupp case [57 Cal.App.2d 695, 135 P.2d 425]. There were additional reasons in the Ackerman case why the failure to give the instruction on imputed negligence would not have confused the jury. It appears from the briefs in that case that the jury were instructed in a formula instruction that the verdict must be for plaintiff if it was shown by a preponderance of the evidence that defendants were negligent and that their negligence was a proximate cause of the accident. Furthermore, the evidence was such as to indicate that the verdict was not the result of confusion on the part of the jury, for the court said (109 Cal.App. at page 367, 293 P. at page 116): "It must be conceded that the evidence unmistakably supports the jury's verdict for the defendants, and that the sole and proximate cause of the accident was the negligent and reckless driving of plaintiff's father. Under such circumstances the judgment must be affirmed, unless the errors assigned are found to be prejudicial."

[9] We would direct a reversal in the present case if we believed it to be probable that the jury were confused as to the determinative issues in the case. In deciding whether there is reason to believe that the verdict was reached on account of confusion on the part of the jury, we must consider the instructions as a whole and also the undisputed evidence in the case. The jury were instructed that if they found defendant to have been guilty of negligence and "that such act of negligence was the proximate cause of the accident or that such act of negligence combined with negligence on the part of Mr. Lund was one of the proximate causes of the accident" and that plaintiffs' mother received injuries in the accident which resulted in her death, plaintiffs would be entitled to a verdict against defendant. This instruction was poorly phrased but its meaning would seem to be clear. The jury were further in-

structed that if they found that the accident was caused solely by the negligence of Mr. Lund, plaintiffs could not recover, and this latter instruction was repeated. These instructions were not the equivalent of instructions to the effect that Mr. Lund's negligence could not be imputed to the plaintiffs and that plaintiffs could recover if the jury found that the concurrent negligence of Mr. Lund and defendant were proximate causes of the accident. The instructions should have been more complete but the question is whether they were inadequate to such a degree as to enable us to say that there is reason to believe that the jury were confused as to the governing rules of law and that the verdict might have been different had the instructions covered the case more adequately. These questions cannot be answered from the instructions alone and in entire disregard of the evidence in the case, especially the evidence tending to show negligence on the part of defendant. That is to say, the conclusion that the jury were probably misled by the instructions would be reached more readily in a case where there was persuasive evidence of the defendant's negligence than in a case where there was but slight evidence of such negligence. The instant case differs materially in its facts from the Krupp and Renowden cases. In the former case there was evidence from which it could have been reasonably found that the automobile was standing still on or very close to the street car tracks when the street car was a quarter of a block away and that the street car could have been stopped in time to avoid the accident, although there was evidence to the contrary. In the Renowden case the automobile in which plaintiff was riding was struck by an electric train which was backing up across an intersection at a speed of about 20 miles an hour. If the evidence tending to show negligence on the part of the motorman in the instant case had been as strong or anywhere near as strong as it was in the Krupp and Renowden cases, we would be persuaded that the failure of the court to state more exactly and clearly the plaintiffs' right to recover for the concurrent negligence of Mr. Lund and the railway company had probably led to confusion on the part of the jury and had resulted in a miscarriage of justice.

We are thus brought to an examination of the evidence in the case in order that we may determine whether there was prejudicial error in the giving or refusal of instructions. We must bear in mind that the court did not misstate the law in any particular nor omit entirely the statement of any pertinent principle of law. The question is: can we say that the jury were confused by the instructions or that it is reasonable to suppose that under more complete instructions the verdict would have been in plaintiffs' favor.

[10, 11] We have mentioned the fact that Mr. Lund testified that he heard no bell or whistle and did not notice the wigwag and that he looked in both directions along the tracks several times and saw no cars approaching. It should be noted also that he did not suddenly come upon the tracks unaware of their presence, for he had been driving for some distance on San Vicente parallel to the tracks, which were not only in plain sight but conspicuously located, with a fence separating defendant's right of way from the street. There was at most but slight evidence of negligence upon the part of the motorman, consisting as it did of the fact that Mr. Lund and another witness testified that they heard no whistle or bell and that the electric car was traveling between 30 and 35 miles an hour. While this is not an unusual speed for electric trains traveling on a private right of way, and the statements that the witnesses did not hear a whistle or bell is purely negative evidence, we are not inquiring as to its legal sufficiency to support a finding of negligence in plaintiffs' favor if such had been made. Unquestionably the jury must have believed that Mr. Lund was paying but slight attention to his surroundings in either listening or looking for danger, for he scarcely could have looked toward the east with any care at all without seeing the approaching car or listened without hearing the noise that such cars make when they are traveling at anything like a speed of 30 miles an hour. In Ellerman v. Pacific Elec. R. Co., 1935, 7 Cal.App.2d 385, 47 P.2d 521, an interurban electric car traveling at a rate estimated variously at between 30 and 50 miles an hour struck an automobile which was traveling across a railway grade crossing at about 30 miles an hour. The court affirmed a directed verdict in favor of defendant. After pointing out that the motorman had a right to assume that the automobile driver would slow down or stop as he approached the tracks and that no duty devolved upon the motorman to slow down or stop his train

until, in the exercise of ordinary care, he observed that the automobile was not being stopped to let the street car go by, the court said (7 Cal.App.2d at page 388, 47 P.2d at page 522): "If there is any negligence in the case attributable to the motorman, then every interurban train approaching a grade crossing has to be kept under the same control as an automobile; and if an automobile happens to be approaching at a good clip, the motorman must not proceed to cross until he is satisfied the driver of the automobile will not attempt to 'beat him to it.' We do not think this is the law." But plaintiffs earnestly insist that they were entitled to recover under the doctrine of last clear chance. They requested instructions which stated that doctrine and the court declined to give them. This ruling is assigned as error and we shall review the evidence briefly in the light of that contention. This was not one of the common collisions which occur at points where highways cross railway tracks. Here there were six entries to the intersection, two for vehicles going west on San Vicente, two for those going east, and two for vehicles approaching on Redondo Boulevard. The motorman admitted having seen Mr. Lund as he stopped at the Redondo intersection before turning across the tracks and to having watched him for a brief time before looking toward other points from which vehicles might have been approaching. He testified that he did not observe the Lund car in a position of danger until it was too late to bring his car to a stop, and that he then immediately applied the brakes. It must be granted that Mr. Lund was unaware of his danger until the car was upon him, but that fact would not have been known to one who was watching the Lund car until it was seen to be traveling the short distance that took it from a position of safety into one of danger. We are aware of no case in California in which the doctrine of last clear chance has been held to apply to a collision between a motor vehicle and a steam or interurban electric railway under facts resembling those we have related. All of the cases cited by plaintiffs are distinguishable upon the facts. An essential element of the last clear chance doctrine which is entirely missing is evidence from which it could be reasonably determined that any appreciable time elapsed while Mr. Lund was traveling from a position of safety just short of the tracks to the point of the accident. The evidence was that there were marks of the collision in the middle of the west bound tracks. From this point it was only 16½ feet to the southerly rail of the east bound tracks, or approximately one and a half times the length of a medium sized automobile. At their respective speeds the automobile could have been stopped almost instantly, but not the train. The car, with brakes set, shoved the automobile 132 feet before coming to a stop. The automobile was a two-door, four-passenger car and it was struck on the door on the right-hand side. We do not see how it could be said that when Mr. Lund drove slowly around the corner and approached the tracks, where he would be expected to look for cars while still in a position of safety, it would have been apparent to the motorman that he was in a position of danger and unaware of it, until he had advanced onto the tracks. The evidence would not have supported a finding by the jury that the motorman would have had the last clear chance to avoid the accident even if he had been watching the automobile at the very instant when it started across the tracks. If the undisputed facts of the instant case justified the application of the doctrine of last clear chance, it would be difficult to imagine a case of a collision between a train and an automobile at a railway intersection where the doctrine could not be invoked. The law is that it applies to such accidents only under unusual circumstances. The clear and thorough discussion of the doctrine in Johnson v. Sacramento Northern Ry., 1942, 54 Cal.App.2d 528, 129 P.2d 503, is a complete answer to appellants' contention on the point.

[12] We find no reason to believe that the jury acted under any misapprehension as to the principles of law by which they were to be guided in arriving at their verdict, but upon the contrary, it appears to us that they reached a proper verdict upon the evidence in the case. As we have said, the jury were not misdirected and we are unable to believe that they were confused or that they were not sufficiently advised as to the law by the instructions that were given.

[13] Plaintiffs cite numerous remarks of the trial judge in the presence of the jury which they contend constituted misconduct warranting a reversal of the judgment. We have considered the conduct of which plaintiffs complain and find it unnecessary to discuss it in detail. The record shows that the judge talked freely and at times out of turn, but his remarks were not such

as have heretofore been regarded as misconduct and we cannot conceive that the case of plaintiffs was prejudiced by anything which the judge said or did.

Furthermore, no objection or exception was noted at the trial and the complaint of alleged misconduct cannot be raised for the first time on appeal. Karwoski v. Grant, 1938, 30 Cal.App.2d 171, 178, 85 P. 2d 944.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



63 Cal.App.2d 452

LAY v. PACIFIC PERFORATING CO., Limited, et al.

Civ. No. 3121.

District Court of Appeal, Fourth District, California.

March 23, 1944.

Appeal and error ⇐480

Where on petition for writ of supersedeas pending appeal judgment was stayed conditioned on giving of sufficient bond which was done and judgment appealed from was subsequently and finally decided adversely to appellant, the question presented under the writ was "moot," and petition would be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Petition to Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Willetta Lay against the Pacific Perforating Company, Limited, and R. L. Guerin, wherein the plaintiff recovered judgment. The defendants filed a petition for writ of supersedeas, pursuant to which a stay was granted, and judgment for plaintiff was subsequently affirmed, 144 P.2d 395.

Petition dismissed.

Sidney A. Moss, of Los Angeles, for appellants.

Claflin & Chain, of Bakersfield, for respondent.

GRIFFIN, Justice.

A petition for writ of supersedeas was filed by defendants and appellants pending the appeal in the above-entitled case. An order to show cause was issued and pending the hearing thereof all proceedings on the judgment were stayed conditioned that defendants file a sufficient bond in the sum of $6,828. Such a bond was filed. The appeal from the judgment was decided adversely to defendants. Lay v. Pacific Perforating Company, Ltd., Cal.App., 144 P.2d 395. A hearing was subsequently denied by the Supreme Court. That judgment has become final. The question presented under the writ has become moot.

Petition dismissed.

BARNARD, P. J., and MARKS, J., concur.



63 Cal.App.2d 504

VAGIM v. BROWN.

Civ. No. 3117.

District Court of Appeal, Fourth District, California.

March 27, 1944.

1. Names ⇐10

Where plaintiff, V., was an individual and the sole owner of and doing business under the name and style of V. Packing Company, the name was not fictitious and plaintiff was not required to file certificate in order to maintain action. Civ.Code, §§ 2466–2468.

2. Sales ⇐52(5)

In buyer's action for breach of contract to deliver raisins, evidence supported finding that defense that there was an illegal transaction in connection with contract in that raisins were to be purchased in violation of California Proration Act was untrue. St.1933, p. 1969, as amended.

3. Contracts ⇐141(1)

If an agreement does not provide for method whereby purpose is to be accom-

plished, it must be assumed that if it can be accomplished by a legal method, that such method was contemplated when contract was made and will be pursued.

4. Contracts ⇐141(1)

Where contract can be performed legally, it will not be presumed that parties intended to perform it in an illegal manner.

5. Contracts ⇐102

Where contract can be performed in a legal manner, as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner, where contract manifests no intent of performance in illegal manner, and party complaining does not participate in illegal performance.

6. Contracts ⇐137(1)

Where method providing for carrying into effect the principal purpose of an agreement has been executed and accepted by both parties and the whole contract in itself is valid, it will not be permitted to fall because of any supposed invalidity attached to means adopted.

7. Sales ⇐52(1)

Where contract was merely an agreement for sale of raisins and seller may have had raisins on hand that were legally acquired, there was nothing on face of instrument indicating invalidity of contract, and burden was on seller to establish his defense that buyer suing for failure to deliver knew that raisins with which seller would fulfill contract would be raisins purchased in violation of provisions of California Proration Act. St.1933, p. 1969, as amended.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by James G. Vagim, doing business under the name and style of Vagim Packing Company, against Porter L. Brown, individually, and doing business under the name and style of Empire Packing Company, to recover damages because of defendant's failure to deliver raisins to plaintiff under a written contract. From a judgment for plaintiff, defendant appeals.

Affirmed.

Irvine P. Aten and Richard Aten, both of Fresno, for appellant.

Iener W. Nielsen and Eckhart A. Thompson, both of Fresno, for respondent.

GRIFFIN, Justice.

Plaintiff prosecuted this action against defendant to recover damages because of defendant's failure to deliver raisins to plaintiff under a written contract. Plaintiff recovered judgment, and defendant appealed.

The appeal is based upon two grounds: (1) that plaintiff was doing business under a fictitious name without compliance with the terms of the statute; and (2) that the contract itself was unlawful and void and known by plaintiff to be unlawful at the time the contract was signed by the plaintiff, and for that reason cannot be enforced.

Plaintiff alleged in the complaint that he "was doing business under the name and style of Vagim Packing Company, and was and is now the sole owner of the business, and has heretofore filed with the county clerk * * * his business certificate showing his ownership of said business after due publication thereof as provided by the laws of the State of California."

Defendant in his answer denied that plaintiff had filed the alleged certificate with the county clerk and had complied with the laws in that respect, and asked that the action be abated for that reason.

The trial court found that the allegations in plaintiff's complaint, in this respect, were true except "no business certificate was filed with the county clerk * * * said filing not being required".

In Kohler v. Stephenson, 39 Cal.App. 374, 178 P. 970, the "Kohler Steam Laundry" was owned and managed by a person named Lottie A. Kohler. It was there held that she was the sole owner thereof, that the name was not fictitious, and no certificate was required to be filed.

In Collection Service Corporation v. Conlin, 98 Cal.App. 686, 277 P. 749, the allegation was and the trial court found that Fred L. Alles, an assignor, was "doing business under the registered fictitious name of Alles Printing Company." It was there stated that the designation used was in the eyes of the law fictitious, required the certificate to be published, and that the action could not be maintained for failure to comply with sections 2466–2468, Civil Code. No petition for hearing

by the Supreme Court was asked in either case.

In Wetenhall v. Chas. S. Mabrey Const. Co., 209 Cal. 293, 286 P. 1015, 1016, the Supreme Court held that the name "W. S. Wetenhall Company" was not a fictitious name and no compliance with sections 2466–2468 was required. In it the Conlin case was discussed and for reasons therein stated it was held that the facts of the Conlin case and the Wetenhall case were "essentially different", and were therefore distinguishable. No mention is made of the Kohler case. We are unable to harmonize the decision in the Conlin case with the decision in the Kohler case. We are impelled to adopt the reasoning expressed by the Supreme Court in the Wetenhall case, which appears to us to be applicable in the instant case. After holding that the name "W. S. Wetenhall Company" was not fictitious, it was there said, at page 295 of 209 Cal., at page 1016 of 286 P.:

"If the name 'W. S. Wetenhall Company' is not fictitious, then [plaintiff] does not come within the purview of section 2466 at all, for the reason that he is an individual doing business under the name and style of 'W. S. Wetenhall Company,' and is not a partnership. That portion of section 2466 of the Civil Code reading 'or a designation not showing the names of persons interested as partners in such business,' etc., refers only to partnerships and not to an individual. Or, in other words, if the name used by W. S. Wetenhall is not fictitious and no other person is interested with him in the business, he does not have to comply with said section 2466. This section is not susceptible of any other reasonable interpretation."

[1] The plaintiff in this action, James G. Vagim, was an individual, the sole owner of, and doing business under the name and style of Vagim Packing Company. The name was not fictitious. Plaintiff therefore was not required to file a certificate under sections 2466–2468, Civil Code.

Plaintiff's complaint alleges, generally, that on February 21, 1941, plaintiff and defendant entered into a certain written agreement whereby defendant agreed to sell and plaintiff agreed to buy 190,000 pounds of choice or custom grade raisins, buyer's option, packed in 25 pound fiber boxes at an agreed price of 3¢ per pound to be delivered in February, March, and April, 1941; that plaintiff demanded delivery but defendant refused to deliver said raisins except 38,700 pounds; that plaintiff was therefore required to purchase 134,300 pounds in the open market, and pay therefor 4⅜ cents per pound, to fulfill commitments to the trade made by plaintiff; that by reason of the failure of defendants to comply with the terms of the contract damages were sought in the sum of $1,863.17, representing the difference in price. A copy of the contract was attached to the complaint, signed Vagim Packing Company, by Edw. J. Vagim (Plaintiff's Agent), and Porter L. Brown.

Defendant's answer admits the due execution of the contract but in connection therewith alleges that "said agreement was unlawful and void * * * for the reason that said contract called for the delivery of 1940 crop raisins, which raisins, under the California Proration Act, St. 1933, p. 1969, as amended, and the basic and seasonal programs relative thereto for the year 1940, require that said raisins so contracted for be purchased and marketed in accordance with the rules and regulations of said seasonal program as directed by the Secretary of Agriculture of the State of California; that plaintiff knew, at the time of the making of the agreement, * * * that these defendants were not conforming to said program and that the raisins with which the defendant would fulfill said alleged contract would be raisins purchased out of said program and prorate act and in violation of the provisions thereof." It is also claimed therein that 95,700 pounds of raisins at 3 cents per pound had been delivered to plaintiff, and that the balance of raisins to be delivered to the plaintiff were of a certain crop and that said raisins were attached by the government agency, Raisin Proration Zone No. 1, and W. B. Parker, Director of Agriculture of the State of California, in the enforcement of said Prorate Act and seasonal program and have been held under attachment since January 2, 1941, and defendant has been unable to deliver said raisins or any raisins by reason of said governmental interference in said attachment. The other allegations of the complaint are denied generally.

The trial court found in substance that the allegations of plaintiff's complaint were true except that defendant delivered 55,700 pounds of raisins to plaintiff instead of

the amount alleged; that plaintiff was required to purchase 134,300 pounds in the open market at a cost of 3 cents a pound and had to expend $15 per ton in processing them to fulfill commitments to plaintiff's trade, and that $1,007.25 damages were due plaintiff for failure of defendant to comply with the terms of the contract. The trial court then specifically found all of the allegations of defendant's answer to be untrue and gave judgment accordingly.

Defendant contends that the uncontradicted evidence shows that the contract was unlawful and void. The evidence on this subject, produced by plaintiff, shows that prior to June 17, 1941, and during that year "free tonnage was the only thing packers purchased * * * prorate took possession of the balance" and that "we bought and paid for 100 per cent of the raisins and assumed title to the raisins, which were stored with the prorate"; that in June, 1941, the pool was closed and plaintiff entered into a deal to secure additional raisins. Defendant testified that he had had trouble buying raisins; that Vagim had formerly purchased from a Mr. Kovacevich his crop of raisins and had taken delivery on part of it and "the prorate stopped the delivery on a hundred per cent basis"; that on February 10, 1941, Vagim's attorney called the defendant to come to his office in reference to it; that an agreement was worked out with Vagim whereby Brown was to purchase those raisins including the part that was in Vagim's packing house, and subsequently deliver them to Vagim, either as "packed or as stemmed picks"; that defendant paid Kovacevich for them; that they were not handled through the prorate; that he never operated under the 1940 prorate program; that he was in litigation against its enforcement during the entire period; that Vagim knew he was operating outside of the program; that he packed a certain amount of raisins in packages under Vagim's brand; that when delivery of one carload was ready plaintiff's son opened several cases of them and rejected the car lot; that all of "our raisins had been attached and we advised them [Vagims] that they were attached, and that we couldn't pack them on account of the fact that they were attached * * * about the middle of May, 1941"; that "he was in jeopardy"; that in order to get his money for the carload of raisins plaintiff insisted defendant make a "secondary deal" which resulted in defendant making an agreement in respect to the sale of the carload lot whereby Vagim was to sell it for the benefit of defendant to an agent in Chicago; that on February 21, 1941, the written agreement in evidence was executed which superseded and canceled a former contract dated May 14, 1940; that plaintiff paid defendant for the carload lot and also had made payments on deliveries made under the other agreement. On rebuttal Ed Vagim testified that the carload lot was rejected because it was below standard; that Brown admitted that fact; that plaintiff did not know that the carload lot was a part of the Kovacevich raisins; that the sale of that lot was only an accommodation to Brown and not a part of any delivery under the written agreement; that he saw Brown only once and that was regarding his failure to make delivery on the "unshipped balance against his contract". Plaintiff James G. Vagim did not testify at the trial.

It is apparent from the contract in evidence that the agreement on the part of the defendant to sell to the plaintiff did not mention any particular raisins that defendant was to sell to plaintiff and did not refer to the Kovacevich raisins or that transaction in any manner. It was merely an agreement to sell 190,000 pounds of "choice or custom grade Thompson seedless raisins (buyer's option) at 3¢ per pound". The defendant may have had raisins on hand that were lawfully and legally acquired.

[2, 3] There is nothing on the face of the contract to support defendant's contention that the contract itself was illegal or void. His affirmative defense that there was some illegal transaction in connection with the contract that caused it to become void was found to be untrue by the trial court. In view of the evidence, the trial court had the right to disregard or disbelieve the defendant's testimony in this respect. Whitechat v. Guyette, 19 Cal.2d 428, 434, 435, 122 P.2d 47; Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 503, 55 P.2d 870. If an agreement does not provide for a method whereby its purpose is to be accomplished, it must be assumed, if it can be accomplished by any legal method, that such method was contemplated when the contract was made, and will be pursued. Burne v. Lee, 156 Cal. 221, 104 P. 438.

[4-7] It is the universal rule that where a contract can be performed legally it will not be presumed that the parties intended to perform it in an illegal manner (Fites v. Marsh, 171 Cal. 487, 153 P. 926), and where a contract can be performed in a legal manner, as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner. Teachout v. Bogy, 175 Cal. 481, 166 P. 319. This last principle stated is applied where the contract manifests no intent or purpose that it is to be performed in an illegal manner and where also the party complaining does not participate in, or cooperate with the illegal performance. If the method providing for carrying into effect the principal purpose of an agreement has been executed and accepted by both parties, and the whole contract in itself is valid, it will not be permitted to fall because of any supposed invalidity attached to the means adopted. In re Estate of Yoell, 164 Cal. 540, 129 P. 999. Since nothing appears on the face of the instrument itself indicating its invalidity the burden was upon the defendant to establish his defense. George J. Birkel Co. v. Howze, 12 Cal.App. 645, 108 P. 145. Having failed in this respect, the trial court's determination may not be disturbed on appeal.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



63 Cal.App.2d 453

LARREY et al. v. SELLERS.

Civ. 3122.

District Court of Appeal, Fourth District, California.

March 23, 1944.

1. Compromise and settlement ⇐11

Where landlord failed to build dairy barn as required by lease, which also required tenants to produce certain amount of butterfat annually, and parties executed compromise agreement providing that, to compensate for failure to build barn, in determining amount of butterfat produced, 4 per cent. increase should be allowed over amount sold, plus 600 gallons of milk per month for domestic consumption, feeding of calves, etc., in addition to the 600 gallons of milk per month allowance there should be calculated 4 per cent. of the 600 gallons per month.

2. Appeal and error ⇐1008(3)

A trial court's construction of written agreements which appeared to be reasonable and in accordance with intent of parties could not be disturbed on appeal.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by Pedro Larrey and another against Grove M. Sellers on a note and a dairy lease contract. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Chester R. Andrews, of Fresno, for appellant.

Thomas F. Lopez and Lawrence W. Young, both of Fresno, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action against defendant setting forth in one count an action on a promissory note in the sum of $1582.83. The second count arose out of a dairy deal between the parties. The defendant leased to plaintiffs certain land in Fresno for the purpose of conducting a dairy thereon. The term of the lease was three years and provided, in substance, that the defendant was, on or before May 1, 1940, to build a grade "A" barn on the land for 30 cows and was to furnish, among other things, necessary feed for the cattle. Plaintiffs guaranteed that each cow would produce 300 pounds of butterfat per year per 1000 pounds live weight and that they would milk and care for the cows. The defendant was to receive as rental for the land, feed and other things furnished, one-half of the gross receipts from the sale of the milk and butterfat from plaintiffs' cows. The butterfat was to be averaged at the expiration of each twelve month period and in the event the cows should fail to average 300 pounds of butterfat per 1000 pounds live weight per cow the difference was to be computed at the average price received for the butterfat throughout the preceding twelve-month period, and plaintiffs were to reimburse the defendant for one-half of the

deficiency. In the event the butterfat average exceeded 300 pounds per year per 1000 pounds live weight per cow, the defendant was to receive 40% and the plaintiffs 60% of the gross amount received from the sale of all butterfat in excess of 300 pounds per year per cow.

The defendant failed to construct the barn called for in the agreement. In 1942, because of the failure of the defendant to construct the barn, differences arose between the parties. They later entered into another written agreement determining their rights and terminating the previous agreement. In negotiating the last contract the defendant was represented by an attorney of his own choosing. It reads in part as follows:

"2. That in determining the amount of butterfat produced on said premises from May 1st, 1940 (the beginning of the period of said lease) to June 30th, 1942, a four per cent (4%) increase of butterfat is to be allowed over the amount actually delivered and sold, plus 600 gallons of milk a month hereinafter mentioned to compensate lessees for the failure of lessor to build a feed barn as provided in said lease.

"3. The figures to be used in determining the amount of butterfat produced are to be the figures of the creameries to which the milk and butterfat were sold, plus 600 gallons of milk per month which is an allowance for milk used for domestic consumption, feeding of calves, etc."

It was stipulated at the trial as to the amount of butterfat that was actually produced from May 1, 1940, to June 30, 1942, and also as to the average price per pound received. Based upon the statistics submitted and agreed upon between the parties, a certified public accountant concluded that there was due to plaintiff, under their agreement, $574.42. A written copy of his report was received in evidence. From the stipulations and the evidence, the problem resolved itself into a mathematical calculation to determine what plaintiffs were to receive on account of their second cause of action. The court found, in substance, that plaintiffs should recover from defendant on their first cause of action the sum of $1582.83 principal and $113.14 interest. On the second cause of action it found that defendant owed plaintiffs $559.87, upon which defendant was entitled to a credit of $372.81, which left a balance due plaintiffs thereon in the sum of $187.06.

[1] Defendant stated that there was no dispute as to the amount due on the note except he believed he was entitled to a certain claimed offset. The trial court allowed him most of the claimed offset, on plaintiffs' second cause of action, which was proper. The lower court properly construed the contracts to mean that, in addition to the 600 gallons of milk per month allowance made to the plaintiffs for domestic consumption, feeding of calves, etc., there should be calculated 4 per cent of the 600 gallons per month.

The defendant contends that the trial court violated the plain language of the contracts in so doing and that the compromise agreement can only mean that the 4 per cent increase of butterfat and the 600 gallons of milk per month are figures to be substituted for actual production, under which actual production the parties would have received from the creameries an equal division of proceeds from such increase and that the compensation to the plaintiffs consists of the relief given them under the new agreement in spite of their failure to live up to their guaranty.

[2] It appears from the certified public accountant's report that in computing the amount due under the two agreements, he took into consideration "two distinct adjustments" regarding the failure to construct a barn. He allowed: "1. An adjustment between the 50-50 and 40-60 basis of revenues which would have been received in excess of guaranteed production; and 2, an adjustment by lessor for one-half of the 4 per cent allowance to lessees due to the fact that lessees would have realized such amount from sale of butterfat if actually produced and would, at the same time, have been developing the excess production benefits allowed by the original contract." This was demonstrated by statistics set forth in the report. The court has placed the same construction on the agreements, which construction appears to be reasonable, in accordance with the intent of the parties, and therefore cannot be disturbed on appeal. McNeny v. Touchstone, 7 Cal.2d 429, 435, 60 P.2d 986.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

63 Cal.App.2d 324

SCHAEFER v. LENAHAN et al.

Civ. 12579.

District Court of Appeal, First District, Division 1, California.

March 18, 1944.

Hearing Denied May 11, 1944.

1. Municipal corporations ⇐808(4)

Owner or occupant of premises abutting on a public street is under no common-law duty to keep the sidewalk in repair and, in absence of statute, he is not liable for injuries sustained by travelers as result of defects in sidewalk not caused by owner or occupant.

2. Municipal corporations ⇐757(1)

City has the primary duty to keep sidewalks in repair.

3. Municipal corporations ⇐808(4)

Statute making it the duty of abutting property owner to maintain sidewalks in safe condition and providing that repairs not made by owner upon notice shall be made by city and cost thereof assessed against owner merely provides statutory method to collect cost of repairs from property owner, and imposes on abutting owner a duty owed to city to keep sidewalks in repair but does not impose liability on owner, either to travelers or to city, for injuries incurred by reason of defective sidewalk. St.1935, p. 2148, § 31.

4. Highways ⇐86
Municipal corporations ⇐665

Streets and public highways are public property, and no private individual possesses any exclusive right to occupy, use, or control any portion thereof by reason of ownership or occupancy of adjacent premises.

5. Municipal corporations ⇐808(1)

Clear language is required to impose by statute a wholly new duty on abutting property owner in favor of third persons traveling on public streets.

6. Municipal corporations ⇐808(4)

Owner of property abutting on public street was not liable for injuries sustained by traveler as result of defects in sidewalk fronting his premises, though owner had been notified to repair sidewalk and had failed to do so. St.1935, p. 2148, § 31.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Action by Florence Schaefer against J. W. Lenahan and others to recover for injuries allegedly sustained by plaintiff when she fell as the result of stepping into a hole in sidewalk abutting real property owned by named defendant. Named defendant's demurrer was sustained without leave to amend, and, from the judgment entered in his favor, plaintiff appeals.

Judgment affirmed.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Hadsell, Sweet, Ingalls & Carroll, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action to recover damages for injuries alleged to have been received by her when she fell as a result of stepping into a hole in the sidewalk abutting the real property owned, at the time of the accident, by J. W. Lenahan. She named as defendants the City and County of San Francisco, E. J., Mary J. and Thomas J. Burns, the former owners of the property, and J. W. Lenahan. The latter's demurrer was sustained without leave to amend. From the judgment entered in favor of Lenahan, the plaintiff appeals.

So far as pertinent here, the complaint alleges that on and prior to September 27, 1937, the date of the accident, the City and County of San Francisco negligently permitted a defective and dangerous condition to exist in the sidewalk in front of the premises owned on that date by Lenahan, and that the superintendent of streets of the City and County of San Francisco duly notified Lenahan to repair the sidewalk; that Lenahan failed and refused to repair the sidewalk after receipt of said notice. There is no allegation that Lenahan caused the defect in the sidewalk.

The sole question presented on this appeal is whether or not the owner of premises abutting on a public street is liable to travelers for injuries occurring on the sidewalk fronting the premises, where such injuries are caused by defects in the sidewalk of which the owner has notice.

[1] The general rule is that, in the absence of statute, there is no common law

duty resting upon the owner or occupant of premises abutting on a public street to keep the sidewalk in repair. Consequently, in the absence of statute, it is well settled that such an abutting owner or occupant is not liable to travelers injured as a result of defects in the sidewalk, which defects were not created by the owner or occupant. Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; Bolles v. Hilton & Paley, Inc., 119 Cal.App. 126, 6 P.2d 335; Black v. Southern Pac. Co., 124 Cal.App. 321, 12 P.2d 981.

Appellant concedes that the occupant or owner of such premises owes no such duty to persons using the sidewalk, in the absence of statute. It is her contention, however, that a 1935 amendment to the Improvement Act of 1911, Stats. of 1911, p. 730, creates a statutory duty to repair on the part of the owner, and that violation of such duty gives rise to a cause of action against such owner in favor of travelers injured on such sidewalks. The amendment in question is to § 31 of the Improvement Act of 1911, Stats. of 1935, p. 2148. So far as pertinent here, it provides: "It shall be the duty of the owners of lots or portions of lots fronting on any portion of a public street * * * to maintain any sidewalk * * * in such condition that the same shall not endanger persons or property and to maintain the same in a condition which will not interfere with the public convenience in the use of said works or areas * * * When any portion of such sidewalk * * * shall be out of repair or pending reconstruction and in condition to endanger persons or property or in condition to interfere with the public convenience in the use of such sidewalk * * * it shall be the duty of the superintendent of streets to notify the owner or person in possession of the property fronting on that portion of such sidewalk * * * so out of repair, to repair the same."

The section goes on to provide that the superintendent of streets shall prepare a notice to repair which will be mailed to the property owner and a copy thereof posted on the premises. If within three days after notice is given, the property owner does not make the required repairs, the superintendent shall do so. After the superintendent makes the repairs, he shall prepare a notice of cost of repairs which is given in the same manner as the notice to repair. This notice specifies the day, hour, and place when the legislative body of such city will hear and pass upon a report by the superintendent of streets of the cost of such repairs, together with any objections or protests, if any, which may be raised by the property owner. The legislative body hears the report and makes any revision or modification it considers just. Thus the statute sets up a procedure whereby property owners may be assessed for the cost of repairs.

[2, 3] It is the theory of appellant that this statute not only imposes a duty upon the property owner to pay for repairs, but also creates a duty in favor of travelers on the sidewalk, and makes the property owner liable to such travelers for injuries received because of the defective condition of the sidewalk. This interpretation of the statute is not sound. The primary duty to keep sidewalks in repair is on the city. The statute above quoted merely provides a statutory method by which the city may collect the cost of repairs from the property owner. The statute creates a duty on the part of the property owner to keep the sidewalks in repair—but that duty is owed to the city, not to the traveler on the sidewalk. The extent of the liability created is to pay for the repairs, not to pay damages to an individual, nor to reimburse the city if it is compelled to pay such damages.

Statutes similar to the one here involved have been passed by many states. In interpreting such statutes, the overwhelming weight of authority is to the effect that a statute which requires abutting owners to maintain and repair sidewalks adjoining their premises, such work to be done by the municipality at the expense of the abutting owners in case of their failure to construct or repair, does not impose liability upon such owners, either to travelers or to the city, for injuries incurred by reason of the defective sidewalk. Russell v. Sincoe Realty Co., 293 Mo. 428, 240 S.W. 147; Dixon v. Missouri Pac. Ry. Co., 104 Kan. 404, 179 P. 548; City of Ashland v. Vansant Kitchen Lumber Co., 213 Ky. 518, 281 S.W. 503; McCarthy v. Adams, 42 Ohio App. 455, 182 N.E. 324; City of Rochester v. Campbell, 123 N.Y. 405, 25 N.E. 937, 10 L.R.A. 393, 20 Am.St.Rep. 760; City of Keokuk v. Ind. Dist. of Keokuk, 53 Iowa 352, 5 N.W. 503, 36 Am.Rep. 226; Webster v. Chesapeake & O. Ry. Co., Ky., 105 S.W. 945; Betz v. Limongi, 46

La.Ann. 1113, 15 So. 385, 49 Am.St.Rep. 344; Rupp v. Burgess, 70 N.J.L. 7, 56 A. 166; Toutloff v. City of Green Bay, 91 Wis. 490, 65 N.W. 168; Cooper v. Village of Waterloo, 88 Wis. 433, 60 N.W. 714; Breen v. Johnson Bros. Drug Co., 297 Mo. 176, 248 S.W. 970; McEvoy v. City of New York, 266 App.Div. 445, 42 N.Y.S.2d 746; Abar v. Ramsey Motor Service, 195 Minn. 597, 263 N.W. 917; McGurk v. City of Shreveport, La.App., 191 So. 553; Henrichs v. New Orleans Public Service, La. App., 192 So. 383; City of Birmingham v. Wood, 240 Ala. 138, 197 So. 885; Willoughby v. City of New Haven, 123 Conn. 446, 197 A. 85; Ouelette v. Miller, 134 Me. 162, 183 A. 341; see, also, Eustace v. Jahns, 38 Cal. 3; Martinovich v. Wooley, 128 Cal. 141, 60 P. 760; see annotations 41 A.L.R. 212; 93 A.L.R. 799.

Many of these cases involved statutes as broad or broader than the one here involved. The following cases are typical: The New York Court of Appeals' decision in City of Rochester v. Campbell, supra, is frequently referred to as a leading case on the subject. The facts in that case are quite similar to those in the instant case, the only difference being that in the Campbell case the plaintiff had recovered from the city, and the city was seeking to recoup its loss from the defendant property owner. The city ordinance provided that "it shall in all cases be the duty of the owner of every lot or piece of land in said city to keep the sidewalks adjoining his lot or piece of land in good repair, and also to remove and clear away all snow and ice or other obstruction from such sidewalk." It was further provided that "the superintendent of streets shall have the power to repair any sidewalk, when the owner of the property shall neglect to repair the same for five days after written notice so to do has been served on him;" and "the street superintendent shall also have the power to collect the expense of any such work or repair from the owner of the property." 25 N.E. page 937. The plaintiff stepped in a hole in the sidewalk and was injured.

The court held (25 N.E. page 939): "There is nothing in this statute showing that the duty of repairs was imposed upon the lot-owners for the benefit of the public generally, or any particular class of individuals. On the contrary it is quite obvious that neither the public nor individuals needed its benefits. They were already sufficiently secured in the right to have passable and safe highways, through the obligations of the charter requiring them to be furnished by the municipality, and abundant indemnity was provided for any damages that might be sustained from defective streets through the common-law liability of the corporation therefor. * * * The statute clearly points out the liability which is incurred by the lot-owners for a neglect to make repairs, and gives the street superintendent an action to recover the damages suffered by the municipality from such cause. This, evidently, affords a full indemnity to the city for any neglect of the lot-owners, and ample means to discharge its duty to make repairs. It seems entirely unreasonable to suppose that the act was intended to impose the same duty upon two independent bodies. The obligation of the municipality to make such repairs is unconditional and unquestioned. It is not only charged with the duty of keeping the streets in repair, and regulating the uses and purposes to which they may be devoted, but it has the power to permit temporary obstructions and erections to be made in them, and to make excavations, authorize disruptions, and grant permanent appropriation of rights under the streets to individuals and corporations desiring to occupy them for public purposes. It cannot be supposed that the legislature intended to impose an absolute duty to repair upon an individual who could not exercise it except under the control of another."

In Dixon v. Missouri Pac. Ry. Co., supra, a city ordinance of Kiowa, Kansas, was construed. It provided, in part: "That when any sidewalk heretofore built in this city, or hereafter to be built, whether in pursuance of an ordinance of the city or not, shall become sufficiently out of repair to be dangerous to pedestrians, the same shall be immediately repaired by the owner of the adjacent and abutting property * * *." 179 P. page 549. The ordinance then provides that the city is empowered to make repairs if the owner does not do so. The court held that the property owner incurred no liability to individuals injured on a defective sidewalk. The reasons given were that no such penalty was attached to the statute, and that the majority rule was against liability.

Russell v. Sincoe Realty Co., supra, presents the Missouri point of view. A Kansas City ordinance provided: "It shall be

the duty of all persons owning or occupying any real property fronting upon any street to keep the sidewalk, curbing and guttering in front and alongside of said property and on the same side of the street in good repair and order, and to clean the same, and remove from any such sidewalk, curbing and guttering all ice, snow, earth or other substance that in any wise obstructs or renders the same dangerous, inconvenient or annoying to any person." 240 S.W. page 147. The court held that the statute created no liability to an individual injured, saying 240 S.W. page 149: "While the city may compel a citizen to remove snow and ice and make a sidewalk safe, he obeys the requirements as an instrument of the city, not as his primary duty. His failure to do it would be the failure of the city."

There are a few cases which establish a contrary rule. Pennsylvania, contrary to the common law rule in force in this state, holds that, regardless of statute, the primary duty to keep sidewalks in repair rests upon the owner or occupant. Consequently, the property owner or occupant is liable to travelers injured because of failure to repair, and if such injured traveler recovers from the city, the property owner or occupant is liable to the city. Vinnacombe v. City of Philadelphia, 297 Pa. 564, 147 A. 826; Mintzer v. Hogg, 192 Pa. 137, 43 A. 465; Borough of Brookville v. Arthurs, 152 Pa. 334, 25 A. 551; City of Philadelphia v. Reading Co., 295 Pa. 183, 145 A. 65; City of Philadelphia v. Merchant & Evans Co., 296 Pa. 126, 145 A. 706; Bruder v. City of Philadelphia, 302 Pa. 378, 153 A. 725; Clifford v. City of Philadelphia, 104 Pa.Super. 338, 159 A. 232.

Some states have statutes expressly making the owner or occupant liable to travelers for injuries occasioned by reason of the defective condition of sidewalks. Under such statutes, of course, abutting owners are liable to travelers for injuries caused by failure to repair. In these cases, however, the statutes not only impose the duty to repair, but expressly provide that such duty is owed to travelers on the sidewalk. Madden v. Delaware, L. & W. R. Co., D.C. 234 F. 731, affirmed in 2 Cir., 241 F. 808; City of Detroit v. Chaffee, 70 Mich. 80, 37 N.W. 882; City of Lincoln v. Janesch, 63 Neb. 707, 89 N.W. 280, 56 L. R.A. 762, 93 Am.St.Rep. 478; Willis v. Parker, 225 N.Y. 159, 121 N.E. 810; Morton v. Smith, 48 Wis. 265, 4 N.W. 330, 33 Am.Rep. 811; Henker v. City of Fond du Lac, 71 Wis. 616, 38 N.W. 187; Devine v. City of Fond du Lac, 113 Wis. 61, 88 N.W. 913.

[4] There is no case directly in point in California. In Martinovich v. Wooley, 128 Cal. 141, 60 P. 760, the statute expressly imposed a liability against the owner and in favor of travelers if the owner failed to repair after being given notice to repair. It was held that where no notice had been given, liability did not exist. In Eustace v. Jahns, 38 Cal. 3, the same problem was considered at some length. In that case it was held that no liability attached to the property owner under a statute expressly providing for such liability in favor of travelers on the sidewalk, in the absence of notice. At page 19 the court stated: "These streets and public highways are public property, opened, constructed, controlled, improved and repaired, for public use and benefit, by the city and county government, and no private individual possesses any exclusive right to occupy, use or control any portion thereof, by reason of his ownership or occupancy of adjacent lots and premises, by virtue of any statute of the State, and we are unable to comprehend by what process of ratiocination the duty to repair a public street or highway is devolved upon an individual from the fact that he is liable to be notified by the Superintendent of Streets to make specific repairs, or owns or occupies a lot liable to be assessed to defray the expenses of repairs, when made by another at the instance of the Superintendent."

[5, 6] Both cases imply that, had notice been given to repair, liability might attach under the statutes there involved. In the instant case notice to the property owner is alleged. But in the two cases cited the statutes expressly provided for liability to travelers on the part of the property owner after notice to repair. The present statute contains no such provision. It was not passed for the purpose of transferring the primary duty to repair sidewalks to the property owners, and to relieve the city of that primary duty and responsibility. The obvious purpose of the statute was to provide a means of reimbursing the city for the cost of the repairs. To impose a wholly new duty upon the property owner in favor of third persons would require clear and unambiguous language. The

present statute, even by implication, creates no such liability. For the many reasons set forth in the cases referred to above it must be held that the complaint herein fails to state a cause of action against respondent Lenahan.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.



63 Cal.App.2d 501

SIMPSON v. WILMER et al.
Civ. No. 12610.

District Court of Appeal, First District, Division 2, California.
March 27, 1944.

1. New trial ⇐76(1)

Trial court may, when there is a conflict of evidence upon issue of damages, grant a motion for a new trial on ground that verdict is excessive, even if it does not appear to the trial court that verdict was given under influence of passion or prejudice.

2. Appeal and error ⇐1004(3)

When a trial court has denied motion for a new trial on ground of excessiveness of verdict, reviewing court, on appeal, may not reverse order or reduce verdict except upon a showing that it is so grossly disproportionate to any reasonable view of evidence as to raise strong presumption that it is based upon prejudice or passion.

3. New trial ⇐76(1)

The 1939 amendment which merely requires that motion for new trial shall be in writing in certain cases does not affect rule that it is within sound discretion of trial court to grant a motion for a new trial on ground of excessive damages, where there is conflict of evidence upon issue of damages. Code Civ.Proc. § 657, as amended by St.1939, p. 2234.

4. New trial ⇐76(4)

Where plaintiff alleged that he sustained a hernia when defendants ejected him from a meeting and evidence was conflicting as to extent of damages, and undisputed evidence showed that cost of repairing hernia would not exceed $300, and plaintiff was in excellent physical condition to undergo operation, trial court did not abuse its discretion in granting a new trial on ground that damages awarded were excessive, where jury returned a verdict for $6,000.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Major Robert Henry Simpson against Brigadier Frank E. Wilmer and others for personal injuries allegedly sustained by plaintiff when defendants ejected him from a meeting. Verdict for plaintiff for $6,000. From an order granting defendant's motion for a new trial, plaintiff appeals.

Affirmed.

Belli & Leahy and Melvin M. Belli, all of San Francisco, for appellant.

Hubbard & Hubbard, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff sought damages for personal injuries which he claimed were sustained when defendants ejected him from a meeting of the Salvation Army on March 19, 1942. Following a trial by jury, judgment in the sum of $6,000 was entered in favor of plaintiff and against defendants. Defendants moved for a new trial and the trial court granted said motion "on the ground that damages allowed by the jury are excessive". Plaintiff appeals from the order granting the new trial.

This action apparently represents but one phase of the general controversy between plaintiff and defendants arising out of the discharge of plaintiff from the Salvation Army in 1940. Plaintiff testified that he had not been gainfully employed since October 1940 but had spent his time in pursuing his claimed rights against the Salvation Army. He further testified that "Continuously and almost as a daily occurrence since that time I have picketed the Salvation Army and its meetings and have displayed in public throughout the City and County of San Francisco various signs and placards concerning the Salvation Army."

Prior to March 19, 1942, plaintiff had been requested by defendants to remain away from the meetings held in the hall from which he was ejected. When he appeared in the meeting hall that evening, he was requested by defendants to leave, but he refused to do so. He was ejected by defendants from the meeting hall at about 7:45 p. m. He immediately went to a saloon where he had left a banner which he had used for the purpose of picketing and thereafter he picketed the meeting until it closed at about 10:30 or 11 p. m.

Plaintiff's testimony was in conflict with that of all other witnesses regarding the manner in which plaintiff was ejected from the hall but it is undisputed that plaintiff was not harmed sufficiently to prevent him from picketing the meeting place for several hours. Plaintiff was not examined by a doctor until two days later and he has not sought or had any treatment at any time for his alleged injuries. There was no testimony concerning any special damages. The testimony offered by plaintiff showed that he had sustained certain bruises, but the only consequential injury claimed was a hernia. The expert testimony was in direct conflict as to whether the hernia was caused by any act of defendants. Plaintiff testified that he had worn a truss since consulting the doctor two days after being ejected and that he had had no pain while wearing the truss. The undisputed evidence showed that the entire cost of repairing the hernia, whatever may have been its cause, would not have exceeded $300 and that plaintiff was in excellent physical condition to undergo the operation.

Plaintiff contends that the order granting the new trial on the ground of excessive damages should be reversed as "there is no evidence nor any basis for the court's ruling that the verdict was a result of jury passion or prejudice." We find no merit in this contention. As above indicated, there was a conflict in the evidence regarding the manner in which plaintiff was ejected and regarding the extent of the injuries which he sustained. Under these circumstances the trial court had a wide discretion in determining whether a new trial should be granted on the ground of excessive damages and we find nothing in the record to indicate that the trial court abused its discretion in granting the motion.

[1, 2] The authorities on the general subject are exhaustively reviewed in Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941, and the rules governing the action of the trial and appellate courts are clearly enunciated. It was there said on page 181 of 12 Cal.2d, on page 944 of 82 P.2d: "These authorities unequivocally hold that it is within the sound discretion of the trial court in ruling upon a motion for a new trial on the ground of excessive damages, to grant the same when there is a substantial conflict in the evidence regarding the extent of the damage." And on page 182 of 12 Cal.2d, on page 944 of 82 P.2d, the court said, "The rule established by the decisions of this court appears to be that a trial court may, when there is a conflict of evidence upon the issue of damages, grant a motion for a new trial on the ground that the verdict is excessive, even if it does not appear to the trial court that the verdict was given under the influence of passion or prejudice, but, when a court has denied a motion for a new trial on the ground of excessiveness of the verdict, on appeal the reviewing court may not reverse the order or reduce the verdict except upon a showing that it is so grossly disproportionate to any reasonable view of the evidence as to raise a strong presumption that it is based upon prejudice or passion."

[3, 4] Plaintiff's only reply to the authorities which are cited by defendants and which are reviewed in Koyer v. McComber, supra, is that said authorities were decided prior to the 1939 amendment to section 657 of the Code of Civil Procedure. Stat.1939, p. 2234. That amendment merely required that the order granting a new trial should be in writing in certain cases and we find nothing in said amendment affecting the applicability of the rules above set forth.

Plaintiff further suggests that if this court does not see fit to reverse the order granting a new trial, this court "should give either an option to remit or order a trial solely on the issue of damages." Assuming, without deciding, that this court has the power to grant such relief on an appeal from an order granting a new trial, we do not believe that it is appropriate to grant such relief under the circumstances presented by the record before us.

The order granting the motion for a new trial is affirmed.

NOURSE, P.J., and STURTEVANT, J., concur.

63 Cal.App.2d 353

KRELING v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14420.

District Court of Appeal, Second District, Division 1, California.

March 21, 1944.

1. Judges ⇐49(2)

A judge is not disqualified to hear case for second time because of expression of opinion by him on question of law at first hearing. Code Civ.Proc. § 170, subd. 5.

2. Judges ⇐49(1)

A trial judge's erroneous rulings against litigant, even when numerous and continuous, form no ground for charge of bias and prejudice disqualifying judge to hear case again, especially when reviewable on appeal. Code Civ.Proc. § 170, subd. 5.

3. Judges ⇐49(2)

A trial judge's conduct and statements, indicating that he has formed opinion regarding legal questions presented in case, do not entitle litigant to change of judge on ground of prejudice disqualifying judge to hear case. Code Civ.Proc. § 170, subd. 5.

4. Judges ⇐49(1)

A trial judge's error in basing his fact findings on inadmissible evidence or erroneous view of law may constitute sufficient ground for reversal of judgment thereon, but will not support charge of judge's disqualification because of bias or prejudice to try case again. Code Civ. Proc. § 170, subd. 5.

5. Prohibition ⇐9

Where there is no substantial conflict in facts on hearing before judge designated by chairman of judicial council to determine question of trial judge's disqualification to try case because of bias and prejudice, question of his disqualification is one of law, and prohibition will lie to restrain him from trying action. Code Civ.Proc. § 170, subd. 5.

6. Prohibition ⇐27

A trial judge's affidavit, disavowing prejudice against party applying for change of judge on such ground, is insufficient to create conflict in evidence rendering conclusion of judge assigned to pass on such question that trial judge was not disqualified conclusive in prohibition proceeding to restrain such judge from trying case, but his state of mind must be determined from what he said or did, not by what he avers his state of mind to be. Code Civ.Proc. § 170, subd. 5.

7. Judges ⇐49(2)

A superior court judge, who stated, in rendering decision sustaining affirmative defense of oral compromise agreement in pending action, that plaintiff was confused, uncertain, and apparently inherently indecisive, and that he tried to repudiate his word, was disqualified to try other pending actions between same parties in such court. Code Civ.Proc. § 170, subd. 5.

8. Judges ⇐49(2)

A trial judge's statements as to credibility and reliability of witness for plaintiff in trial of action amounted merely to opinion concerning such witness' veracity, and hence did not disqualify judge to try other pending actions in same court between same parties on ground of bias and prejudice, which must be against a party to disqualify judge. Code Civ.Proc. § 170, subd. 5.

9. Judges ⇐51(2)

Where trial judge, after granting motion to try several pending actions between same parties in particular order, stated at inception of trial of first case that he could not then determine whether affirmative defense therein would bar all causes of action and hence would hear cases separately, plaintiff's petition for change of judge on ground of prejudice was not filed too late after such trial, though order was made on commencement thereof that all evidence received therein should be deemed received and considered in remaining actions. Code Civ.Proc. § 170.

Proceeding by Mike Kreling for a writ of prohibition, restraining the Superior Court in and for the County of Los Angeles and Myron Westover and Stanley Mosk, Judges thereof, from trying certain actions pending therein. On respondent's demurrer to and motion to strike out certain portions of the petition.

Demurrer overruled, and motion to strike granted in part and denied in part,

with leave to file an answer to the petition.

Leo V. Youngworth, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, and Alfred Gitelsen, all of Los Angeles, for respondents.

WHITE, Justice.

Petitioner seeks by prohibition to restrain the Superior Court in and for the County of Los Angeles, and Honorable Stanley Mosk, a judge thereof, from hearing and trying three certain actions now pending in that court, and in which actions petitioner is named as a party plaintiff or defendant. Petitioner contends that Judge Mosk is disqualified from proceeding with the trial of said actions on the ground that it is "probable that, by reason of bias or prejudice of such * * * judge * * * a fair and impartial trial can not be had before him" (subdivision 5, section 170, Code of Civil Procedure).

The record before us reveals that on March 6, 1942, petitioner herein filed his complaint in action numbered 473943 for damages against Saul Walsh, Ann Walsh, Robert Wooltz and Mildred Wooltz, as defendants. Thereafter on April 15, 1942, the above named defendants commenced an action numbered 618380 against petitioner in the Municipal Court of the City of Los Angeles to recover certain rents allegedly due them. This last numbered action was later transferred to respondent Superior Court and filed therein under number 476334. By stipulation of the parties such action was consolidated with the first above named action numbered 473943.

On or about the month of June, 1943, petitioner herein filed his complaint in action numbered 483841 alleging forcible detainer after unlawful entry by defendants. The defendants in the action filed their answer and also set up an affirmative defense wherein it was alleged that all the parties to the litigation had entered into an oral agreement on the eighth day of January, 1943, and: "That by the terms of said agreement, plaintiff and these defendants did compromise all claims existing on the part of these defendants as against said plaintiff and on the part of said plaintiff as against these defendants, said plaintiff forever releasing, discharging and acquitting these defendants from any obligation or liability unto said plaintiff and these defendants forever releasing, discharging and acquitting said plaintiff from any obligation or liability unto these defendants."

On June 12, 1943, petitioner herein, as plaintiff, filed action numbered 486038 against the above named defendants, grounded on the issue of alleged conversion of personal property. In their answer thereto, defendants again pleaded by way of a special defense the aforesaid oral agreement of mutual compromise of all claims.

The litigation embraced within all of the above mentioned actions arose out of a certain written lease entered into by petitioner herein as lessee and the parties heretofore designated as defendants in certain of the actions above enumerated, and under the terms of which lease, the named defendants demised unto petitioner for the term of ten years and seventeen days, certain real property improved with "a gasoline super service station for the sale of gasoline, fuel motor oils, tires and similarly allied products and commodities", and upon which there was being operated a going business. The total consideration involved in the lease transaction was $75,342.72, payable in certain stipulated installments.

On November 5, 1943, petitioner herein filed in respondent court his "Notice of Motion" to set the above named cases for trial in the following order: (1) Action numbered 483841 for forcible detainer after alleged unlawful entry by defendants; (2) action numbered 486038 for conversion of personal property; (3) action numbered 473943 for fraud. This last named action, as heretofore indicated, was by mutual consent consolidated for trial with action numbered 476334, originally filed in the Municipal Court and transferred to respondent court.

On November 12, 1943, all of the aforesaid actions were duly and regularly assigned for trial to Department 37 of respondent court, before Honorable Stanley Mosk, judge, presiding therein. Upon the calling of said actions for trial, Judge Mosk granted the motion of petitioner that the causes be tried in the order requested in petitioner's aforesaid "Notice of Motion".

Thereupon, over petitioner's objection, the court granted defendants' motion that all of the testimony received in action

numbered 483841, the first to be tried, might be deemed introduced into evidence in the remaining actions numbered 486038, 473943 and 476334 insofar as such evidence should prove competent and material to the issues raised in the last named actions. Pursuant to the provisions of section 597 of the Code of Civil Procedure, the court directed that in the trial of the first case, numbered 483841, the issues raised by the affirmative defense pleaded by defendants be tried first.

At the conclusion of the trial upon the affirmative defense pleaded by defendants, the court, in action numbered 483841, announced its decision in favor of defendants and against petitioner, and in such decision the court declared: "I am convinced that there was a sufficient and complete agreement reached, a full and complete agreement reached at the Court House on January the 8th by all parties; and it was not for the creation of an interest in realty, but for cancellation of the existing interest; and the cases are clear that they need not be in writing. Further, I am convinced that plaintiff Kreling (petitioner herein) approved the agreement that was reached at the Court House." It is, therefore, at once apparent, argue respondents, that the court's finding in favor of defendants that the oral agreement, which furnished the basis of the defendants' special defenses, decided that by such agreement the parties had effectively and decisively compromised their claims against each other and that such finding was necessarily conclusive not only of the action on trial, numbered 483841, but of the remaining and untried actions numbered 473943, with which action numbered 476334 was consolidated.

Following the rendition of the court's decision, petitioner herein filed his "Petition for Change of Judge" under the provisions of subdivision 5 of section 170, Code of Civil Procedure. In his application for change of judge, petitioner did not, nor does he now, seek to disqualify Judge Mosk from proceeding further in case numbered 483841 in which a decision was announced, but is attempting to prevent said judge from presiding at the trial of the remaining cases which are now pending in his department of respondent court.

Upon the denial of his application to disqualify Judge Mosk by respondent court petitioner sought the writ with which we are here concerned. Upon the return day fixed in the alternative writ issued by us, respondents appeared by demurrer to, and a motion to strike therefrom certain portions of the petition. At the oral argument it was agreed that in the event respondents' demurrer was overruled, and when the motion to strike was determined, respondents should have additional time within which to file an answer to the petition for a writ, should they be so advised.

Petitioner's application for change of judge was primarily based upon claimed bias and prejudice of Judge Mosk by reason of certain statements made by him when rendering his decision upon the aforementioned affirmative defense urged in the trial of case numbered 483841. In answer to the "Petition for Change of Judge", Honorable Stanley Mosk filed his affidavit denying any bias or prejudice. The parties being unable to agree upon a judge to hear and determine the question as to the qualifications of Judge Mosk, the chairman of the Judicial Council appointed and designated Honorable Myron Westover, presiding judge of respondent court, to conduct such hearing. Judge Westover ruled that Judge Mosk was not disqualified and denied the "Petition for Change of Judge." The decision of Judge Westover resulted in the present petition for prohibition, which is based on the theory that Judge Mosk is disqualified, as a matter of law, from presiding at the trial of the aforesaid remaining and untried cases.

[1-4] A very considerable portion of the petition for prohibition herein is based upon the claim that Judge Mosk is disqualified because of erroneous rulings made by him upon the admission and rejection of evidence, and because of claimed errors of law allegedly committed by said judge in deciding the affirmative defense in favor of the defendants and against petitioner. We shall not give consideration to such claims because of our belief that the alleged errors of law, and the ruling of the trial judge on the affirmative defense adverse to petitioner herein, do not constitute sufficient grounds for disqualification of said judge. A judge is not disqualified to again hear a case because of an expression of opinion by him upon a question of law. It has also been held that a judge is not disqualified by a statement of his belief as to the guilt of a

person charged with an offense before him. Evans v. Superior Court, 107 Cal.App. 372, 381, 290 P. 662. Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias and prejudice, especially when they are subject to review on appeal. Petitioner's claim that the conduct and statements of the judge indicate that he had formed an opinion regarding the legal questions which had been presented in the case does not entitle him to a change of judge, for it does not measure up to that prejudice against a litigant which the statute contemplates as a basis for disqualifying a judge. Petitioner's claim that in finding facts Judge Mosk fell into error by basing his conclusions upon inadmissible evidence or upon an erroneous view of the law, while it may constitute sufficient ground for a reversal of the judgment, will not support a charge of disqualification under section 170 of the Code of Civil Procedure. Evans v. Superior Court, supra; Fishbaugh v. Fishbaugh, 15 Cal.2d 445, 457, 101 P.2d 1084; In re Estate of Friedman, 171 Cal. 431, 153 P. 918.

However, the rules which we have just announced are not conclusive of the situation in its entirety as presented to us in the instant case. In the remaining untried cases Judge Mosk will be called upon to pass upon the issues of fact, and, according to the petition on file herein, the evidence upon these issues of fact will, without doubt, be conflicting. In his petition for a writ of prohibition herein, petitioner alleges, and the reporter's transcript shows, that in rendering his decision upon the affirmative defense in action numbered 483841, Judge Mosk expressed himself of and concerning petitioner herein, as follows: "Secondly, Kreling, the plaintiff was confused and uncertain; and he is apparently a man who is inherently indecisive. * * * every time any of these matters (referring to the contents of the oral agreement and the unsigned written version thereof) were put up to him on the stand, he said these people were acting without his consent, that is, all except Kelly. * * * in other words, it was a big conspiracy, and I cannot believe it was. * * * I think the whole thing with Kreling was that he anticipated the inventory would show more than it actually did. * * * and, so, he tried to repudiate his word from that point on". We have set forth sufficient of the remarks made by the trial judge to indicate his state of mind at the time he made them, of and concerning petitioner. The latter contends that Judge Mosk has clearly made it appear that it is "probable that by reason of bias or prejudice * * * a fair and impartial trial cannot be had before him" of the remaining causes pending in his department of respondent court for the reason that by his statements Judge Mosk has shown that he will start the trial of such cases with the settled conviction that "petitioner was without self-possession; was mixed and likely to mistake one thing for another; that he, your petitioner, would become confused and would fail to discriminate and would make false identification; that he, your petitioner, would mix and jumble things together indiscriminately in his mind and mistake one thing for another and to so mingle things in his mind that they would be indistinguishable and disordered; that your petitioner would so intermix things in his mind that they could no longer be distinguished and that such mingling or mixing suggests absolute confusion and mental disorder; that your petitioner was wavering, unconstant and unsettled; that your petitioner was prone to indecision; that your petitioner was possessed of an indecisive state of mind and that he, your peitioner, was an indecisive character; that your petitioner would repudiate his word; that your petitioner tried to repudiate his word in connection with the proceedings in the action No. 483841; that your petitioner as plaintiff in action No. 483841 testified falsely, was dishonest, given to deceit, was treacherous and not faithful or loyal to his obligations; that your petitioner was unworthy of belief; and that he, the Honorable Stanley Mosk, had made up his mind and did not and would not believe the testimony of your petitioner notwithstanding that your petitioner had sworn to tell the truth and nothing but the truth in consolidated actions Nos. 473943 and 476334, and Actions No. 483841 and No. 486038."

[5] In answer to respondents' claim that the judge designated by the chairman of the Judicial Council having decided upon conflicting evidence that Judge Mosk was not disqualified, such determination is final, it may be conceded that where the claimed disqualification of a judge is a question of fact and the facts are in conflict, the conclusion arrived at by the judge,

assigned to pass upon the question, is final and conclusive under the established rule that appellate tribunals are bound by the determination of the trier of facts, predicated on conflicting evidence. However, when there is no substantial conflict in the facts, and the proceeding being before us on demurrrer, we must assume the truth of the facts alleged, then the question of disqualification is one of law, and prohibition will lie. Briggs v. Superior Court, 215 Cal. 336, 342, 10 P.2d 1003.

[6, 7] When the statements of Judge Mosk are read as a whole, it seems to us that the only reasonable conclusion to be drawn therefrom is that said Judge meant to assert and charge, and did charge, that the petitioner was "confused and uncertain; that he is apparently a man who is inherently indecisive; that he is a man who would and did repudiate his word once given; that he is unworthy of belief, and unfaithful to his obligations". True, as urged by respondents, Judge Mosk in his affidavit disavowed any bias or prejudice upon his part toward petitioner. But this is not sufficient to create a conflict in the evidence. The very legislative act with which we are here concerned, by its terms, deprives the challenged judge of the power of passing upon his own state of mind. If the statement of the challenged judge concerning his state of mind be held binding and conclusive, then he himself would in effect be passing upon the question of his own qualifications. This is forbidden by both the spirit and the letter of section 170 of the Code of Civil Procedure. Therefore, the state of mind of the challenged judge must be determined from what he said or did and not by what he may think and aver his state of mind to be. Briggs v. Superior Court, supra. We do not wish to be understood as holding that the affidavit of the challenged judge may not, under any circumstances, be considered by the judge assigned to pass upon the issue of bias or prejudice, as to the existence of such bias or prejudice, but that in the instant case, the undisputed remarks by Judge Mosk, of and concerning petitioner, sustain a charge of bias and prejudice. In view of the declarations made by the trial judge concerning petitioner, we are persuaded that it is not fair either to Judge Mosk or to petitioner that the former should preside at the trial of the remaining cases in which petitioner is a party litigant. Where the trial judge acts as the trier of both the facts and the law, his qualifications, insofar as bias and prejudice are concerned, are more or less analogous to the qualifications of a juror. Evans v. Superior Court, supra, 107 Cal.App. at page 381, 290 P. 662. Can there be any doubt that if a prospective juror had spoken of and concerning petitioner as did Judge Mosk, that such juror not only should but would be disqualified, notwithstanding that such juror should assert his ability and willingness to give to the parties a fair and impartial trial? As to the character of bias and prejudice which may disqualify a judge, see Evans v. Superior Court, supra, and Briggs v. Superior Court, supra. Under the theory of the cases just cited and the principles therein stated, we must conclude that as a matter of law, Judge Mosk is disqualified because he has admittedly expressed an opinion as to the lack of credibility of the petitioner herein, and that, therefore, the latter is clearly entitled to the writ he seeks.

[8] Petitioner also relies upon statements made by Judge Mosk as to the credibility and reliability of one Kelly, who appeared as a witness for petitioner at the trial of action numbered 483841. Such expressions amounted merely to an opinion concerning the veracity of a witness. To disqualify a judge, a prejudice must be against a party. Evans v. Superior Court, supra, 107 Cal.App. at page 379, 290 P. 662; People v. Sweet, 19 Cal.App.2d 392, 396, 65 P.2d 899.

[9] Finally, as heretofore indicated, respondents contend that an order having been made upon the commencement of the trial, whereby it was ordered that all evidence offered and received at the trial of action numbered 483841 should be deemed received into evidence and considered, insofar as such evidence should be competent and material, in the remaining actions, and all evidence having been introduced in action numbered 483841 upon the affirmative defense, and the court having announced its decision thereon, and said affirmative defense also having been pleaded in action numbered 473943, with which action numbered 476334, was consolidated, that the decision rendered in case numbered 483841 necessarily became the decision upon the affirmative defense and was decisive of case numbered 473943, with which action numbered 476334, was consolidated. That, therefore, the "Petition for Change of

Judge" was filed too late. In this contention respondents cannot be upheld. A complete answer to their claim is contained in the statement made by the trial judge at the inception of the trial of case numbered 483841, when, after granting petitioner's motion to try the several cases in a particular order, the court said: "First will be No. 483841; second, 486038; third, 473943. *I can not at this time determine whether the same affirmative defense will bar all three causes of action; and therefore we will hear them separately and individually.*" With reference to the time when objection must be made to the qualifications of a judge, section 170 of the Code of Civil Procedure provides: "The statement of a party objecting to the judge on the ground of his disqualification, shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge." In view of the state of the record as just narrated, it is unnecessary to further consider respondents' point as to the reasonableness of the application to disqualify Judge Mosk, for it is plainly to be seen that such application was filed as soon as the alleged bias and prejudice were ascertained by petitioner, and that there could not possibly have been a claim of bias and prejudice made by petitioner prior to the conclusion of trial in case numbered 483841 because any grounds for such a claim originated in, grew out of, and was founded upon the opinion delivered by Judge Mosk in deciding action numbered 483841.

From what we have herein stated, it follows that respondents' demurrer on the ground "that neither the petition nor any part thereof states facts sufficient to constitute a cause of action for the issuance of a writ of prohibition" must be overruled.

We shall now proceed to a consideration of respondents' motion to strike therefrom certain portions of the petition herein filed for a writ on the ground that the same are irrelevant and redundant. In that regard such motion is granted as to: (1) The entire of Paragraph X, commencing with line 19, page 4 to line 3, page 5 of said petition; (2) the entire of Paragraph XI, commencing with line 6, page 5 to line 17, page 5 of said petition; (3) the entire of Paragraph XIV, commencing with line 11, page 6 to line 14, page 8 of said petition; (4) the entire of Paragraph XV, commencing with line 16, page 8 to line 1, page 9, of said petition; (5) the entire of Paragraph XX, commencing with line 25, page 11 to line 24, page 12 of said petition; (6) the entire of Paragraph XXI, commencing with line 26, page 12 to line 10, page 13 of said petition; (7) the entire of Paragraph XLII, commencing with line 10 of page 26 to line 25 of page 26 of said petition; (8) the entire of Paragraph XLIII, commencing with line 2 of page 27 to line 18 of page 27 of said petition; (9) the entire of Paragraph LIX, commencing with line 9 of page 48 to line 17 of page 48 of said petition; (10) that portion of Paragraph LX, commencing with the word "That" on line 7, page 49, to the number "483841" on line 13, page 60 of said petition; (11) the entire of Paragraph LXIII, commencing with line 8, page 63 to line 11, page 63 of said petition; (12) the entire of Paragraph LXVIII, commencing with line 4, page 65 to line 12, page 65 of said petition; (13) the entire of Paragraph LXIX, commencing with line 14, page 65 to line 23, page 66 of said petition; (14) the entire of Paragraph LXX, commencing with line 24, page 66 to line 10, page 68; (15) Subparagraph 4 of Paragraph LXXI, commencing with the word "That" on line 24, page 68, to and including the word "Complaint" on line 15, page 69 of said petition; (16) the entire of subparagraph 5 of Paragraph LXXI, commencing with the word "That" on line 16, page 69, to the number "476334" on line 19, page 69; (17) that portion of subparagraphs 6 and 7 of Paragraph LXXI, reading as follows: "That the damages suffered by plaintiff: a. As alleged in action 473943 (Fraud) was and is in the sum of $61,192.83; b. Money belonging to Mike Kreling erroneously attached by Saul Walsh, et al., Action No. 476334, was and is the sum of $5,322.19; c. Value of personal property of Mike Kreling wrongfully converted by defendants Saul Walsh, et al., was and is the sum of $2,224.50."; (18) that portion of Paragraph LXXII, reading: "That your Petitioner, having waived a Jury Trial in Action No. 486038 and the consolidated actions Nos. 473943 and 476334, has petitioned the Superior Court of the State of California, in and

for the County of Los Angeles to grant to Mike Kreling, plaintiff and defendant in consolidated actions Nos. 473943 and 476334, and plaintiff in action No. 486038, for trial by jury. That the granting of said petition is in the discretion of the Honorable Judge hearing these actions." In all other respects said motion to strike is denied.

For the foregoing reasons the demurrer of respondents is overruled and the motion to strike is granted in part and denied in part as hereinabove set forth. Within fifteen days after the filing of this decision, respondents may, if they so desire, file their answer to the petition herein for a writ of prohibition.

YORK, P. J., and DORAN, J., concur.



63 Cal.App.2d 464

BUSH v. LOS ANGELES RY. CORPORATION.

Civ. 14132.

District Court of Appeal, Second District, Division 3, California.

March 24, 1944.

1. Negligence ⇐136(9)

Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference.

2. Street railroads ⇐117(22)

A pedestrian who attempted to cross intersection within pedestrian crosswalk while traffic light was in his favor, and who had looked to his left at least twice and observed light of streetcar stopped across intersection, was not contributorily negligent as a matter of law so as to bar his recovery for injuries sustained when he was struck by streetcar.

3. Appeal and error ⇐989

When judgment is attacked as being unsupported, power of appellate court is limited to determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by trial court.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by W. L. Bush against the Los Angeles Railway Corporation for injuries sustained when plaintiff was struck by a streetcar. From an order granting plaintiff a new trial after a verdict had been directed for defendant, defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellant.

Charles L. Nichols and A. B. Monk, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from an order granting plaintiff's motion for a new trial.

The action was to recover damages for personal injuries suffered by plaintiff, a pedestrian, when he was struck by one of defendant's streetcars in the City of Los Angeles. The court, at the close of the evidence and upon defendant's motion, directed a verdict in favor of defendant. The court granted plaintiff's motion for a new trial upon the ground that the evidence was insufficient to sustain the verdict. Defendant contends that plaintiff was guilty of contributory negligence as a matter of law, and therefore the court erred in granting plaintiff's motion for a new trial.

The accident occurred about 5:30 p. m., after dark, on December 27, 1941, in the marked pedestrian crosswalk immediately south of the intersection of Virgil Avenue and Santa Monica Boulevard. Virgil Avenue extends north and south; Santa Monica Boulevard extends east and west; but they do not cross at right angles. There is a jog in Virgil Avenue at the intersection. Virgil Avenue at the north of the intersection extends farther east than Virgil Avenue at the south of the intersection —the northwest corner projecting about 55 feet farther east than the southwest corner, and the northeast corner projecting about 51 feet farther east than the southeast corner. Santa Monica Boulevard is approximately 60 feet wide. Virgil Avenue, at the south pedestrian crosswalk, is approximately 94 feet wide from the west curbline to the east curbline, and at the

north pedestrian crosswalk is approximately 89 feet wide. The west rail of the southbound streetcar track on Virgil Avenue north of the intersection is approximately 21 feet east of the northwest corner curbline, and the west rail south of the intersection is approximately 59 feet east of the southwest corner curbline; in other words, the northwest corner of the intersection was closer to the rails than the southwest corner, and the rails extended diagonally, from northeast to southwest, across the intersection. (Exhibit 1, introduced by the plaintiff and reproduced by photostat at page 20 of the transcript presents a picture of the intersection.) It was stipulated that the intersection was controlled by "semaphore signals and during darkness by red and green lights."

Plaintiff was 75 years of age at the time of the accident, was wearing dark clothing, and carrying a cane which was "partially painted white." He had had two cataract operations in 1941. Plaintiff had been to a theater and was walking to his daughter's home which was in that vicinity.

The evidence, in the view most favorable to plaintiff, shows that: The "weather was dry," and the intersection was lighted. When plaintiff arrived at the southwest corner of Santa Monica Boulevard and Virgil Avenue he waited for the traffic light to change to green to permit him to proceed east across Virgil Avenue. After the light changed to green, permitting pedestrians to cross Virgil Avenue, plaintiff stepped from the curb into the pedestrian crosswalk south of the intersection, waited for an automobile on Santa Monica Boulevard to make a right turn in front of him onto Virgil Avenue, then looked to his left for traffic and saw none but he did see the headlight of defendant's streetcar, and it appeared that the streetcar was in "a state of rest" at the northwest corner of the intersection headed south. He then proceeded to cross Virgil Avenue in an easterly direction. He "walked briskly with the aid of a cane." When he arrived at a point about "midway of the track," he "began looking to the right" for northbound traffic "because the first movement" of traffic "would be across" in front of him if he "wasn't across before the signal changed." When he was on the west rail of the southbound track, he heard the "gong" of the streetcar ring, and he looked up and saw the streetcar very close to him —it seemed "not over 15 feet away." He was afraid he "was going to be trapped," and he "hurried forward." As he was stepping off the east rail of the southbound tracks, with his left foot off, his right leg was struck by the left front fender of the streetcar, and he fell to the pavement, sustaining the alleged injuries. Two northbound automobiles were waiting at the southeast corner of Virgil Avenue for the traffic light to change to green. Plaintiff traveled approximately 59 feet from the time he left the southwest curb to the time he stepped on the southbound track, or approximately the same distance as the width of Santa Monica Boulevard, and was at all times within the marked pedestrian crosswalk. Previous to the accident the streetcar was traveling south on Virgil Avenue, and stopped at the northwest corner to take on passengers and wait for the green light to permit northbound and southbound traffic to cross Santa Monica Boulevard. The motorman testified that after the green light came on he waited until 2 trucks on Santa Monica Boulevard "which would obstruct my [his] vision" had cleared the intersection, and then he started the streetcar across the intersection. The motorman did not see plaintiff until plaintiff was "about 10 feet away, going east from west on Santa Monica in the pedestrian zone," at which time the streetcar was traveling 10 or 12 miles an hour. The motorman "rang the gong" and applied the brakes, and the streetcar "traveled approximately 25 feet" before "it came to a standstill." It was "just a matter of seconds" from the time the bell was rung until the plaintiff was struck.

[1, 2] The sole question to be considered upon appeal is whether plaintiff was guilty of contributory negligence as a matter of law, as defendant contends. Contributory negligence is a matter of law only when from the facts reasonable men can draw but one inference. Costerisan v. L. A. Railway Corp., 1942, 50 Cal.App. 2d 143, 145, 122 P.2d 598. Viewing the evidence most favorably to plaintiff, it cannot be concluded that reasonable men could draw but one inference in the present case. "It cannot be said that a person is guilty of contributory negligence merely because he attempts to cross a street railway when a car is approaching. If that were so, he could never attempt to cross such a track in the crowded parts of a city where there is practically always an approaching car;

and, in such case, as streetcars go at a comparatively low rate of speed and are quickly stopped, the question of negligence would depend on the proximity or remoteness of the car, and upon all the other circumstances surrounding the occurrence. In such a situation the traveler cannot be held to exercise the very highest prudence and judgment. It is sufficient if he exercises that degree of care and prudence and good sense which men who possess those qualities in an ordinary or average degree exercise." Wright v. Los Angeles Ry. Corp., 1939, 14 Cal.2d 168, 174, 93 P.2d 135, 137; Scott v. San Bernardino Valley, etc., Co., 1908, 152 Cal. 604, 611, 93 P. 677; Clark v. Bennett, 1899, 123 Cal. 275, 278, 55 P. 908. Plaintiff was within a marked pedestrian crosswalk where he had a right to be. He had entered the crosswalk, and attempted to cross the intersection while the traffic light was in his favor. The evidence shows that he had looked to his left for traffic at least twice—once as he stepped from the curb and waited for an automobile to make a right turn in front of him, and again when he observed the light of the streetcar across the intersection. Whether plaintiff was sufficiently vigilant under the circumstances was a question upon which reasonable minds might differ. In the case of Watkins v. Nutting, 1941, 17 Cal.2d 490, at page 495, 110 P.2d 384, at page 387, the court said: "Where, as in the present case, there is evidence that the injured person looked, but either did not see the approaching automobile, or saw it and misjudged either its speed or distance, the question whether, under the particular circumstances then existing, he was guilty of contributory negligence is one of fact." It was stated in the case of Schneider v. Market Street Ry. Co., 1901, 134 Cal. 482, at page 488, 66 P. 734, 737: "[I]t falls within the province of the jury not only to determine the facts constituting negligence, but also the question as to what would be the conduct 'of a person of ordinary prudence' under similar circumstances, which, commonly, is a question of fact, not of law." See also Sanker v. Humborg, 1941, 48 Cal.App.2d 203, 204, 119 P.2d 431.

[3] Defendant contends that there was no substantial conflict in the evidence in reference to contributory negligence, and therefore the order granting a new trial should be reversed. The record shows the evidence was substantially conflicting in several respects, i. e.: (1) As to where plaintiff was when the motorman first rang the bell; (2) as to the speed of the streetcar at that time; (3) its proximity to plaintiff; (4) as to what point plaintiff had reached when the impact occurred; (5) the rapidity of plaintiff's walk; (6) as to whether he increased his speed after the "gong" sounded; and (7) as to the visibility at the intersection at the time of the accident. These conflicts were material and relevant to the question of contributory negligence, and presented questions of fact which should have been presented to the jury. It was stated in the case of Ross v. San Francisco-Oakland Terminal Railways Co., 1920, 47 Cal.App. 753, at page 759, 191 P. 703, at page 706: "But a traveler may cross an electric street railway track in front of an approaching car which he sees and hears and not be negligent. If, in view of his distance from the car, the rate of its speed, and all other circumstances of the event, a reasonably prudent man would accept the hazard and undertake to cross the highway, a traveler may do so, and the propriety of his conduct is ordinarily a question for the jury." When a judgment is attacked as being unsupported, the power of the appellate court is limited to a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trial court. "[I]n a reviewing court all intendments are to be indulged in to support the action of the trial court in passing upon a motion for a new trial. When the question of the propriety of the trial court's ruling on the motion is open to debate, it will not be disturbed. * * * Unless the action of the trial court in granting the motion for a new trial constituted an abuse of discretion, the appellate tribunal is without power to interfere." Mazzotta v. Los Angeles Ry. Corp., Cal.App.1944, 145 P.2d 662, 666. There was no abuse of discretion by the trial court.

The order granting plaintiff's motion for a new trial is affirmed.

DESMOND, P. J., and SHINN, J., concur.

63 Cal.App.2d 446

McMORRIS v. PAGANO et al.

Civ. No. 3115.

District Court of Appeal, Fourth District, California.

March 23, 1944.

Hearing Denied May 19, 1944.

1. Easements ⇐36(3)

Where owner of lot built garage facing 10-foot strip which was used thereafter by her and her successors in interest for over 20 years as a passageway, evidence sustained finding that owner of lot had easement over the strip.

2. Easements ⇐5

Open and notorious character of use of right of way by plaintiff, who sought to establish an easement, brought notice home to owner of land that person using land was doing so under a claim of right.

3. Easements ⇐5

The assertion of a claim of adverse right of way over land may be inferred from notorious acts.

4. Appeal and error ⇐1008(1)

The question whether use of right of way has been adverse and under a claim of legal right so to do or is a mere permissive use is generally a question of fact to be determined by court from all circumstances.

5. Easements ⇐36(3)

Evidence sustained finding that claimed easement of right of way was appurtenant to land owned by plaintiff. Civ.Code, § 801.

6. Easements ⇐5

Where right of way easement was appurtenant to land owned by plaintiff, and plaintiff paid all taxes on her property, the fact that she did not pay taxes on the claimed right of way which was not separately assessed did not preclude acquisition of title to easement by adverse possession. Civ.Code, § 801.

7. Easements ⇐7(5)

Where owner of dominant tenement claiming right of way easement over 10-foot strip paid all taxes on her property and the easement was not separately taxed, the sale of the 10-foot strip for delinquent taxes did not break the continuity of adverse possession.

8. Quieting title ⇐54

In quiet title action where one defendant claimed title to land involved and two additional defendants denied every allegation of plaintiff's complaint and also disclaimed any interest in land, court on entering judgment for plaintiff properly awarded costs against all defendants. Code Civ.Proc. § 739.

9. Quieting title ⇐54

In quiet title action, if defendants wish to avail themselves of statutory provision relating to disclaimers, to save themselves from costs, they should not raise the issue on plaintiff's possession and other material issues alleged and put him to his proof. Code Civ.Proc. § 739.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Suit to quiet title by Grace McMorris against Margaret Pagano and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Thomas F. Lopez, of Fresno, for appellants.

Walter Sorensen, of Fresno, and Penn Cummings, of Los Angeles, for respondent.

GRIFFIN, Justice.

In 1919 one E. P. Smith held title to the south 87½ feet of lots 17 to 20, inclusive, in block 6, Orchard Hill Addition to the City of Fresno. He deeded the north 37½ feet of the south 87½ feet of those lots to his wife, Anna Smith, and she deeded her interest in the south 50 feet of the said lots to him. Thereafter, in 1920, Mr. Smith deeded the south 50 feet of lots 17 to 20, inclusive, excepting the east 10 feet of the south 50 feet of lot 17 to Marietta Coleman, who subsequently, in 1925, deeded the same property with the same exception to one J. I. Tucker, who in 1935 deeded it with the same exception to Delfina Pagano, one of the defendants and appellants herein. It is apparent that in excepting the east 10 feet of the south 50 feet of lot 17 and retaining title to it, Smith apparently intended that the 10-foot strip would afford his wife a means of ingress to and egress from the main alleyway in block 6 to the rear of her property which he had previ-

ously deeded to her. Anna Smith sold the north 37½ feet of the south 87½ feet of lots 17 to 20, and it went through various hands until 1926 when plaintiff Grace McMorris bought the Anna Smith property with the house and garage located upon it which were and still are in the same position. The garage faces south toward the alley and it can be entered only by means of the 10-foot strip. However, plaintiff's property does face on a public street. Other houses to the north, south and back of her property were so closely adjacent to her house as to hem her in and precluded her from maintaining the driveway to her garage on either side of the house. Plaintiff was given to understand by the real estate agent selling the property for the owner that the 10-foot passageway was for plaintiff's use. She and her predecessors in interest used the right of way from 1920 to 1942 as a mode of ingress and egress to and from the garage located on the rear of her property. In the meantime the taxes on the 10-foot strip had gone delinquent, unknown to plaintiff. On March 8, 1942, defendant Delfina Pagano purchased the tax deed to it for $10 and deeded it to her daughter, defendant Margaret Pagano, who in turn deeded it to Manuel Penheiro, who deeded the strip back to Delfina Pagano sometime before this suit was instituted. About March 18, 1942, plaintiff drove home and found that defendants had blocked and barricaded the 10-foot strip so that she could not use it. She instituted this proceeding to quiet title to the passageway over the 10-foot strip by prescriptive right and to have the same declared to be a perpetual easement for her. Defendant Delfina Pagano in her answer denied all of the allegations of the complaint with the exception of paragraph 2, which alleged that she claimed an interest in and title to said strip. This she admitted. The other defendants, in a joint answer, denied generally and specifically each and every allegation of plaintiff's complaint and also disclaimed any interest in the 10-foot strip.

On the issues thus framed the cause was tried before the court without a jury. Judgment was rendered in favor of the plaintiff and against the defendants declaring that the plaintiff and her predecessors in interest for more than ten years last past had been in possession of the right of way and used it, openly, notoriously and adversely during said time, and although not the owner of the fee, she had a perpetual easement or right of way upon and over the strip of land in question and her title to the easement or right of way was quieted. It did not decree that plaintiff was the owner of the 10-foot strip. Judgment was entered against all defendants for costs. This appeal followed.

The evidence shows that plaintiff did not know the owner Smith, nor did she have any dealings with him. It is claimed, however, that the open and notorious character of the use of the right of way brought notice home to him. The 10-foot strip in question was at no time fenced in by plaintiff or anyone else but was open into the neighbor's property, open into the alley, and was also used occasionally by the neighbors. Taxes on the ten-foot strip of land were admittedly not paid by plaintiff with the exception of one year, but it is her contention that the taxes on the right of way were included in the taxes she paid on her own real property which was adjacent to the strip. The evidence further shows that the 10-foot strip was separately assessed but the easement or right of way over that strip was not so separately assessed.

Defendants claim that there was no evidence that plaintiff or her predecessor in interest used the strip of land adversely for the time required by statute; that a right of way by prescription may be acquired upon lands of another only by use which is neither expressly nor tacitly permitted; that such use must be for the full period of five years, not only open, notorious and continuous, but adverse and under a communicated claim of right as well; that plaintiff's use thereof was permissive only and neither adverse to the true owner and hostile to his title, nor under a claim of right asserted in such manner that the owner might know of the claim, citing Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383, and other similar cases.

[1-4] The evidence supports the findings of the trial court and shows that in 1920 Mrs. Smith built her garage facing the 10-foot strip and that it was used thereafter by her and her successors in interest for over 20 years as a passageway. Plaintiff used it for over eight years before Pagano purchased his property from Tucker and 16 years before Pagano received a

tax deed to the 10-foot strip. Whether the original use of the 10-foot strip was merely permissive and whether its use was adverse to the true owner and hostile to his title and under a claim of title is not clear from the evidence. However, there are facts which might indicate that plaintiff's use thereof was not "merely permissive" but was under a claim of right and adverse to the true owner and hostile to his title for the statutory period, i. e., that the user was so continuous and so openly and notoriously adverse to the owner as to create a presumptive knowledge in the owner that the person using the land was so doing under a claim of right. It is true that plaintiff did not directly show that she knew Smith or had any dealings with him but the open and notorious character of the use of the right of way brought notice home to him. The assertion of a claim of adverse right of way over land may be inferred from notorious acts. Conaway v. Toogood, 172 Cal. 706, 710, 158 P. 200; Grimmesey v. Kirtlan, 93 Cal.App. 658, 665, 270 P. 243. The question as to whether or not the use of a right of way has been adverse and under a claim of legal right so to do, or is a mere permissive use is generally a question of fact to be determined by the court from all the facts and circumstances of the case. Conaway v. Toogood, supra; Alper v. Tormey, 7 Cal.App. 8, 93 P. 402; Yuba Consolidated Goldfields v. Hilton, 16 Cal.App. 228, 116 P. 712, 715; Hanson v. McCue, 42 Cal. 303, 304, 10 Am.Rep. 299; Alvarado v. Nordholt, 95 Cal. 116, 30 P. 211; Barbour v. Pierce, 42 Cal. 657; Bernstein v. Dodik, 129 Cal.App. 454, 18 P.2d 983; Kellogg v. Huffman, 137 Cal. App. 278, 30 P.2d 593; Mings v. Compton City School District, 129 Cal.App. 413, 18 P.2d 967; Wells v. Dias, 57 Cal. App. 670, 207 P. 913; Redemeyer v. Carroll, 21 Cal.App.2d 217, 220, 68 P.2d 739. The trial court's finding has evidentiary support.

[5, 6] Defendants next argue that payment of taxes is necessary to the successful assertion of title by adverse possession and that plaintiff did not prove payment of such taxes on her claimed easement of right of way for the prescribed period. The claimed easement of right of way was not separately assessed. The court found that it was appurtenant to the land owned by plaintiff. Under the evidence this finding was proper. Elliott v. McCombs, 17 Cal.2d 23, 109 P.2d 329; Sec. 801, Civ.Code. Plaintiff paid all taxes on her property.

In Redemeyer v. Carroll, supra [21 Cal. App.2d 217, 68 P.2d 741], the rule here applicable is thus quoted:

" 'One line of cases holds that the claimant is required to show that there was no assessment of the property claimed adversely, or if assessed that the taxes were paid. Another line of cases holds that the burden rests on defendants to show that there was an assessment. It appears, however, that those cases which cast the burden upon the claimant involve title in fee, and not an easement. On the other hand, the law does not require an easement to be assessed. * * * And the burden of showing that taxes have been assessed is upon the party contesting the claim of adverse possession. * * *' " (Citing cases.) See, also, Smith v. Smith, 21 Cal.App. 378, 131 P. 890; Bernstein v. Dodik, supra; City of Gilroy v. Kell, 67 Cal.App. 734, 228 P. 400.

[7] The next contention is that the sale of the ten-foot strip for delinquent taxes broke the continuity of adverse possession, citing Spotswood v. Spotswood, 4 Cal.App. 711, 89 P. 362. That case involved a claimed perfected title in fee to the land in controversy and not an easement for right of way over the lands. In the instant case the claimed easement was not separately assessed and taxed. The easement was not sold to the state for nonpayment of taxes, because the taxes on said easement were presumed, nothing to the contrary appearing, to be paid by respondent when she paid her taxes on her own real property, which was the dominant tenement and included the servient tenement which was the right of way. Smith v. Smith, supra.

[8, 9] Judgment for costs was entered against all defendants. Plaintiff, in the complaint, in addition to other allegations, alleged possession of the property. Margaret and Dominic Pagano filed an answer denying all of the allegations of plaintiff's complaint and then disclaimed any interest in the property. It is argued now that costs should not have been entered as to them. Sec. 739 of the Code of Civil Procedure provides that a plaintiff may recover no costs if the defendant in his answer disclaims any interest in the property. However, in a quiet title action, if defendants wish to avail themselves of the statutory provision relating

to disclaimers, to save themselves from costs, they should not have raised the issue on plaintiff's possession and other material issues alleged, and put him to his proof. Brooks v. Calderwood, 34 Cal. 563, 566; Graham v. Hunt, 119 Cal.App. 586, 590, 7 P.2d 186; Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L.R.A.1916B, 1209; Pinheiro v. Bettencourt, 17 Cal.App. 111, 118 P. 941.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.



63 Cal.App.2d 308

KRAMER v. WATNICK et ux.

Civ. 14363.

District Court of Appeal, Second District, Division 2, California.

March 17, 1944.

1. Trusts ⇐89(1)

Where plaintiff, who had conveyed property to himself and daughter as joint tenants, sought to have court hold that daughter held title in trust for plaintiff, evidence supported finding that no trust resulted from conveyances.

2. Trial ⇐404(2)

Trial court's statement, following the heading "Conclusions of law", that no trust was intended by parties where father conveyed property to himself and daughter as joint tenants and that no trust resulted from conveyances, was in effect a finding of fact as to purpose of deeds.

3. Trial ⇐404(2)

Where finding of fact was placed among conclusions of law, it should nevertheless be given same weight as if it had been placed among findings of fact.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Solomon Kramer against Sarah R. Watnick, formerly Sarah R. Kramer, and husband to have the court declare that plaintiff's daughter holds title to certain real estate in trust for plaintiff and to order her to reconvey. From a judgment for defendant, plaintiff appeals.

Affirmed.

Samuel A. Rosenthal and Burton B. Crane, both of Los Angeles, for appellant.

Jerome J. Mayo and Guy H. Hayes, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

In this action plaintiff asked the court to declare that his daughter, Sarah R. Watnick, holds title to five parcels of real estate in trust for him and to order her to convey the property to him. Harry Watnick, the husband of Sarah Watnick, has been made a party defendant. Hereinafter Sarah Watnick will be referred to as defendant. Plaintiff prosecutes this appeal from a judgment in defendants' favor.

In his complaint plaintiff alleges that defendant induced him to execute joint tenancy deeds covering the property in question in which plaintiff and defendant were named as joint tenants; that to induce the execution of these deeds defendant stated to him that, since he was a widower, in case of his death she as his only child would be put to the expense of probating the estate and that the joint tenancy deeds should be executed to facilitate the transfer of the property upon his death; that she agreed that if he would convey the property to her in joint tenancy she would not claim any interest in the property but would hold it only for the purpose of the transfer of title at the time of his death and that if he chose to sell the property she would join with him in the execution of any necessary instruments; and that she would at any time upon his request, without consideration, reconvey her joint tenancy interest in the property to him. It is further alleged that in reliance upon the statements of defendant plaintiff did on December 23, 1940, convey the property to defendant and to himself as joint tenants. In the following month plaintiff married and thereafter demanded of defendant that she reconvey the property and upon her refusal to do so the present action was commenced.

The testimony of plaintiff unquestionably supports his allegations and if his testimony had been found to be true doubtless the court would have granted the relief sought in the complaint. The record, how-

ever, discloses a sharp conflict in the testimony. Defendant testified that she was to be married on December 25, 1940, that her father told her that he had appreciated all that she had done during her mother's illness, that if anything happened to him he wanted to know that defendant was taken care of because she deserved it, and that he wanted the deeds recorded immediately so that she would get them on her wedding day. Defendant testified that she had not agreed to reconvey the property to plaintiff on demand and had not stated that she would make no claim to the property or that she would hold the joint tenancy interest only for the purpose of transfer of title upon plaintiff's death. The parties were living on one of the parcels conveyed at the time of defendant's marriage and after her marriage she continued to live on the property without the payment of rent. The trial court found that the conveyance was executed "in consideration of love and affection and other valuable consideration".

[1] The record presents a simple case of conflict in the testimony, which the trial court resolved in favor of defendant. It was within the province of the trial court to credit the testimony of defendant and to draw reasonable inferences therefrom and base its findings thereon. We are satisfied that there is ample evidence to support the findings in favor of defendant.

[2, 3] Plaintiff complains that the trial court failed to make findings "as to the purpose of the deeds transferring title to the whole property at his death". Following the heading, conclusions of law, we find: "That no trust was intended by the parties hereto nor did any trust result from the conveyances and the vesting of the title to said real property, or otherwise". The statement that no trust was intended by the parties is in effect a finding of fact which sufficiently answers the criticism of plaintiff. Although it is placed among the conclusions of law it should be given the same weight as if it had been placed among the findings of fact. 24 Cal.Jur. p. 960, sec. 199; Linberg v. Stanto, 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555; Gossman v. Gossman, 52 Cal.App.2d 184, 192, 126 P.2d 178. Moreover the court expressly found to be untrue the allegations that as an inducement for the execution of the deeds or for any reason defendant agreed that she would not make any claim to the property, that she would hold it only for the purpose of transferring title upon plaintiff's death and that she would join in any instrument conveying or leasing the property. The record discloses no error prejudicial to plaintiff.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



63 Cal.App.2d 318

Ex parte McMANUS.

Cr. 1861.

District Court of Appeal, Third District, California.

March 17, 1944.

Habeas corpus ⇐85(1)

On habeas corpus proceedings by mental patient to secure release from hospital to defend himself on a pending murder charge, testimony that patient was suffering from persecutory paranoia, delusions, and irrationality of mental processes, sustained finding of referee that patient had not sufficiently recovered mental health to counsel with his attorney and to conduct a rational defense and required dismissal of writ. St.1937, p. 1164, § 6760; Pen.Code, §§ 1368, 1372.

"Paranoia" is a chronic mental disease, of which systematized delusions with or without hallucinations of the senses are the prominent characteristics. The delusions may take the form of ideas of persecution or of grandeur and ambition. The disease may begin during adolescence, but the great majority of the subjects manifest no symptoms of the affection until full adult life.

See Words and Phrases, Permanent Edition, for all other definitions of "Paranoia".

Original proceedings in the matter of the application of Patrick Joseph McManus for a writ of habeas corpus to obtain his release from the Mendocino State Hospital to en-

able petitioner to defend himself on a charge of murder pending against him.

Writ discharged.

Charles Kasch, of Ukiah, for petitioner.

James E. Busch, Dist. Atty., of Ukiah, for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner Patrick Joseph McManus seeks to obtain his release from the Mendocino State Hospital, pursuant to Section 6760 of the Welfare and Institutions Code, St.1937, p. 1164, for the purpose of enabling him to defend himself on a charge of murder which is pending against him in the Superior Court of Los Angeles County. On February 24, 1937, an indictment was returned by the Grand Jury of Los Angeles County, charging the petitioner with the crime of murder. On February 26, 1937, he entered pleas of not guilty and not guilty by reason of insanity. On March 16, 1937, the trial judge expressed a doubt as to McManus' present sanity and pursuant to Section 1368 of the Penal Code set a hearing on that issue for March 30, 1937. On the latter date a jury regularly impaneled for the purpose of considering the present sanity of petitioner found him to be insane. The Superior Court of Los Angeles County thereupon committed him to the custody of the Superintendent of the Mendocino State Hospital, Mendocino County, California, until he regained his sanity, whereupon he was to be returned to the custody of the Sheriff of Los Angeles County for trial, as provided by Section 1372 of the Penal Code.

On September 17, 1943, petitioner made an application to the Superior Court of Mendocino County for a writ of habeas corpus claiming that his imprisonment in the Mendocino State Hospital was illegal in that he was at that time sane, and able to consult with counsel and enter upon his defense of the felony charge pending against him in the Superior Court of Los Angeles County. After a hearing in which medical testimony and evidence by the petitioner were introduced, the Superior Court entered an order discharging the writ of habeas corpus and remanding petitioner to the custody of the Superintendent of the Mendocino State Hospital.

Section 6760 of the Welfare and Institutions Code provides that:

"A patient committed to a State hospital under the provisions of Chapter 6, Title 10, Part 2, of the Penal Code, shall, upon the certificate of the superintendent that the person has recovered, approved by the superior judge of the county from which the patient was committed, be redelivered to the sheriff of such county, and dealt with in accordance with the provisions of the above-mentioned chapter of the Penal Code."

On November 12, 1943, petitioner filed a petition with this court praying that a writ of habeas corpus issue, directed to the Medical Superintendent of the Mendocino State Hospital, to test the legality of his restraint and imprisonment. On November 29, 1943, this court appointed the Honorable Benjamin C. Jones, Judge of the Superior Court of Lake County, as Referee, to hear and take testimony of all witnesses in the matter of petitioner's application and further ordered that the Referee prepare and file in this court findings of facts based upon the testimony relating to the issue of petitioner's sanity.

The matter concerning petitioner's sanity was heard on December 6, 1943, before said duly appointed referee. During the proceeding, three physicians, including Doctor M. J. Rowe, Medical Superintendent of the Mendocino State Hospital, testified regarding the present mental sanity of petitioner. The doctors who testified all agreed that petitioner's mental condition was such as to prevent him from consulting with counsel in such a manner as to properly prepare his defense to the crime with which he was charged. The medical testimony was to the effect that petitioner's exercise of judgment would be definitely impaired by certain delusions which were experienced as a result of a form of persecution complex. Doctor Rowe testified in part, as follows: "A. He could consult with his attorney, but I think his statements would be influenced by his delusions so that there would not be a rational opinion." Doctor Louise Petty, in answer to the question concerning petitioner's ability to aid in the preparation of a rational defense, testified: "A. I feel that he has a good many delusionary ideas which are tied together in his mind concerning the neighborhood in which he lived, and somewhat with the City Hall, and the lawyers in Los Angeles, and their connection with this alleged crime. I think he is definitely de-

lusionary about those things and definitely retains those delusions and has all the time I have known him." It was admitted by the examining physicians that there were intervals when the petitioner appeared to be quite normal but that generally his mind was preoccupied by the delusions referred to. Each testified that in his opinion the petitioner was insane.

Three physicians from the medical staff of the Mendocino State Hospital, one of whom had observed the petitioner over a period of six years while he was an inmate at that Hospital, and who had participated in six conferences regarding his mental condition, testified that it is their opinion he is of unsound mind and not capable of rationally defending himself in the trial of the criminal charge against him. They base those opinions upon medical examinations of the patient, from statements which he made to one or more of them while he was confined in that institution, from observations and from listening to his testimony at the trial. They appear to agree that he is possessed of fixed delusions of persecution. One of them characterized his ailment as paranoia. They infer that he is sometimes more lucid and logical in his statements than at other times. He is indefinite and general in his charges of persecution, avoiding mentioning the names of particular individuals, but placing the blame for his troubles and prosecution upon groups, organizations or societies. Nevertheless it seems clear that he possesses fixed delusions that his troubles and the reason for the institution of the criminal charge against him are due to persecution of designated groups of individuals, which is recognized as a symptom of "persecutory paranoia". A definition of that incurable mental disease is found in 17 Encyclopedia Britannica, 14th ed., page 266. It reads in part:

"A chronic mental disease, of which systematized delusions with or without hallucinations of the senses are the prominent characteristics. The delusions may take the form of ideas of persecution or of grandeur and ambition. The disease may begin during adolescence, but the great majority of the subjects manifest no symptoms of the affection until full adult life."

On the witness stand, and in conversations with the physicians, the petitioner persistently asserted that he believed he was being persecuted and opposed by the conspiracies of groups of persons variously referred to as the "peace officers", the "homicide squad", "gangsters", the "Hibernians", the "Odd Fellows", and the "Ku Klux Klan". Speaking of the lawyer who represented him at the hearing of the criminal charge, in response to the question, "How many lawyers did you have?" he replied, "I don't know how many there was there, but I counted six." Doctor Rowe, the Superintendent of the Hospital, said that he believed he was of unsound mind because of his delusions. He said:

"His belief for one thing that those charges are brought primarily because of gangster enemies, who, he believes, are trying to punish him for not having joined various secret societies, and other people in the neighborhood that he thought were against him, neighbors who had criminal interests and were opposed to him and his wife. I think he believes that the chief source of his troubles is due to those persecutors."

It is interesting to note the fact that in illustrating the tendency of a person afflicted with paranoia to refer to his persecutors in indefinite manner, or by groups, rather than by individual names, it is said in the text found in Britannica, above cited:

"He often never fixes the direct blame upon any individual, but refers to his persecutors as 'they' or a 'society', or some corporate body such as 'lawyers', 'priests' or "freemasons'."

That is characteristic of the accusations of the petitioner in this proceeding. Doctor Petty testified that the petitioner in charging his neighbors with persecution mentioned "fifty families and connected them up". She said that he included the authorities of the hospital in the imagined conspiracy against him by saying: "He told me this morning that he had been prevented from receiving letters from his sister *through religious bigotry at the Hospital.*"

The foregoing testimony furnishes satisfactory evidence of the existence of fixed delusions strongly indicating the presence of paranoia and an unsound mind. At least that is the unanimous judgment of the medical expert witnesses.

The Honorable Benjamin C. Jones, after hearing considerable testimony in the matter, including the testimony of petitioner, made findings of fact concluding that petitioner had not recovered his sanity since

his commitment to the Hospital and that he was still insane at the time of the hearing. The findings stated that although petitioner experienced interludes of rationality and clarity of mental processes that he nevertheless suffers from delusions which influence his actions and would prevent him from advising with counsel in a rational manner. The findings also conclude that petitioner in his present confinement and restraint is not dangerous to himself or to others but that if he were removed from protectional restraint the actions he would take under different circumstances are uncertain.

Petitioner contends that the only question to be determined by the habeas corpus proceeding is that of the ability of petitioner to counsel with his attorney and to conduct a rational defense to the charge of murder pending against him. It is further contended that the testimony adduced at the hearing supports the conclusion that petitioner did have such mental capacity and was proved to have adequate mental ability to properly conduct a defense to the crime charged. In support of his position petitioner cites the case of In re Buchanan, 129 Cal. 330, 61 P. 1120, 50 L.R.A. 378, wherein it was determined, contrary to the conclusion of alienists, that the petitioner therein was capable of conducting his defense to the crime charged in a rational manner. Accepting the construction of the pertinent Penal Code provisions, Sections 1367 to 1372, as decided in the Buchanan case, to the effect that an individual may be deemed sane for the purposes of standing trial on a criminal charge although mentally deranged and unsound otherwise, it nevertheless appears that the circumstances in the Buchanan case were quite different from those presented in the instant proceeding. In that case the opinion, after ascribing the petitioner's temporary insanity to the excessive use of intoxicating liquor, proceeded to hold that such insanity would not disqualify him from making his defense. It referred to the general intelligence and demeanor of the petitioner at page 335 of the opinion in 129 Cal., 61 P. at page 1122, 50 L.R.A. 378, in the following language:

"But this is a species of insanity which the statute governing this case does not contemplate. It is not such insanity as would disable him to make his defense. The same witnesses that testify that he is insane admit that during his long stay at the Napa asylum he has exhibited no symptoms of insanity. He reasons as other men do. He has no delusions. He is more than ordinarily intelligent, his memory is unimpaired. He appreciates exactly the nature of the criminal charge against him, and his relations to the proceeding. As far as mental operations are concerned, he is sane as men are ordinarily. According to the testimony of Dr. Smith under whose care he was at Napa, if he had to judge alone by what he saw of him there he would be obliged to discharge him; and this testimony is strongly corroborated by all the other evidence, both professional and unprofessional, as to his behavior at the asylum.

"But the most conclusive evidence on this point is the testimony of Buchanan himself. He was not sworn as a witness, but he offered himself as an exhibit; and not only by his statement, but by his appearance and bearing, both in the superior court and in this court, he showed a perfect possession of his faculties, and complete ability to conduct his defense."

The testimony adduced at the hearing in the present proceeding certainly fails to disclose petitioner as an individual possessed of his faculties such as was proved to be the situation in the Buchanan case. To the contrary, it appears that the petitioner herein is subject, almost continuously, to delusions and irrationality of mental processes.

The case of People v. Woods, 19 Cal. App.2d 556, 65 P.2d 940, cited by petitioner, does not, in our opinion, lend aid to the argument that petitioner is sufficiently competent to conduct a rational defense to the charge of murder pending against him. That case simply recognizes, as does the opinion in the Buchanan case, supra, that there may be different phases of insanity and that there are special distinct legal tests applied in determining the question. There is nothing contained in the opinion in the Woods case, supra, however, which would induce us to conclude that petitioner in the instant case was of sufficient sound mentality enabling him to conduct a rational defense to the charge of murder which is pending against him.

The evidence based upon the testimony given at the hearing before the Referee in this case sufficiently supports the findings to the effect that petitioner has not recovered his sanity. We therefore adopt the

findings of the Referee as the findings of this court.

We conclude from the testimony of the medical expert witnesses and from the other evidence adduced that the petitioner has not so far recovered his sanity as to enable him to reasonably and properly defend himself against the criminal charge.

The writ is discharged.

ADAMS, P. J., and PEEK, J., concur.



63 Cal.App.2d 365

In re KING'S ESTATE.

KING v. WILSON.

Civ. 14082.

District Court of Appeal, Second District, Division 3, California.

March 21, 1944.

As Modified April 17, 1944.

Rehearing Denied April 18, 1944.

Hearing Denied May 19, 1944.

1. Wills ⇐163(2)

In will contest by testator's widow, evidence showed that proponent, who was residuary devisee under will, held a confidential relationship toward testator for long period before his death, but that neither proponent nor his agent participated actively in procuring execution of will or codicil making no provision for widow, so that burden was not on proponent to prove that he exerted no undue influence on testator's mind at time of execution of such codicil.

2. Trial ⇐165, 178

A nonsuit or directed verdict for defendant may be granted only when, giving plaintiff's evidence all value to which it is legally entitled, indulging every legitimate inference therefrom, and disregarding conflicting evidence, there is no evidence of sufficient substantiality to support a verdict for plaintiff.

3. Wills ⇐324(3)

In will contest by testator's widow, evidence was insufficient to take to jury question whether testator was so unduly influenced by residuary devisee and his agent as to prevent testator from making provision in codicil for contestant in accordance with statements and promises made to her by testator at time of their marriage.

4. Wills ⇐163(1)

In action to set aside will on ground of undue influence, plaintiff must show that influence was such as to destroy testator's free agency and substitute for his own will that of another person, and evidence that pressure was brought to bear directly on testamentary act must be produced.

5. Wills ⇐159

Mere general influence, not brought to bear on testamentary act, is insufficient to invalidate will, but, to effect such result, influence must be used directly to procure will and amount to coercion destroying testator's free agency, and mere opportunity to influence testator's mind is not sufficient, though coupled with interest or motive to do so.

6. Wills ⇐166(6)

The circumstance that provisions of will, executed before instrument propounded as will, are harmonious or consistent with those of such instrument, tends to rebut allegation of imposition or undue influence over testator, and, if he is shown to have executed earlier writing voluntarily, implication is that later instrument was not procured by imposition or undue influence.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding by Gladys C. King to contest the will of George King, deceased, propounded by Griffin Walter Wilson. From a judgment of nonsuit and an order admitting the will and two codicils to probate and appointing proponent as executor without bond, contestant appeals.

Affirmed.

Rosalind Goodrich Bates, of Los Angeles, for appellant.

Walter G. Danielson and Irsfeld & Irsfeld, all of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal by contestant, Gladys C. King, widow of George W. King, sometimes known as Henry H. King, from a judgment of nonsuit and an order admitting to probate his will and two codicils

and appointing as executor without bond, proponent Griffin Walter Wilson, nominated as such by decedent in said will.

By the terms of this instrument, which he signed on November 5, 1928, Mr. King devised and bequeathed "all the rest, residue, and remainder of my estate, both real and personal of whatsoever kind or character and wheresoever situated, to my friends and benefactors, Griffin Walter Wilson and his wife, Pearl E. Wilson, * * * share and share alike, or to the survivor of them." A codicil was executed on August 8, 1934, by which Mr. King left his foster daughter the sum of $1 and otherwise ratified and confirmed the will of 1928. A second codicil was executed on November 28, 1938; this codicil, as well as the will and the first codicil, being signed "Henry H. King," a name under which the testator was known in the neighborhood where he lived. By its terms, this second codicil referred to the will of 1928 and the codicil of August 8, 1934, ratifying and confirming them "in all respects save in so far as any part thereof shall be revoked or altered by this present Codicil. I hereby declare that since the making of my Will and first Codicil, to-wit, on the 19th day of September, 1938, I married at Reno, Nevada, and that my wife's name is Gladys King. I am making no provision in said Will for my said wife for the reason that I am transferring to her name and mine, in joint tenancy the following described property: The northeast ninety feet (90') of Lot Eleven (11), Tract Fifty-Eight Hundred and Thirty (5830), City of San Fernando, County of Los Angeles, State of California, as per map thereof recorded in the County Recorder's office, said Los Angeles County."

The widow, by her contest, alleged that the will and codicils should be denied probate on various grounds: First, defects in execution as follows: (a) that the instruments in question were not subscribed by the decedent; (b) that he could neither read nor write except for the writing of his name and certain simple words which he had learned, and that he did not know the contents of the codicils or publish or acknowledge them in the presence of witnesses; (c) that he did not sign his will in the presence of alleged witnesses or acknowledge to them that the signature to the will was his or that it was made by his authority; (d) that said witnesses did not sign the will in the presence of the decedent or in the presence of each other; second, that the signature of the decedent to the purported will and to the last codicil "if the same was signed by decedent" was procured by undue influence and fraudulent representations made by Wilson; third, that the decedent was not of sound and disposing mind at the time he executed the first and second codicils but "on the contrary, he was * * * at the point of dissolution and in such extreme condition of mental and physical weakness that he was not capable of making or undertaking to make a will or codicil to will." The contestant prayed that the "said will and each of the purported codicils thereto and, in particular, the purported last codicil thereto, be denied probate," and that letters of administration be issued to her.

When the case was called, the court excused the jury before any evidence was taken and then proceeded to hear the preliminary proof as to the validity and proper execution of the three documents and, finding that a prima facie showing had been made, thereupon recalled the jury for the purpose of hearing evidence upon the contest. At the conclusion of contestant's case, upon motion of counsel for the respondent, a nonsuit was granted upon each and all of the alleged grounds of contest, the court finding "that no substantial evidence or any evidence had been introduced by the contestant upon any of the alleged grounds of contest in her amended contest of probate of will." The court ordered that all three of the instruments offered be admitted to probate.

Appellant in her opening brief states that "in the trial court appellant contended (1) that the testator was acting under undue influence at the time of the execution of the will and codicils thereto, and (2) that at the aforesaid times the testator was mentally incompetent to dispose of his estate by will. Henceforth appellant's attack will be concentrated upon ground (1) above, to-wit, undue influence." No serious contention is made that the testator was mentally incompetent at any time or that there was any defect in the execution of his will or codicils. The entire argument is devoted to an effort to prove that he was acting under undue influence when he undertook to dispose of his estate. There is no specification in the amended contest, upon which this case went to trial, of any undue influence exerted upon the testator in connection with the execution of his

will and first codicil, all the allegations concerning undue influence being contained in the second ground of contest and confined to the activities of the proponent and his son-in-law and agent, Joseph E. Brewer, at or about the time the second codicil was executed. These allegations charged "that almost immediately after the marriage of the said Contestant to the said decedent, Griffin Walter Wilson and his son-in-law, Joseph E. Brewer, commenced to poison and prejudice the mind of decedent against Contestant, telling him that Contestant married the decedent for his money and property only, and that Contestant was only interested in his money and not in decedent." It was further charged that the proponent stated to Mr. King that the appellant herein was not trying to be a true wife to him, was not making a home for him, was not caring for him as she should have done, and otherwise criticized her so that decedent's mind was further poisoned against her; that Wilson and Brewer urged Mr. King to protect himself from the appellant and "by exerting their influence upon him and imposing upon his confidence and trust in them, otherwise caused the said decedent to become changed toward your Contestant, so that his feeling of affection and regard were changed into feelings of dislike, disfavor and aversion." It was also charged in the amended contest that except for the statements made by Wilson and his son-in-law and their influence upon the decedent, and except for the fact that they were both his constant companions and that Mr. King had absolute confidence in everything they said and in their statements made against appellant, each and all of which were false, "the relationship between your Contestant and said decedent would have been harmonious, and said decedent would have provided by will for your Contestant herein, in accordance with his original statements and representations to your Contestant." The contestant finally charged that the last codicil would not have been executed by the decedent except for the false statements and representations made by Wilson and Brewer at the time of its execution, but that he would have made provision for her in accordance with the statements and promises made to her at the time of her marriage.

In his answer, the proponent Wilson, whose wife had passed away, denied all the above mentioned allegations but admittted the truth of certain other allegations in the following language, "proponent admits that decedent had known proponent for many years, to-wit, about forty years, and that decedent's relations with proponent had been of a very friendly nature, and that decedent had worked for proponent, and that said parties had been in business together and that decedent placed great reliance upon the statements, representations and wishes of proponent. Proponent also admits that contestant was married to said decedent in September, 1938. and that at that time decedent was 85 years of age and contestant was 34 years of age."

The evidence showed that the date of the marriage was September 19, 1938, approximately 10 years later than the date of Mr. King's original will, and the record discloses that he had never known the contestant until approximately 6 months prior to the execution of his last codicil. Her first meeting with Mr. Brewer followed shortly thereafter when Mr. King introduced him to her. The proponent Wilson never met her until after her marriage, when she was introduced to him by her husband. It is apparent, therefore, that no undue influence adverse to this appellant was exerted upon Mr. King's mind when his will was executed; the same is true of the codicil executed on August 8, 1934, approximately 6 years later. The court's consideration of the charge of undue influence exerted by Mr. Wilson and Mr. Brewer, therefore, was limited to the second codicil, which, it will be noted, not only bequeathed the parcel, above mentioned, in joint tenancy, but ratified and confirmed the will of 1928 and codicil of 1934 "in all respects save in so far as any part thereof shall be revoked or altered by this present Codicil."

Section 70 of the Probate Code provides that: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." The second codicil which we are considering, states in definite terms "I am making no provision in said Will for my said wife" and then gives as the reason "that I am transferring to her name and mine, in joint tenancy the following described property:" etc. He car-

ried this intention into effect when, on the 28th day of December, 1938, he executed a grant deed conveying to himself and his wife, as joint tenants, the real property mentioned in the codicil. On July 31, 1939, the decedent passed the entire title in said parcel to his wife by executing a deed in her favor, reciting that "This Deed is given to carry out the mutual agreement of the parties hereto: That said property shall become vested in the Grantee as her sole and separate property free from all interest, title or claim of the Grantor now existing, or which may hereafter arise by reason of the marital relations of said parties, and is so accepted by said Grantee, whose signature is subscribed in confirmation thereof." Approximately one month earlier, on June 30, 1939, Mrs. King had conveyed to her husband whatever interest she had in "Lot 10, Tract 9402 as per map recorded in Book 129, page 99 of Maps, in the office of the Recorder of said County." This parcel is located in the Town of Newhall, and the deed signed by Mrs. King contained the identical language just quoted from the deed of Mr. King, dated July 31, 1939, passing the San Fernando property to her.

[1] The appellant argues that the evidence which she produced at the hearing was sufficient to place upon proponent the burden of showing that the will (presumably meaning the second codicil) was not induced by his undue influence. In answer to this, the respondent asserts that under the rule as it is mentioned in many of our California cases, including Matter of Estate of Higgins, 1909, 156 Cal. 257, 261, 262, 104 P. 6; In re Estate of Baird, 1917, 176 Cal. 381, 384, 168 P. 561; In re Estate of Relph, 1923, 192 Cal. 451, 465, 221 P. 361, such burden would fall upon him only if the evidence showed that while holding a confidential relationship toward the decedent, he participated actively in procuring the execution of a testamentary instrument providing undue profit for him. He does not concede that a confidential relationship existed between himself and Mr. King, and denies that he participated actively in procuring the execution of the will or either of the two codicils. He also denies that he profited unduly by the will or codicils.

It is our opinion that he held a confidential relationship toward Mr. King over a long period of years and up to the time of his death. It appears from the evidence that he first met Mr. King 35 or 40 years ago when he hired him as a carpenter; that at a later date, approximately 1923, when King was over 70 years of age, he returned to California from a trip to some other part of the country and stayed in the Wilson home as a guest of Mr. and Mrs. Wilson for several weeks, during which time he tried unsuccessfully to get a job. Mr. King was then an old man and some of his fingers were missing. Referring to the transcript, we find the following testimony of Mr. Wilson, called under Section 2055, Code Civ.Proc.:

"I started him in the building business, agreed to take care of him, look after him in business affairs, take care of him in sickness and in health, and to see that he had a good, Christian burial, and I bought the lot he wanted I should buy, and buried him there. I did not consult his wife because I had that agreement with him, with the pledge exacted from me, that I would attend to this. It was stated that I was an old friend of Mr. King, and that is true; that Mr. King had the utmost confidence in me, and that is true; and I am proud to have it brought up by the opposing attorney that such is the case. Now, the agreement was expressed by Mr. King on his own account that whatever he had should be mine and my wife's. He had often told my wife he loved her, that she had been a mother to him for a long time. He was a man who appreciated courtesy and care; and he was a man that I held in the highest esteem; and, so, the agreement was that whatever Mr. King could make out of the building business, he would deed the property to me. Mr. King lived up to that part of the agreement. He deeded these properties to me, because we considered it was a good plan to keep them and get an income from them; one of them was to be a home. I kept my part of the agreement with Mr. King by doing as I agreed. * * * The agreement was that when we went into business that whatever could be made out of that, after caring for Mr. King through life, he had so much a month, whatever he needed; and the will was made in case there should be some piece of property that was in his name and not in mine, that it should go to me and my wife.

"Q. In other words, to carry out the original plan so that he would be leaving you all of this property—that was the effect of it? A. That's right. * * * Any time Mr. King wanted extra money,

he would come to me and I would just hand it to him.

"Q. He always paid it back? A. He did. He didn't owe me a cent when he died.

"Q. So that this money which came from the properties you did not consider as an advance by you to Mr. King, did you? A. No, Mr. King did not claim ownership; that which came from the property which was deeded to me, it went into a fund.

"Q. And out of this fund you advanced the money for him to live on? A. I did."

Other testimony showed that proponent's son-in-law, Mr. Brewer, acted as his agent "with reference to taking care of Mr. King"; that this was pursuant to an agreement which he had with Mr. King. Additional excerpts from the testimony might be quoted, but we feel that the foregoing sufficiently shows that a confidential relation existed between the proponent and Mr. King.

We pass now to a consideration of the second point urged by the appellant and denied by the respondent, namely, that the will and the second codicil were procured by active participation of the beneficiary. To prove such participation, the appellant reviews some of the incidents occurring when these instruments were executed, omitting any reference to the first codicil of the 8th day of August, 1934. That particular document, according to the testimony, was prepared by an attorney of San Fernando at the instance of Mr. King himself, who was not accompanied by anyone so far as the attorney could recall. It was witnessed by the attorney and a bank officer.

As to the will, appellant notes that Brewer, Wilson's son-in-law, was one of the witnesses and calls attention to the fact that the attorney who prepared that will and also witnessed it, Mr. Douglas Fawcett, had offices with Mr. Irsfeld, who, on a prior occasion, had acted for Mr. Wilson in regard to some minor legal matters. It appeared from Wilson's testimony that on that occasion he took Mr. King to Mr. Irsfeld's office upon learning that he wanted to draw a will. It does not appear that on that occasion Wilson was present at any discussion concerning the terms of the will.

As to the second codicil, the testimony was to the effect that King told Wilson that he wished to draw a codicil and that Wilson then "accompanied" him to Mr. Irsfeld's office. What became of Wilson after he arrived with King at the Irsfeld office does not appear, but there is no testimony that he was present when the terms of the codicil were discussed or that he had any knowledge of its terms. Mr. James B. Irsfeld, Jr., witnessed the execution of the codicil and testified, "My father read the original will and this codicil to Mr. King, and asked him if that was his intention, to execute this codicil to that will, and he said it was." Miss Jean Gordon, the other witness to the codicil, was asked, "Was Mr. Wilson present?", and answered, "No, Mr. Wilson was not even in the office that day at all. Q. And did you hear this will read to Mr. King? A. Mr. Irsfeld, Sr. read it to him." Appellant, in her brief, states: "We have already seen that Mr. Wilson did not permit Mrs. King to accompany Mr. King at the drawing of the codicil, stating 'No, where we are going we do not want women along.'" We believe she is mistaken in applying that remark to the occasion when the second codicil was executed. According to the record, Mr. Brewer had left a note, dated "Sunday." for Mr. King to "Come over Monday morning 9 or 10 o'clock regarding refund on tax bill. Has to be signed before a notary, Joe.", and it was then, upon leaving the house, that Wilson made the remark quoted. We notice that the date when the second codicil was executed, November 28, 1938, also fell upon a Monday, but it would be mere conjecture to assume that when the three men left for the ostensible purpose of securing a tax refund they had in mind the execution of the codicil or that the codicil was executed on that day.

We find nothing in this record to indicate that either Wilson or Brewer participated actively in procuring the execution of the will or the second codicil. It seems appropriate, since in this case the court granted a nonsuit on the issue of undue influence, to quote the language of the Supreme court in another case upholding similar action. In Re Estate of Arnold, 1940, 16 Cal.2d 573, 581, 107 P.2d 25, 29, it is said:

"Conceding, simply for the purpose of argument, that a confidential relation was proved to have existed between Mrs. Logan and Arnold, proof of that fact alone did not cast the burden of proof upon her that the will was not obtained by her through

undue influence. [In re] Estate of Purcell, 164 Cal. 300, 303, 128 P. 932. In that case it was held that proof of a confidential relationship did not bring into play a presumption of undue influence in the absence of evidence that the beneficiary suggested the terms of the will. In [Re] Estate of Baird, 176 Cal. 381, 384, 168 P. 561, 563, we find the applicable rule stated in the following concise language: 'As suggested in [Re] Estate of Higgins, 156 Cal. (257), 261, 104 P. (6), 8, a "presumption of undue influence" arises from proof of the exercise [existence] of a confidential relation between the testator and such a beneficiary, *"coupled with activity on the part of the latter in the preparation of the will."* The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will.'

"In an unbroken line of decisions of this court, the above statement of law has been approved. [In re] Estate of Anderson, 185 Cal. 700, 716, 198 P. 407; [In re] Estate of Ricks, 160 Cal. 450, 461, 117 P. 532; [In re] Estate of Relph, 192 Cal. 451, 465, 221 P. 361; [In re] Estate of Lances, 216 Cal. 397, 14 P.2d 768; [In re] Estate of Lavinburg, 161 Cal. 536, 540, 119 P. 915; [In re] Estate of Presho, 196 Cal. 639, 651, 238 P. 944. See, also, 28 R.C.L. 146.

"As the evidence of contestant failed to show any activity on the part of Mrs. Logan in the procurement of the will of decedent, it was inadequate to prove undue influence on her part in the execution of said will. The evidence being insufficient to show that the will of said decedent was the result of the undue influence of either of the proponents, the court properly granted the motion of respondents for a nonsuit."

[2] Since the evidence in the instant case disclosed no activity on the part of the beneficiary or his agent in the preparation of the will, there is lacking one of the essential elements tending to cast upon the beneficiary the burden of proving that no undue influence was exerted upon the mind of Mr. King at the time he executed the second codicil. That being so, we are called upon to consider whether, on the plaintiff's presentation of the case, there was any evidence which warranted the submission of the case to the jury. In Re Estate of Arnold, supra, 16 Cal.2d at page 576, 107 P.2d at page 27, the court quotes, from an opinion written by the late Mr. Justice Langdon in Re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579, as follows: " 'It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given".' " In the light of this rule, we have considered the multitude of details appearing in the transcript upon which appellant bases her claim that at the time the second codicil was executed, Mr. King was so unduly influenced as to prevent him from making provision for her "in accordance with the statements and promises made to her at the time of her marriage." The contestant's recital regarding these promises is vague, as will be seen from the following:

"Q. Now, during this period of time that you have described [a few weeks prior to the marriage], did you ever discuss with Mr. King anything about his property or what he intended to do with his property? * * * A. * * * in my first talk with Mr. King * * * Mr. King went on to tell me that day that he had these properties that he could give to anyone; and that is why I happened to suggest that he try to find some widow with a child or someone that could be really helpful; and he said he had these properties he could give to anyone; and, as I remember, we waited a certain length of time for Elsie to come home, and when she did not and I would have to go in a few minutes, and I said, 'How about seeing that house today that you are building?' He said, 'Sure, go ahead, let's do it,' and he put on his hat and we got in my car and went up and looked at that house. Then, on the way up, we passed some of the houses he built, and he started pointing them out to me, and then he had me drive around and showed to me other houses he built, but I didn't pay so much attention to them at that time; but he showed me the ones he had and the ones that were paying off mortgages and the ones that were just rented.

"Q. Did he make any statement to you as to the title to any of those houses? A. He said the 'Hollywood folks,' he called them his 'people at Hollywood,' that they were no relations but that they were taking care of the funds from these houses that were paying off on the mortgages; and in case anything should come up he would have more than the usual allotment, that that was their understanding, that they were to give it to him.

"Q. Now, after these occasions that you have told us about did you ever discuss with Mr. King anything about how he would leave the property? A. Well, he told me, of course, that if I could come and be his housekeeper—

"Q. Tell us when this conversation you are about to relate took place. A. Well, he said that day if I did come and be his housekeeper that that would be what he could do for me and he had made that proposition to several other people, but that he had not been able to work out anything that would be satisfactory both to him and them; and so often it would be someone that could not drive a car, and so on.

"Q. Then, on any other occasion did you have a talk with him about how he would leave the property? A. Yes.

"Q. When? A. Well, on every occasion that I saw him before we were married, practically, and he said, 'The property I showed you and that I pointed out to you,' and 'That is what I have to offer,' and 'That is the proposition.' Then I told him I could not be his housekeeper, and then is when he said, 'I don't suppose you would consider marrying anyone like me.'

"Q. Now, other than the statements you have told us, did he make any other statement about his property and what he would do with it after he died? A. Well, he said if he could get someone who was satisfactory to come in there and take care of him, keep his home and help him.

"Q. Any other conversation than that one that you recall, that differs from any you have told us about? A. He said, 'What I would like to do would be to take a trip every summer and build a house every winter'; and everything he built would go to the party that would do the things for him, if there was anyone that he could find; and that was the natural conclusion.

"Q. Before we leave this point I want to try to refresh your memory to see if you can recall any other conversation or anything said by Mr. King from the time you first met him until he died pertaining to the method in which he intended to dispose of the property at the time of death. A. Well, when he was angry with me, he would say he [it] was going to the 'Hollywood Folks'; and when he was angry with them he would say he wanted me to have it, or he didn't care who got it.

"Q. Do you recall any other things he said pertaining to how he was disposed to handle it? A. Well, he told me that they would not let him fix it up for me.

"Q. When did he tell you that? A. He told me that, I think it was this same occasion that they took him down the street and Mr. Brewer wrote the note—I remember he told me, on the way over there that morning—that was the first occasion we had been over there in the daytime, so that they could get into the bank and safe deposit and get the deed out for him; and he said he was going to ask them to do it; and on the way home he told me that they had put him off and told him to let everything ride, because maybe something might happen and they had to protect him, of course; and that very likely before long he would find out what the object was, or something; and so, he said, 'The only thing they let me do was to fix up the property where we are building, and to give that to you as a Christmas present.'

"Q. Was that about November, as well as you remember? A. Yes, as near as I can remember. It seems to me it was about the time the taxes were due, because it seems like the refund in taxes, it seems like that note came right after the taxes were due.

"Q. Now, you say that Mr. King told you that they said they would let him fix up the place he was building. Do you know what the address of that place was? A. 1508 Fifth, San Fernando.

"Q. It is the same piece of property about which I questioned Mr. Wilson a while ago, while he was on the witness stand? A. Yes. The northeasterly ninety feet of Lot 11 of Tract 1530 (?), San Fernando—I believe I have that correct. Pardon me just a moment. What he said was that they would allow him to put that in joint tenancy immediately—they would fix it in his name and they would allow him to fix it so that it would be his and mine, but that is all they would allow him to do.

"Q. Well, now, you say that was about the time that the taxes were due, is that correct? A. That is what I hook it up to in my mind, associate it with, I should say."

[3] If the foregoing recital can be said to indicate a promise to bequeath various parcels of land to the future Mrs. King, the jury certainly had no information as to what those parcels were. There was a discussion at the trial concerning a declaration which Mr. King made on April 6th, 1939, in which he stated: "During the past fifteen years, I, Henry H. King, have transferred to Griffin W. Wilson, Pearl E. Wilson, his wife, and Joseph E. Brewer and Kathaleen M. Brewer, his wife, certain properties as hereinafter described. Said transfers were made for a valuable consideration and with the intention that the properties transferred should belong to the respective transferees as their own properties; the consideration for said transfers was the agreement of the transferees to look after me and see that I was well cared for as long as I lived and to bury me when I died. I have been associated with Griffin W. Wilson for over forty years; he has always, during that time, looked after me. I am making this declaration so there can never be any question as to my intention in making said transfers and in order that the ownership of the properties transferred may not be questioned by anyone who might claim through me after my death." Then followed a description of 5 parcels of land, located in the Town of Newhall, transferred to Joseph E. Brewer or to Joseph E. Brewer and Kathaleen M. Brewer, husband and wife; also a description of 4 parcels, transferred to Griffin W. Wilson and Pearl E. Wilson, husband and wife, as joint tenants, 3 of these parcels being located in Newhall and the other in the City of San Fernando. The last mentioned parcel consisted of the northeasterly 90 feet of Lot 11 and all of Lots 12 and 13 of Tract 5830, which, it will be noted, included the parcel conveyed in joint tenancy by Mr. King to his wife. This last mentioned lot, namely, the northeasterly 90 feet of Lot 11, Tract 5830, was conveyed to Henry H. King, a widower, by deed, dated August 19, 1938, signed by Griffin W. Wilson and Pearl E. Wilson. We may conclude from the testimony that this transfer took place during the brief courtship of Mr. and Mrs. King and, without question, was the parcel concerning which contestant testified that Mr. King said: "The only thing they let me do was to fix up the property where we are building, and to give that to you as a Christmas present."

We are left in the dark, and so was the jury, as to whether any of the parcels mentioned in the declaration which Mr. King executed were the properties which he showed her at or about the time of their first meeting and which he said "he could leave to anyone." The evidence showed that at the time Mrs. King first met King he was just completing a house at Newhall and that immediately thereafter he started building another on the lot in San Fernando which Mrs. King selected as the place where she would like to live with him.

We have quoted at length from the transcript at this point in order to point out not only that there was a discussion between Mr. King and his wife-to-be concerning property which he claimed to own, but also to show that he was not in a position, as matters then stood, to convey the real estate either by deed or by will; it had all been transferred to Brewer or Wilson in accordance with the trust agreement which had existed between them and Mr. King for a long period of years. There is no evidence in the record to indicate that the proponent ever failed, either personally or by his agent, in carrying out the terms of that trust. All the evidence is the other way. To be sure, there is some indication in the testimony which we have quoted that King had discussed with Wilson and Brewer some adjustment of their affairs, by which, possibly on an accounting, he might be recognized as possessor of one or more parcels of real estate, but such discussion if it ever took place brought no tangible results, unless the San Fernando lot may be so considered, for, according to Mrs. King, her husband told her that the only thing they would "let me do was to fix up the property where we are building [1508–5th Street, San Fernando], and to give that to you as a Christmas present."

The statement of Mrs. King of her husband's vacillation between "the Hollywood folks" and herself as his beneficiaries was confirmed by a note produced by the respondent in cross-examination, which Mrs. King had written to a next door neighbor at San Fernando, where she had been

living, or we might say "camping," for approximately a month and immediately following her marriage. This note reads as follows: "November 7, 1938. My dear Mrs. Charles: Don't bother to return the bread. I had a hard time getting the carpenter back on the job after you were here this morning. He was white and shaky and said every time you come onto the place he gets so nervous he can hardly work the rest of the day. He practically told me yesterday that everything is going to Brewers and Wilsons so all I'll get out of this embarrassing mess is what he can do from now on and he's promised me a home and promised to take care of me and if I get him to keep on I'll do well. Please try to understand and if he doesn't put in your walk when he finishes building on the other side of you, I'll see that you get the equivalent. Now, that's a promise in writing. He promised you that walk and he owes it to you. Like a lot of things he promises me today, and forgets tomorrow. I'm used to keeping my promises. Please try to understand, Mumsy, Gratefully, Gladys." While Mr. King is not mentioned personally in this note, he is referred to as the "carpenter" and at that time, certainly, he had no intention to depart from the plan which he had outlined years before, as evidenced by his will and first codicil, as well as by his working harmoniously and satisfactorily with both Brewer and Wilson for a period of approximately ten years after the will was written.

It cannot be questioned that Wilson took occasion to state his personal views on the marriage both to Mrs. King and to Mr. King. He testified: "I had a little heart to heart talk with Mrs. King, and I told her that she would find that she didn't marry an angel, she married a hard headed, hard working old Irishman, and that if she would just 'rub the fur the right way' she could get anything that was right from Uncle George; but when she crossed him and interfered with his affairs, things might not go quite as well." He also testified: "I don't doubt in the least at this time that I told Mrs. King that I didn't think as fine a looking a woman as she was would marry as old a man as Mr. King because she loved him; and I am pretty sure that she admitted that my deductions were right." He further testified that at a later time he might have said to Mr. King that Mrs. King married him for his money —"It would be naturally discussed. You must remember, Mr. King and I were very close, old friends, and I was looking after his interests as best I could." According to Mrs. King, on another occasion after there had been some disagreement, "he [Wilson] remarked to Mr. King that if I [he] did not behave I would be likely to try to do something, just like poisoning his food, or something like that, and that it was up to him to protect himself against me." Whether this was said jokingly or not, Mrs. King did not know. It also appears that King came to Wilson and told him that he wanted to get a divorce from Mrs. King and wanted to know what he should do. "I told him I never tried it, and the only way he could find out was to go to one that was qualified to answer the question, which would be an attorney. Q. Did you take him to an attorney? A. At his request; he probably said, 'Where will we go to, Jim?' Q. Then you went to Mr. Irsfeld regarding a divorce? A. Yes. Q. Do you know whether a complaint of divorce was drawn? A. The preliminary proceedings were taken; and Mr. King wanted to know what it was going to cost him, and if it had to be contested, it would be $400. Mr. King came back the next morning to say he would fight it out to the bitter end, but he would not pay $400 to get a divorce, if she wanted one let her get it. That stopped the proceedings." Mrs. King also testified that at some later time Wilson suggested to her that she might obtain an annulment from Mr. King.

[4] It is contended that these and similar incidents, some of which occurred long after the testamentary act of November 28, 1938, make a case precluding the court from ordering a nonsuit, having in mind the conditions under which such action might be taken as stated in Re Estate of Flood, supra, 217 Cal. 763, 21 P.2d 579, but we have in mind the following: "In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [In re] Estate of Motz, 136 Cal. 558, 563, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. * * * 'The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased

person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made".' [In re] Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876." In re Estate of Arnold, 1940, 16 Cal.2d 573, 577, 107 P.2d 25, 27.

[5] In re Kaufman's Estate, 1897, 117 Cal. 288, 295, 49 P. 192, 194, 59 Am.St.Rep. 179, quotes the court as saying in Eckert v. Flowry, 43 Pa. 46: "'Unless there was some evidence tending legitimately to prove that some fraud had been practiced upon the testatrix at that time, or that some misrepresentation had then been made, or that some physical or moral coercion had been employed, such as to destroy her free agency, the court erred in submitting to the jury the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law, as well as reason, presumed had no existence.'" No such error could be charged to the trial judge in the instant case, for he was governed by the principle expressed in the following language: "Mere general influence, however strong and controlling, not to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. [In re] Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. It is further held that mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [In re] Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614." In re Estate of Arnold, 1940, 16 Cal.2d 573, 577, 107 P.2d 25, 27.

The comment of the court on the claimed undue influence, consisting of the alleged domination and control of beneficiaries under the will of Mrs. Purcell, in Re Estate of Purcell, 1912, 164 Cal. 300, 302, 128 P. 932, 934, is pertinent in our consideration of the present case: "The most that can be said of the evidence on this branch of the case is that it shows that they had the opportunity to exercise undue influence upon her in the matter of the making of this will, and might have done so if they had been so disposed, and had possessed such influence. This, however, is not sufficient. The undue influence must actually exist, it must be actually exerted, and it must be so exerted as to affect the terms of the will. There is no substantial evidence of either of these conditions. The fact that the confidential relation of attorney and agent existed between the testatrix and Purcell does not in itself prove that the will was procured by undue influence arising from that relation, nor cast upon him the burden of proving the absence of such influence at the time of its execution. (Citing cases.) There is no evidence that either of them suggested to her any of the provisions contained in the will."

It is also proper, in closing, to consider the comment in 26 Cal.Jur. at page 646: "'What would be an undue influence on one man would be no influence at all on another. A man of strong will, whose mind is in its wonted vigor, could not be shown to have been influenced by what might be such influence as to wholly invalidate the will of one whose mind has been weakened by sickness, dissipation or age.' 'It is no easy thing to overpower the mind of a normal person in full possession of his senses by the mere pressure of importunities and entreaties.'" The evidence in this case shows that Mr. King, while advanced in years, was still possessed of physical and mental vigor and that he was a man of determined purpose, fixed intention, and strong will. Appellant had reason to recognize these characteristics in him before she married him. While they were on their way to Reno, where they had planned to be married, they undertook to drive around Lake Tahoe. As night approached, Mr. King asked the appellant, who was driving, to turn around and drive back to their afternoon starting point. She declined to do so and tried to persuade him to her view that the distance completing the circuit of the lake was practically as short as required to retrace their route. Her arguments had so little effect that Mr. King stepped out of the car, left her sitting in the automobile and made his way back by foot or hitch hiking to the starting point. The proposed marriage was temporarily abandoned, but during the following day their differences were made up. They proceeded to Reno and were married. One cannot read the record without concluding that decedent was not a man easily influenced or swayed from what he set out to do.

[6] The court, in its ruling, may have had in mind also the fact that: "If the provisions of a previously executed writing are harmonious or consistent with those of the propounded instrument, the circumstance tends to rebut the allegation of imposition or undue influence. If the decedent is shown to have executed the earlier writing voluntarily, the implication is that the later instrument was not procured by imposition or undue influence." 26 Cal.Jur. 657.

Judgment and order affirmed.

SHINN and PARKER WOOD, JJ., concur.



63 Cal.App.2d 332

SOCIETY OF CALIFORNIA PIONEERS et al. v. McELROY et al.

Civ. 12514.

District Court of Appeal, First District, Division 1, California.

March 20, 1944.

As Modified on Denial of Rehearing April 19, 1944.

Hearing Denied May 19, 1944.

1. Charities ⇐37

The rule of "cy pres" is one of construction, the object of which is to permit the main purpose of donor of charitable trust to be carried out as nearly as may be where it cannot be done to the letter.

See Words and Phrases, Permanent Edition, for all other definitions of "Cy Pres".

2. Charities ⇐37

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if settlor manifested a more general intention to devote the property to charitable purposes, trust will not fail but court will direct application of the property to some charitable purpose which falls within general charitable intention of settlor. Civ.Code, § 2279.

3. Charities ⇐37

The court may interpret language of will to determine whether rule of cy pres may be invoked, but if testator's estate has been distributed and decree of distribution has become final, it is the decree and not the will that must be interpreted.

4. Executors and administrators ⇐315(7)

After final decree of distribution the probate court or a court of general jurisdiction retains power to compel distribution of trust property in accordance with decree.

5. Executors and administrators ⇐315(6)

Where decree of distribution had become final, decree, right or wrong, controlled in subsequent proceedings to determine whether doctrine of cy pres could be applied to charitable trust created by the will, and such question could not be determined by going back to terms of the will. Probate Code, § 1123.

6. Executors and administrators ⇐315(6)

Decree distributing testator's estate was measure of rights of parties under will, in absence of showing that fraud concealed a fact which caused court in decree of distribution to eliminate possible reversionary interest as set forth in will.

7. Executors and administrators ⇐315(6)

A court sitting in equity has no power to declare decree of distribution void because it does not conform to provisions of will.

8. Executors and administrators ⇐315(6)

When a decree of distribution becomes final it becomes measure of rights of beneficiaries under will and is immune from collateral attack even though in contravention of terms of the will.

9. Charities ⇐37

Where decree of distribution provided for outright distribution to beneficiaries named in charitable trust created by will, with no condition attached and no right of reverter reserved, and the decree became final, residuary trustees who claimed under an alleged catch-all clause in the decree had no interest in question whether probate court was justified in applying rule of cy pres in disposition of trust property.

10. Charities ⇐49

Where property has become fully vested in trustees for a valid charitable purpose, neither creator of trust nor his heirs or assigns have any standing in a court in proceeding to compel proper execution of the trust, except as relators.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Suit by the Society of California Pioneers and another against R. D. McElroy and others, trustees of the trust created by the will of James D. Phelan, deceased, and others, for construction of terms of a testamentary trust, wherein the defendant trustees filed a cross-complaint. From an adverse judgment, the defendant trustees alone appeal.

Affirmed.

Eustace Cullinan, of San Francisco, for appellants.

I. M. Peckham and Linforth, Cannon & Miller, all of San Francisco, for respondents.

WARD, Justice.

This is an appeal from a judgment and decree wherein the court, applying the equitable doctrine of cy pres, ordered that a bequest of twenty-five thousand dollars "To the Grand Parlor of Native Sons of the Golden West, for cooperation with The Society of California Pioneers, in erecting a pioneer monument on Telegraph Hill in San Francisco" contained in the willl of James D. Phelan, deceased, be divided equally between those two organizations, the part allotted to the Society of Pioneers to be used in acquiring "Californiana," and the part allotted to the Grand Parlor to be used in defraying the expense of marking historical places and points pertaining to the pioneer era of California.

Defendants are the trustees or their successors of a residuary trust created by the will of the deceased, and the beneficiaries thereof or their representatives. In addition to their answer defendant trustees filed a cross-complaint. Judgment being rendered in plaintiffs' favor both defendants and cross-complainants have appealed.

Prior to the institution of the present proceeding in equity, the probate court, by a decree of ratable distribution in the matter of said estate, distributed the above mentioned bequest "To the Grand Parlor of the Native Sons of the Golden West, in trust, for cooperation with The Society of California Pioneers, in erecting a pioneer monument on Telegraph Hill in San Francisco, twenty-five thousand dollars."

After the death of James D. Phelan and partly prior and partly after the above decree was made, through funds from a bequest by one Lillie Hitchcock Coit, deceased, plans were made and carried out for the erection of the Coit Memorial Tower upon the summit of Telegraph Hill. Owing to the character and limited extent of the area available, it would be quite impossible to erect another memorial, such as that evidently contemplated by the testator, upon the hill without obstructing the roadway leading to the summit and without detracting from the beauty of the landscaping. In view of the changed conditions, therefore, since the creation of the trust and the making of the decree of ratable distribution, it is no longer reasonably possible to carry out the testator's intention or to execute the trust in accordance with the decree of ratable distribution.

By his will James D. Phelan had made many bequests for charitable purposes, including several to various units of the society of Native Sons, namely, "to the Native Daughters' Children's Home Finding Society, Ten Thousand Dollars; to the Grand Parlor of the Native Sons of the Golden West and to the Grand Parlor of the Native Daughters of the Golden West, for charitable uses, Ten Thousand Dollars each; to the Pacific Parlor of the Native Sons of the Golden West Sick Benefit Fund, Twenty Thousand Dollars; I give outright to the Hall Association of the Native Sons of the Golden West of San Francisco, Ten Thousand Dollars; to the Bohemian Club of San Francisco, to the Trustees of the San Francisco Public Library and to the Board of Trustees of the California Palace of the Legion of Honor of San Francisco, for uses appropriate to their respective activities, Ten Thousand Dollars each."

Immediately following the above is this provision: "If for any reason any gift herein before made for any charitable purposes shall be illegal or inoperative then in such event I give an amount equivalent to the amount of each and all such gifts to R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing [parties originally named as trustees] absolutely and unconditionally." The will then provides: "I hereby establish the James D. Phelan Foundation, the income of which is to be expended solely for charitable purposes, and in that behalf I give and bequeath to R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, the survivors or survivor of them, and their successors, the

sum of One Million Dollars ($1,000,000) and also all lapsed bequests (except as herein otherwise provided) in trust," etc.

The two corporations plaintiff in bringing this suit set up the impossibility of performance of the terms of the trust, and prayed for such a judgment as was afterwards rendered. The residuary trustees, cross-complaining, admitted that the monument trust had failed and prayed that the fund be paid over to them as such residuary trustees. The appeal is taken on the judgment roll alone, appellants relying thereon without bringing up the evidence for the reason that the trial court declared in its findings that "Said Phelan never expressed orally or in writing any intention or understanding with respect to the sense in which he used the word 'monument' in his will, or as to the nature of said bequest otherwise than in the language contained in the will itself, but the interpretation placed by the court in these findings on said bequest and as to the meaning intended by said Phelan to be given to the word 'monument' in his will is based solely on the contents of the will and on the other facts recited and found in these findings."

The court found generally that for some time before the death of James D. Phelan both plaintiffs had considered a plan or scheme for the erection of a monument or memorial on the top of Telegraph Hill which should combine the features of a memorial to the pioneers of California with those of a museum for the fireproof housing of relics, objects and writings pertaining to the early history of California; that the testator was a member of the two organizations, knew of these plans, which were the only ones in which it was contemplated that both plaintiffs could cooperate; that he intended that the pioneer monument should include the above features, which are in accordance with the recommendations of plaintiffs' complaint; that the word "monument" in the will was not used in a restricted sense as relating to a shaft or statue, but in accordance with the intentions of the testator, included features of the nature of those above set forth; "that his dominant purpose was primarily a permanent monument or memorial to the pioneers of California, which would combine the features of such a monument or memorial and a museum for the fireproof housing of relics, objects and writings pertaining to the early history of California and especially the historical collections of plaintiff The Society of California Pioneers; that the purpose that such monument or memorial should be on top of Telegraph Hill was secondary to such primary and dominant purpose.

"It is not true that said Phelan in making said bequest of said sum of $25,000 for the erection of a pioneer monument on Telegraph Hill in San Francisco intended to or did provide for any particular charity to be administered in a particular way." As a conclusion of law the court stated that "this case is a proper one for the application of the doctrine of cy pres; * * * that the proposed application of said fund agreed upon between plaintiffs should be and it is approved; * * * that is to say 50% of said fund shall go to and be paid to plaintiff The Society of California Pioneers as a permanent fund for the acquisition of historical material, documents and writings bearing on the history of California during the pioneer period; and that 50% of said fund, together with the accrued interest on the whole of said fund, shall go to and vest in plaintiff Grand Parlor of the Native Sons of the Golden West to be used * * * in erecting or installing plaques and markers commemorating important events in the pioneer period of California history; that none of the defendants have any interest in said fund; that plaintiffs and cross-defendants are entitled to judgment that defendants and cross-complainants * * * as residuary testamentary trustees of James D. Phelan, deceased, take nothing by their cross-complaint herein, but that plaintiffs be dismissed from said cross-complaint."

In asking for a reversal of the judgment appellants make the following contentions: (a) That the trial court erred in overruling the demurrer to the complaint; (b) extrinsic facts cannot alter plain language of a will containing no uncertainty on its face; (c) the Pioneer Society is not a legatee under the will; neither is it a trustee of the cestui que trust; (d) the doctrine of cy pres is not applicable in this case; (e) the testator had no general charitable intent in providing for a monument to be erected on Telegraph Hill; (f) the "monument" trust having failed, the trust fund belongs to and should be delivered to the residuary trustees.

[1, 2] The rule of cy pres is one of construction, the object of which is "to permit the main purpose of the donor of a charitable trust to be carried out as nearly as

may be where it cannot be done to the letter." 14 C.J.S., Charities, p. 512, § 52. A trust ceases if the object becomes impossible or unlawful. Civil Code, sec. 2279. "If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor." Restatement of the Law, Trusts, § 399. "Admittedly cy pres is an unusual doctrine. Generally, if a court cannot enforce or discover the intent of a donor or grantor, or of parties to a contract, it gives no relief. It does not ordinarily substitute for the dubious intention of the party or parties some scheme which the court thinks ought to have been their intent. If the original intent is clear, but cannot be carried out, the court does not usually substitute a second best intent and give a judgment or decree carrying it into effect." 2 Bogert, Trusts and Trustees, § 431, p. 1288. However, following precedent, and in accordance with carefully selected phraseology from previous opinions, the courts of this country have gone far in substituting another charitable object when that designated is impossible of fulfillment. There is substantial authority that this rule is not applied if the donor in the gift instrument and the court in the decree of distribution, direct a valid gift-over in the event that his primary purpose cannot be given effect. In re Fletcher's Estate, 280 N.Y. 86, 19 N.E.2d 794.

There appears in the will herein a purported gift over clause, heretofore referred to, and in the decree of distribution a so-called "catch all" clause. This "catch all" clause was not made a part of the order of distribution to respondents. So far as this record shows, the trustees failed to assert the gift-over or "catch all" clause in the immediate distribution to appellants. In re Fletcher's Estate, supra, contains language of assistance to appellants, but that was a case wherein there was a motion to modify or "reopen" a decree. In re Fletcher's Estate, 166 Misc. 486, 2 N.Y.S.2d 771. In the decision in 280 N.Y. 86, 19 N.E.2d 794, it was the will that was interpreted and not the final decree.

[3] A court may interpret the language of a will to determine whether the rule of cy pres may be invoked, but if the estate has been distributed and the decree of distribution has become final, then it is the decree and not the will that must be interpreted.

Assuming, without deciding, that the rule announced in the Fletcher case is sound, it has no application here. In the present case respondents specifically contend that neither the executors nor the trustees nor the residuary beneficiaries asserted any rights against the ratable distribution in the probate proceedings. The decree, not made a part of the present transcript on appeal except by reference, has become final. The cross-complaint alleges: "There was not distributed, in the matter of the estate of said James D. Phelan, deceased, by any decree of distribution, partial, ratable or final, to R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, or any of them, absolutely and unconditionally, or otherwise, in their individual capacities, or otherwise than as trustees of said residuary trust, any reversionary interest in said sum of $25,000.00 which was by the said decree of ratable distribution, referred to in paragraph III above, to which reference is hereby made, distributed to the Grand Parlor, in trust, for cooperation with the Society, in erecting a pioneer monument on Telegraph Hill in San Francisco, nor was there distributed, by said court in the matter of said estate, by any decree of distribution, partial, ratable or final, to R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, or any of them, absolutely and unconditionally, or otherwise, an amount equivalent to, or as an equivalent of, the amount of such legacy of $25,000.00 to the Grand Parlor." The findings set forth that "It is true that on January 19, 1933, the Superior Court of the State of California in and for the City and County of San Francisco in the matter of the estate of said Phelan made its decree of settlement of first and final account and final distribution whereby it distributed to defendant R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, and their successors, as trustees of said residuary trust, the entire residue and remainder of the estate of said Phelan not otherwise distributed by any decree of distribution there-

tofore made in the matter of said estate, together with all property not then known or discovered or not described in said decree belonging to said Phelan or in which said Phelan in his lifetime or his estate after his death had or acquired any interest, and that said decree has become final,

"It is not true that the residue so distributed to defendants R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, and their successors, as trustees of the residuary trust under the will of said Phelan, included all or any of any reversionary interest in said bequest or fund of $25,000 which was distributed to plaintiff Grand Parlor of the Native Sons of the Golden West by the decree of ratable distribution made in said Phelan's estate on July 29, 1931.

"It is true that in the matter of the estate of said Phelan there was not distributed by any partial, ratable or final decree of distribution to R. D. McElroy, Noel Sullivan, T. B. Doyle and O. K. Cushing, or any of them, absolutely and unconditionally or otherwise, in their individual capacities or otherwise, or as trustees of said residuary trust or otherwise, any reversionary or other interest in said sum of $25,000 which was by said decree of ratable distribution made on the 29th day of July, 1931, distributed to plaintiff Grand Parlor, in trust, for cooperation with plaintiff The Society of California Pioneers in erecting a pioneer monument on Telegraph Hill in San Francisco."

[4] After a final decree of distribution a probate court or a court of general jurisdiction retains the power to compel the distribution of trust property in accordance with the decree. In re Estate of Evans, 62 Cal.App.2d 249, 144 P.2d 625.

[5] In the present appeal we are prohibited from going back to the terms of the will. Right or wrong, the decree controls unless it is void on its face. Probate Code, § 1123; Crew v. Pratt, 119 Cal. 139, 51 P. 38; Keating v. Smith, 154 Cal. 186, 97 P. 300; Manning v. Bank of California, 216 Cal. 629, 15 P.2d 746; Security-First National Bank v. Superior Court, 1 Cal. 2d 749, 37 P.2d 69; In re Estate of Richards, 17 Cal.2d 259, 109 P.2d 923. The decree in which we are interested has become final. In McLellan v. McLellan, 17 Cal.2d 552, 553, 554, 110 P.2d 1034, 1035, the court said: "The decree of distribution has long since become final. It determined the persons to whom the estate should be distributed and also the amount to which each person was entitled. If there was any error in the decree, the remedy was by appeal." Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282.

The decree of the probate court was a determination of the rights of the parties. Appellants state that they "are not claiming title under the gift-over provision in the Phelan will. They are claiming as residuary trustees under the catch-all clause in the final decree of distribution", and that the error of respondents' position "lies in assuming that the decree of ratable distribution conveyed the 'whole property', that is complete unlimited ownership of the $25,000 fund, to the Grand Parlor."

[6] Respondents contend that "The court by its decree has thrown the property out of court, and has stripped itself of all jurisdiction over the subject matter." The terms of the decree provide distribution "To the Grand Parlor of the Native Sons of the Golden West in trust for cooperation with the Society of California Pioneers in erecting a pioneer monument on Telegraph Hill in San Francisco, $25,000." There is no condition attached, and no right of reverter is reserved in the decree. A gift-over, or language equivalent thereto, is not mentioned in the decree. The decree is the measure of the rights of the parties, unless it should appear, which the record does not disclose, that fraud concealed a fact which caused the court in the decree of distribution to eliminate the possible reversionary interest as set forth in the will. Miller v. Pitman, 180 Cal. 540, 182 P. 50. In the present proceeding there is no question raised as to the sufficiency of notice, if any was required before the signing and filing of the final decree. Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105.

[7, 8] In Mitchell v. Bagot, 48 Cal.App. 2d 281, 119 P.2d 758, no mention of a trust was found in the will, but there was in the decree. At page 285 of 48 Cal.App.2d, at page 760 of 119 P.2d, the court said: "There is no rule of law that will permit a court sitting in equity to declare a decree of distribution void because it does not conform to the provisions of the will. If such were the law there would be no principle that the decree is conclusive as against collateral attack even though in contravention of the terms of the will. The rule is

well-settled that once the decree of distribution becomes final it becomes the measure of the rights of the beneficiary and is immune from collateral attack even though in contravention of the terms of the will." In Miller v. Pitman, supra, 180 Cal. at page 543, 182 P. at page 51, the court said: "Clearly the probate court had jurisdiction of the subject-matter of the decree of distribution, and the fact that the decree erroneously construed the terms of the will did not operate to render the decree void. The time for appeal from the decree has long since expired. It is well settled that a decree of distribution is not subject to collateral attack, no matter how erroneously it may appear to depart from the terms of the will devising and bequeathing the estate distributed, if all of the interested parties have had due notice of the petition." See, Crew v. Pratt, supra; Gladding v. Superior Court, 7 Cal.2d 408, 60 P.2d 857; In re Estate of McCarthy, 36 Cal.App.2d 194, 97 P.2d 480. Under the authorities mentioned we feel compelled to hold that although the trial court construed the will and the decree, it is the decree which controls and the interpretation of the will must be disregarded.

[9, 10] If the provisions of the decree determine this matter, as we hold, then the appellants have no interest in the question whether the probate court was justified in applying the rule of cy pres in its disposition of the $25,000 fund. In O'Hara v. Grand Lodge I. O. G. T., 213 Cal. 131, 139, 2 P.2d 21, 24, the court said: "However, even if defendant be treated as the creator of this trust, it does not appear what standing it has in this action to claim any interest in the real property. Defendant parted with its entire interest in the property for a valuable consideration, subject to the trust, and retained no reversionary interest therein. Under such circumstances, it has no standing in a court of equity, except as a relator, to attempt to compel the proper execution of the trust, or to claim any interest in the trust property. The law is well settled that when property has become fully vested in trustees for a valid charitable purpose, neither the creator of the trust nor his heirs or assigns have any standing in court in a proceeding to compel the proper execution of the trust, except as relators. Perry on Trusts, 7th Ed., p. 1255, § 732-A."

The rule of cy pres is applicable here. The appropriate disposition of the property thereunder is primarily a matter in the discretion of the trial court. In the absence of any objection by the Attorney General or by the Society of California Pioneers, we do not deem it proper to interfere with the conclusion here reached in this case.

The judgment is affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.



63 Cal.App.2d 384

O'CONNELL GOLD MINES, Limited, v. BAKER et al.

Civ. No. 6886.

District Court of Appeal, Third District, California.

March 21, 1944.

1. Mines and minerals ⇐108

On the doctrine of comity, a corporation organized in the state of Washington may acquire and hold California realty, such as quartz mining claims. Civ.Code, § 405 et seq.

2. Mines and minerals ⇐108

Where a foreign corporation acquired title to quartz mining claims and operated the enterprise for several years after filing a copy of its articles, and then leased the claims, it did not forfeit or abandon its title to the realty by later filing the statutory surrender of its right to transact intrastate business. Civ.Code, §§ 405, 411.

3. Mines and minerals ⇐108

Where a foreign corporation, after acquiring title to quartz mining claims and operating the enterprise for several years, leased the claims and surrendered its right to transact business in the state, it did not thereafter "transact intrastate business" within the statute either by collecting rental from its lessee or by commencing or maintaining a suit to quiet title to the realty. Civ.Code, §§ 405, 408, 411.

See Words and Phrases, Permanent Edition, for all other definitions of "Transact Intrastate Business".

4. Corporations ⇐661(3)

A foreign corporation may maintain a suit to quiet title to its realty, without filing a copy of its articles as required by statute, if the property is not being used by the corporation incident to its conducting of an intrastate business. Civ.Code, § 405.

5. Corporations ⇐672(5)

Failure of a foreign corporation to file a copy of its articles in the proper county is a mere matter of abatement, which must be specially pleaded. Civ.Code, §§ 405, 408.

6. Mines and minerals ⇐38(14)

In an action, as by a foreign corporation, to quiet title to quartz mining claims, the corporation's alleged failure to perform the annual assessment work required by statute is an affirmative defense, and the burden of proving it rests on defendants. Civ.Code, § 1426*l*.

Appeal from Superior Court, Siskiyou County; H. S. Gans, Judge.

Suit to quiet title by the O'Connell Gold Mines, Limited, against H. George Baker and another, who filed a cross-complaint seeking to quiet title in themselves. From a judgment for plaintiff, defendants appeal.

Affirmed.

See, also, 141 P.2d 785.

J. Everett Barr, of Yreka, for appellants.

Tebbe & Correia, of Yreka, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment quieting title in the plaintiff, O'Connell Gold Mines, Ltd., to quartz mining claims situated in Siskiyou County. The plaintiff is a corporation organized under the laws of the State of Washington.

The appellants contend that because plaintiff had surrendered its right to "transact intrastate business in this State" (Sec. 405, Civil Code) and failed to perform "assessment work" upon the mining property for the years 1936-1937 (Sec. 1426*l*, Civil Code, now Sec. 2314, Public Resources Code, St. 1939, p. 1083), the claims and title thereto were forfeited.

The plaintiff is a foreign corporation organized in the State of Washington. May 11, 1931, it filed with the Secretary of State of the State of California a certified copy of its articles in full compliance with the provisions of Section 405 of the Civil Code. April 28, 1931, it acquired title to the mining claims in question, located in Siskiyou County, California. For several years after filing its articles in California the corporation operated the mining enterprise. August 27, 1935, the corporation executed a three-year lease of the mining claims, with an option to purchase, to W. D. Lundy of Long Beach, California. The corporation thereafter ceased to conduct its business of mining in the State of California. That mining enterprise was thereafter operated by the lessee, Lundy, for his own benefit. He performed the required assessment work. August 4, 1937, the foreign corporation voluntarily filed with the Secretary of State of California its written surrender of authority to transact business in this State, as provided by Section 411 of the Civil Code, but specifically designated therein the representative of the corporation upon which process was authorized to be served and the post office address. October 7, 1940, this suit to quiet title to the mining claims was commenced. The appellants filed an answer to that complaint, denying the material allegations thereof, and also filed a cross-complaint asserting title to the claims and demanding a decree quieting title in their favor.

The court adopted findings favorable to the plaintiff in every respect. It was determined that the corporation was organized under the laws of the State of Washington; that it was authorized pursuant to Section 405 of the Civil Code to transact an intrastate mining business in the State of California; that it acquired title and the right to possession of the mining claims in question; that all assessment work thereon was thereafter performed as required by law; that the plaintiff did not abandon its title to said claims, but did surrender its right, only, to continue to transact the intrastate mining enterprise within this State, as provided by Section 411 of the Civil Code; that the plaintiff had the legal authority to maintain this suit to quiet title to its real property, and that the defendants have no right, title or interest in said mining claims. Judgment was accordingly rendered quieting title in the plaintiff to the mining claims described in the complaint. From that judgment this appeal was perfected.

[1, 2] On the doctrine of comity, the plaintiff, a foreign corporation, had the

right to acquire and hold real property in the State of California. 23 Am.Jur. 161, sec. 164. Neither the Constitution nor the statutes of Washington or California prohibit the holding of real property under the circumstances of this case. The plaintiff acquired title to the mining claims in California April 28, 1931. May 11th of that same year it duly qualified to transact intrastate mining business in California, as provided by Section 405 of the Civil Code. Section 405 et seq. (Div. 1, Part 4, Title 1, Ch. XVI) do not prohibit foreign corporations from owning or holding real property in this State. Chapter XVI purports only to regulate the circumstances under which a foreign corporation may be permitted to transact intrastate business. The plaintiff complied with that chapter before it attempted to operate a mining business in California. It is true that the plaintiff thereafter surrendered its right to continue to maintain that mining enterprise in the State of California by filing its written certificate as required by Section 411 of the Civil Code, but it did not thereby forfeit or abandon its title to the real property. The corporation executed the three-year lease of the property to W. D. Lundy, August 27, 1935, after which it ceased to conduct the business of operating the mines. That lease created the relationship of landlord and tenant between the lessor and the lessee. It is not contended the lessee operated the mines as the agent or representative of the corporation.

[3] We are of the opinion the plaintiff may not be deemed to have transacted intrastate business in California by either collecting from its lessee rental for the property or by commencing or maintaining this suit to quiet title to the land. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411; Chapman v. Title Guar. & Trust Co., 25 Cal.App.2d 567, 78 P.2d 268; Davies v. Mt. Gaines Min. & Mill. Co., 104 Cal. App. 730, 286 P. 740; Indian Refining Co., Inc., v. Royal Oil Co., Inc., 102 Cal.App. 710, 283 P. 856; 60 A.L.R. 1018 note; 35 A.L.R. 917 note. It will be observed the appellants concede that the plaintiff lawfully acquired the property in question and leased it to a resident of California during the time it was duly authorized to transact intrastate business as required by Section 405 of the Civil Code. In that regard the only contention relied on by the appellants is that the maintenance of this suit after plaintiff surrendered its right to transact the mining business in California, as provided by Section 411 of the Civil Code, constitutes the conducting of intrastate business contrary to law. That identical question was determined against the appellants' contention in the case of Indian Refining Co., Inc., v. Royal Oil Co., Inc., supra. At page 713 of 102 Cal.App., at page 857 of 283 P., it is said:

"Appellants next contend that, even though plaintiff had complied with the law relative to a foreign corporation doing business in this state, * * * and had thereafter on January 5, 1926, filed with the secretary of state a certificate surrendering its right to do intrastate business in the state of California, it still cannot maintain this action, for the reason that, after filing said certificate of withdrawal it has continued to do business in the state of California. * * *

"Appellants first insist that the bringing of this action in itself constituted doing business in this state, within the meaning of the statutes governing this case. (Stats. 1923, p. 1037.) We think that this contention cannot be upheld. General Conference of Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411. Where a foreign corporation has complied with the provisions of law enabling it to do business in this state, and has subsequently withdrawn from such intrastate business, and filed the certificate thereof in the proper manner, there is nothing in our law to prevent it from subsequently maintaining an action to collect an account that arose while it was lawfully doing business in this state, and the filing of such an action does not constitute doing business within the meaning of the statute."

Nor did the mere collection of rent from the lessee, after the execution of the lease, constitute the conducting or continuation of the mining business. General Conference of Free Baptists v. Berkey, supra. In the heading to a note upon the subject of mere collections of purchase money or rental, found in 60 American Law Reports at page 1018, which is supported by numerous authorities, it is said:

"The fact that the agent collects the purchase price of the goods from the purchasers does not alter the interstate character of the transaction, or amount to doing business within the state so as to render the corporation or its agent amenable to regulation by the state."

Likewise, it has been held that even when the right of a foreign corporation to do business within the state has been forfeited, it is not precluded from maintaining an action in the state on a cause arising before the forfeiture. 20 C.J.S., Corporations, p. 88, § 1862. The text last cited reads:

"The forfeiture of a foreign corporation's right to do business in the state does not preclude it from thereafter maintaining an action in the state on a cause of action arising before the forfeiture, especially where it has not done any business in the state since the forfeiture. Thus, the withdrawal or forfeiture of the right of a foreign corporation to do business in the state because of noncompliance with the statutory requirements does not affect the validity or enforceability of a contract on which a cause of action accrued before the forfeiture or which does not require or contemplate the further doing of business in the state by the corporation."

All that Section 405 of the Civil Code provides in that regard is that, "No foreign corporation shall transact intrastate business in this State until it has filed with the Secretary of State a copy of its articles," etc. Section 408 of the same Code merely provides that "No foreign corporation which has failed to file a certified copy of its articles * * * in a county in this State in which it holds real property can maintain any action or proceeding, commenced prior to such filing, in relation to such real property, its rents, issues or profits," until such certified copy of its articles shall have been filed.

The foregoing prohibition evidently applies only to an action involving real property which is used in connection with the unlawful transaction of intrastate business by a foreign corporation which fails to file its articles as required by that chapter of the Code. The restriction clearly applies only to a foreign corporation "which has failed to file a certified copy of its articles." Moreover the restriction is limited to the maintaining of actions "commenced prior to such filing."

[4] This action was not commenced prior to the filing of the copy of plaintiff's articles in this state. The articles were previously duly filed as required by law. The articles have never been withdrawn from the records of the Secretary of State. They are still on file in that office. The designation of the party upon whom process may be served and the post office address were specifically made and retained as required by law. We know of no reason why a foreign corporation may not maintain an action to quiet title to real property which it acquires and owns in this state, without complying with Section 405 of the Civil Code, if that property is not being used by the corporation incident to its conducting of an intrastate business.

[5] Moreover, it has been held that the failure of a corporation to file a copy of its articles in the proper county is a mere matter of abatement, which must be specially pleaded. Chapman v. Title Guar. & Trust Co., supra; 6a Cal.Jur. 1377, sec. 803. The defendants failed to demur to the complaint in this action, and the answer fails to raise the question of plaintiff's failure to comply with the provisions of the Civil Code with respect to filing with the Secretary of State a copy of its articles, or to question the effect of subsequently surrendering its right to conduct intrastate business in this state.

[6] There is an abundance of evidence to support the findings of the court that the plaintiff did not forfeit its title to the mining claims by failure to perform the annual assessment work required by Section 1426*l* of the Civil Code (now Sec. 2314, Public Resources Code) for the years of 1936–1937, or otherwise. The alleged failure of the plaintiff to perform the annual assessment work as required by law constitutes an affirmative defense, the burden of proving which rests on the defendants. Callahan v. James, 141 Cal. 291, 74 P. 853. The defendants failed to sustain that burden. Witnesses testified in behalf of the plaintiff to both the value and character of the annual assessment work which was performed (17 Cal.Jur. 392, secs. 73, 74) sufficient to comply with the requirements of law.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

63 Cal.App.2d 632

PEOPLE v. GIBSON.

Cr. No. 1864.

District Court of Appeal, Third District, California.

March 30, 1944.

1. Criminal law ⇐406(3)

Accused's extrajudicial statement that he did not have owners' permission to take automobile out to ride around and that though he had been working for owners eight months that was the first time anything like that had happened, and that it would never happen again, was merely an admission which did not amount to a "confession" and was admissible without preliminary proof that it was voluntarily made. Vehicle Code, § 503, St.1939, p. 1481.

See Words and Phrases, Permanent Edition, for all other definitions of "Confession".

2. Criminal law ⇐517(3)

A confession of guilt of the crime charged is inadmissible in absence of preliminary proof that it was made voluntarily without coercion or promise of leniency.

3. Automobiles ⇐355(10)

Evidence that accused to whom employer entrusted automobile for a particular mission did not return in a reasonable time and was found intoxicated some 10 hours later in automobile stalled for lack of gasoline did not show the intent to deprive owner of possession of automobile necessary to sustain conviction of driving automobile without owner's consent with intent to deprive owner of temporary possession thereof. Vehicle Code, § 503, St. 1939, p. 1481.

4. Automobiles ⇐353

Prosecution must prove as a necessary element of the offense of driving automobile without owner's consent with intent to deprive owner of possession thereof that accused intended to deprive the owner of the possession of automobile. Vehicle Code, § 503, St.1939, p. 1481.

5. Automobiles ⇐355(10)

The intent to deprive owner of possession of automobile may be inferred from facts and circumstances of a particular case, but there must be substantial evidence from which such intent may reasonably be determined. Vehicle Code, § 503, St.1939, p. 1481.

6. Automobiles ⇐352

Assuming that accused's failure to return automobile within a reasonable time for which its custody was entrusted to him amounted to a constructive taking of the vehicle without consent, there would be a fatal variance between such proof and allegations of information charging that accused drove automobile without owner's consent with intent to deprive owner of temporary possession thereof. Vehicle Code, § 503, St.1939, p. 1481; Pen.Code, § 499b.

7. Automobiles ⇐339

The gist of offense defined in statute is the driving of an automobile without owner's consent and with intent to permanently or temporarily deprive owner of title to or possession of automobile. Vehicle Code, § 503, St.1939, p. 1481.

8. Automobiles ⇐339

Where accused took automobile at owner's request to perform a particular mission, statute relating to the taking of an automobile without owner's permission had no application. Pen.Code, § 499b.

9. Automobiles ⇐355(10)

Proof that accused retained custody of automobile entrusted to him by owner beyond the time reasonably required to perform a designated mission without showing that he drove beyond direct course to be pursued in performing mission or otherwise drove automobile with intent to deprive owner of possession thereof will not sustain conviction of driving automobile without owner's consent with intent to deprive owner of possession. Vehicle Code, § 503, St.1939, p. 1481.

10. Automobiles ⇐339

Trial court sitting without a jury was required to consider accused's intoxication in determining the necessary element of intent or purpose involved in offense of driving automobile without owner's consent with intent to deprive owner of possession. Vehicle Code, § 503, St.1939, p. 1481.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Eulice H. Gibson was convicted under Section 503 of the Vehicle Code, St. 1939,

p. 1481, of driving an automobile without owners' consent with intent to deprive owners of temporary possession of the vehicle, and he appeals.

Judgment reversed.

Chas. H. Epperson, of Stockton, for appellant.

Robt. W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was convicted under Section 503 of the Vehicle Code, St.1939, p. 1481, of feloniously driving an automobile without the consent of the owners, and with intent to deprive the owners of the temporary possession of the vehicle. The case was tried by the court sitting without a jury. The defendant did not take the witness stand in his own behalf. He was found to be guilty as charged, but in the discretion of the court he was fined the sum of $100 and, upon failure to pay the same, he was sentenced to imprisonment in the county jail one day for each three dollars of said fine. From that judgment this appeal was perfected.

The evidence is brief. It satisfactorily shows that for several months prior to the commission of the alleged offense the defendant worked for Renney Motors, a copartnership, at Stockton, cleaning and servicing machines. While there is some dispute regarding the technical title to the automobile in question, we are satisfied that machine, together with others, belonged to Renney Motors. On several occasions the defendant drove those cars on different missions at the request of his employers. On October 1, 1943, at about one o'clock P. M., at the request of Louis Raballo, the manager of the business, the defendant took the machine in question and drove Lieutenant Jack Renney to the Stockton Airfield. The record is silent with respect to how much gasoline the tank contained, or whether the defendant was expected to immediately return to the place of business. Nor does the evidence indicate the location or distance of the airfield from the Renney Motors shop. The defendant failed to return that afternoon. At four o'clock the following morning the Stockton police patrol officers found the automobile stalled on the railroad track in the outskirts of Stockton. The gasoline was exhausted. The defendant sat at the steering wheel in an intoxicated condition. He was placed in jail. The machine was towed to a garage.

Not having learned of the recovery of the machine or the arrest of the defendant by the policemen, the owners of the automobile filed a charge against the defendant of violating the provisions of Section 503 of the Vehicle Code. At the trial the manager of the company said that if they had known the facts they would not have charged him with that offense.

The chief issue on appeal is whether the record contains sufficient evidence of the alleged intent of the defendant to deprive the owners of possession of their car by merely showing that he became intoxicated and failed to return the machine within the time ordinarily required to make the trip to the airfield and back. He was charged with driving the automobile, without the consent of the owners with intent to deprive them of the possession of the machine. There is no evidence that he drove the machine beyond the regular course to and from the airfield. The defendant was evidently on his way back to the Renney Motors shop when the machine became stalled on the track in the outskirts of Stockton for lack of gas. The record fails to show whether the tank contained enough gasoline when he started to drive to the airfield and back.

[1] The court did not err in receiving in evidence an extrajudicial statement of the defendant without preliminary proof that it was voluntarily made. When that statement was offered in evidence, the defendant objected on the ground that it was incompetent and that the foundation for its reception had not been established. The objection was overruled. There is no evidence that it was voluntarily made. All that it contains was testified to by the stenographic reporter as follows:

"Q. You had no permission to take the car out to ride around? A. No; I just took Bob Renney's brother out there.

"Q. You were to come back? A. Yes, I have been there for about eight months now. This is the first time that anything like this has happened; it will never happen again."

[2] It is true that if the foregoing statement may be deemed to constitute a confession of guilt of the crime charged it would have constituted error to receive the evidence in the absence of preliminary proof that it was made voluntarily without coercion or promise of leniency. 8 Cal.Jur. 109, sec. 201. However, we consider the statement a mere admission of certain facts

which does not amount to a confession. Therefore the statement was admissible in evidence without preliminary proof that it was voluntarily made. People v. West, 34 Cal.App.2d 55, 61, 93 P.2d 153; 8 Cal.Jur. 99, sec. 195. The court did not err in receiving the statement without proof that it was voluntarily made.

[3-6] We are of the opinion the evidence in this case does not affirmatively show that the defendant intended to deprive the owners of possession of their automobile. We may not be permitted to infer that merely because he unintentionally got drunk and delayed returning the car for some ten hours that he deliberately intended thereby to deprive the owners of the possession of the machine. Under Section 503 of the Vehicle Code it is essential for the prosecution to prove as a necessary element of the offense charged that the defendant intended to deprive the owner of the possession of the machine. People v. Zervas, 61 Cal.App.2d 381, 142 P.2d 946; People v. Neal, 40 Cal.App.2d 115, 104 P.2d 555. While it is true that the intent may be inferred from the facts and circumstances of a particular case, there must be substantial evidence from which the intent may reasonably be determined. People v. Zervas, supra. In the present case the evidence is undisputed that the defendant took the car with the express consent of the owners. Even though it may be assumed that a failure to return the machine within a reasonable time for which its custody was entrusted to the defendant, might amount to a constructive taking of the vehicle without consent, the defendant was not charged with taking the machine without consent. Under such construction there would be a fatal variance between the allegations of the information and the proof.

In the Zervas case, supra, a judgment of conviction of two defendants prosecuted under Section 503 of the Vehicle Code was reversed on appeal, for lack of proof of an intention to deprive the owner of the possession of the automobile. In that case the machine was not obtained with the consent of the owner. A third defendant named Evilsisor, jointly charged with the offense, and who pleaded guilty, admitted that he "borrowed the car." He probably stole it. The three defendants were acquainted while they were inmates at San Quentin State Prison. He picked up the appellants on Ellis Street in San Francisco to take them to a bus which they missed, after which they drove around the city for some time before they were apprehended. The Appellate Court [61 Cal.App.2d 403, 142 P.2d 948] held that "from that evidence it cannot reasonably be inferred that the appellants had the requisite felonious intent" to deprive the owner of the possession of his machine. The court said, "The evidence is totally insufficient to sustain their conviction."

[7-9] The gist of this offense, contained in Section 503 of the Vehicle Code, under which the defendant was convicted, is the driving of an automobile "without the consent of the owner, * * * and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle." Section 499b of the Penal Code has no application to this case because that section depends upon the taking of the machine "without the permission of the owner." In the present case the evidence is undisputed that the defendant took the machine at the request of the owner to perform the particular mission of conveying the Lieutenant to the airfield. The burden was on the prosecution to affirmatively prove that the defendant drove the car with the intent to deprive the owner of its possession. Does the evidence show that fact? We think not. There is no evidence to show that the defendant drove the machine beyond the direct course to and from the airfield in performing his mission. Of course he would have been guilty of driving it without the consent of the owner if he had violated his instructions by driving it to San Francisco or some other remote place beyond the course to and from the airfield. But in this case, so far as the evidence shows the fact to be, he may have become intoxicated by drinking whisky from a bottle which he possessed without even getting out of his machine on the way back. He was evidently returning to his employers' place of business when the car was stalled on the railroad track for lack of gasoline, for it was found in the outskirts of Stockton at four o'clock the following morning. The gasoline tank may not have contained sufficient gas with which to make the round trip; or the defendant may have stopped on his return trip at a roadhouse by the highway to quench his thirst and he may have imbibed too much liquor. In either case it could not be said he was driving the vehicle with the intent to deprive the owner of its possession. The most that may be said under the proved facts of this case is that the defendant retained

the car for about ten hours beyond the time ordinarily required to perform his mission. Section 503 of the Vehicle Code does not make it an offense to retain a machine specifically entrusted to one by the consent of the owner beyond the time reasonably required to perform a designated mission. If he merely retained possession of the car by letting it stand parked for a few hours at a roadhouse by the side of the highway, without driving it, or it was detained by becoming stalled on a railroad track for lack of gasoline, it may not be said it was either driven or taken without the consent of the owner with the intent to deprive the owner of its possession. The information in this case specifically charges the defendant with driving the car, without the consent of the owner, with the intent to deprive the owner of the possession of the machine. The defendant did not admit in his statement made to the officer that he "rode around" in the car. When he was asked if he had permission to "ride around" in the car, he said "No". But in effect he denied riding around in the car, for he added "I just took Bob Renney's brother out there" to the airfield. When he was further asked "You were to come back?" he replied "Yes, I have been there for about eight months now. This is the first time that anything like this has happened; it will never happen again." The reasonable inference to be drawn from the latter statement is that he regretted the fact that he became intoxicated on that mission to the airfield; that he had no intention of delaying his return or depriving his employer of the use of his automobile, and that it would never happen again. The proof lacks evidence of an intention to deprive the owner of the possession of his car. At least it does not show that he was driving the machine during the delay. The learned trial judge recognized the foregoing distinction for in pronouncing judgment he said, "I will state to you, informally, that I do consider this a case of drunken driving; perhaps it should have been disposed of as such." Moreover, recognizing the fact that the proof in this case lacks evidence of a motive on the part of the defendant to violate the statute, the trial judge, in his discretion, leniently imposed the penalty of a mere fine of $100, or upon failure to pay that sum, that he be imprisoned in the county jail one day for each three dollars thereof. We are of the opinion the evidence fails to show that the defendant drove the car without the consent of the owners, with the intent to deprive the owners of the possession of the machine.

[10] Reasonably construed, we infer that this is merely a case of drunkenness, just as the trial judge wisely said that it was. Not only was the court authorized under Section 22 of the Penal Code, but it was its duty, to consider that intoxication of the driver in determining the necessary element of intent or purpose, if any, which prompted him to retain custody of the car for a period of ten hours. The reasonable probability is that he unintentionally became intoxicated, and had no intention of depriving the owners of their automobile.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.



63 Cal.App.2d 302

BARRY et al. v. MADDALENA et al.

Civ. 14301.

District Court of Appeal, Second District, Division 2, California.

March 17, 1944.

1. Automobiles ⇐226(1)

In action for wrongful death as result of automobile collision, it was not essential to validity of judgment for defendants that jury should have found that defendants were free from negligence.

2. Automobiles ⇐245(6)

In action for death of pedestrian who was struck by automobile, whether defendants, who struck pedestrian within less than six seconds after passing approaching automobile with glaring headlights, were negligent, was for jury.

3. Automobiles ⇐245(72)

In action for death of pedestrian who was struck east of center line of highway in country by automobile traveling north, whether pedestrian was contributorily negligent was for jury. Vehicle Code, §§ 562, 564, St.1935, p. 188; Vehicle Code, § 648, St.1939, p. 1603.

4. Automobiles ⇐242(8)

The presumption that deceased was exercising due care at the time he was struck by automobile and killed is not conclusive. Code Civ.Proc. § 1963.

5. Automobiles ⇐244(51)

Evidence that pedestrian was seen to step from a position of safety into path of automobile traveling north or that he was seen walking in easterly lane of highway in country was not necessary to support finding of pedestrian's negligence. Vehicle Code, §§ 562, 564, St.1935, p. 188; Vehicle Code, § 648, St.1939, p. 1603; Code Civ.Proc. § 1963.

6. Automobiles ⇐242(8)

Uncontradicted facts establishing that pedestrian was east of the center stripe when struck by an automobile traveling north in country outweighed the presumption that pedestrian was exercising ordinary care. Vehicle Code, §§ 562, 564, St. 1935, p. 188; Vehicle Code, § 648, St.1939, p. 1603; Code Civ.Proc. § 1963.

7. Automobiles ⇐244(51)

Implied finding that pedestrian, struck and killed on east part of highway by automobile traveling north in country, was contributorily negligent, was sustained by physical facts. Vehicle Code, §§ 562, 564, St.1935, p. 188; Vehicle Code, § 648, St. 1939, p. 1603; Code Civ.Proc. § 1963.

8. Automobiles ⇐246(58)

In action for death of pedestrian, evidence that pedestrian was struck on highway in open country and in easterly lane of highway by left lamp of automobile proceeding northerly justified instruction setting forth section of Vehicle Code and declaring that if pedestrian violated it he was negligent as a matter of law and that if such act was a proximate cause of the accident plaintiffs could not recover. Vehicle Code, § 564, St.1935, p. 188.

9. Automobiles ⇐246(58)

Evidence that pedestrian, while in easterly lane of highway in open country, was struck by left lamp of automobile proceeding northerly, justified instruction that duty of pedestrian to yield right of way while crossing a highway at a point other than a crosswalk area may call for higher degree of care than when crossing at crosswalk, that if pedestrian failed to exercise degree of care of reasonably prudent person in crossing at a point where he does not have the right of way he was guilty of negligence as a matter of law and that if such negligence was proximate cause of accident plaintiffs could not recover. Vehicle Code, § 564, St.1935, p. 188.

10. Automobiles ⇐246(58)

Instruction that degree of care required of pedestrian was that of a reasonably prudent person under similar circumstances, and that a reasonably prudent person would have known that by virtue of the darkness and the color of his clothing it would be difficult for motorist to observe pedestrian, and that therefore a greater degree of care was imposed upon pedestrian under the circumstances if they were found to have existed, was proper under the evidence. Vehicle Code, § 564, St.1935, p. 188.

11. Automobiles ⇐246(60)

Where there was evidence that pedestrian was struck and killed in easterly lane of country highway by left lamp of automobile proceeding northerly, plaintiffs were not entitled to an instruction that pedestrian was presumed to have complied with provisions of Vehicle Code requiring him to yield right of way to approaching vehicles; but all that plaintiffs were entitled to was instruction advising jury that they should weigh the presumption and any evidence supporting it against evidence offered by defendant and determine whether pedestrian had been negligent. Vehicle Code, § 564, St.1935, p. 188; Code Civ. Proc. § 1963.

12. Appeal and error ⇐1170(9)

Record showed that no miscarriage of justice had resulted from the giving of any instruction in the case. Const. art. 6, § 4½.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Charles E. Barry, Rodney Barry, Rupert Barry, Violet Dannatt, and Lucy Hinman, heirs at law of Robert Emmett Barry, against Clemente Noel Maddalena and Clem Maddalena for wrongful death. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Allard & Whyte, of Pomona, for plaintiffs and appellants.

C. P. Jorz, of Los Angeles, for defendants and respondents.

MOORE, Presiding Justice.

As heirs at law of decedent, Robert Emmett Barry, appellants sought damages from defendants resulting from the wrongful death of deceased. On this appeal they contend (1) that the evidence is insufficient to support a finding that defendants were free from negligence or (2) that Mr. Barry was guilty of contributory negligence, and (3) that certain instructions were erroneous.

(1) About 11:30 p. m. on the night of July 30, 1942, defendant Clem Maddalena and his minor son, Clemente, were proceeding northerly in the father's Chevrolet on U. S. Highway 101 with Clemente in the driver's seat. The weather was clear of fog or cloud and the pavement was dry as they approached the city of Santa Marguerita. The concrete highway was divided in the center by a white stripe. On each side was a six foot smooth shoulder. They were still in the open country traveling at about 45 miles per hour when another automobile with glaring headlights, going southerly, passed them. On approaching the south-bound vehicle Clemente lowered the beam of his head lights. Within less than six seconds after passing the south-bound car the Chevrolet collided with the deceased. The left fender and lamp struck him, indicating that deceased was east of the highway's center. The collision was the first knowledge defendants had of the presence of any object on the pavement notwithstanding both of them had been on the lookout just prior to the impact.

[1, 2] It is not essential to the validity of the judgment that the jury should have found that the defendant was free from negligence. However, such reasonable inferences may be drawn from the established facts as to justify a finding that Clemente was not negligent. His speed did not exceed that which was lawful; he traveled in the right lane of the highway; he kept a lookout for perils of the night. Whether he failed in any of those respects was a fact which the jury impliedly determined in his favor. The brilliant head lights of the south-bound car may have dimmed Clemente's vision.

[3] (2) Not only was the finding of Clemente's freedom from negligence justified, but the evidence warranted the implied finding of the contributory negligence of deceased. Whether deceased by his own negligent act caused his collision with the Chevrolet was a question for the jury. If deceased had been walking southward, he was presumptively negligent in violating the rule which requires that a pedestrian on the highway in the open country walk close to the left-hand edge. Vehicle Code § 564, St.1935, p. 188. If he had been northward bound he should have been on the outside of the westerly lane. Ibid. On the other hand, the jury may have determined that deceased was attempting to cross from the west side to the east side of the highway at a point where there was no cross walk and without yielding the right of way. Two established facts warranted such determination: (1) His position, when struck, in the easterly lane near the center stripe; and (2) neither defendant saw him. If he did attempt to cross as the Chevrolet was approaching, he should have yielded the right of way and in failing to do so he was negligent. Sec. 562, Vehicle Code. Under the circumstances a finding that such act contributed to the accident is amply justified. It follows that if the jury found that the headlights of the Chevrolet did not comply with the rule requiring that its lighting beams have sufficient intensity to reveal a person at a distance of 100 feet ahead, Sec. 648, Vehicle Code, St.1939, p. 1603, still upon other facts the jury may properly have found that the negligence of deceased justified a denial of recovery.

[4] The authorities cited by appellants (Hatzakorizian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A.L.R. 1027; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066) do not support their contention. Prior to those decisions it was the law that a pedestrian had the right to travel on either side of the highway, and of course it was not negligence for him to do so. But following them the legislature altered the rules thereby forbidding a pedestrian to walk "upon any roadway outside of a business or residence district otherwise than close to his left hand edge." Sec. 564, Vehicle Code. Plaintiffs contend that since there was no testimony contrary to the presumption that deceased was exercising due care at the time of the impact, Sec. 1963, Code Civ.Proc., therefore he was not negligent. This is not a conclusive presumption.

[5-7] The fact that there was no witness to say either that he saw deceased step from a position of safety into the

path of the Chevrolet or walk in the easterly lane was not necessary to support the finding of deceased's negligence. The dents on the headlight and fender were more eloquent than the speech of many witnesses. Those and the other uncontradicted facts establish that deceased was east of the center stripe and were sufficient to outweigh the presumption that decedent was taking ordinary care for his own concerns. But if the inclusion of such presumption had been essential in order fairly to instruct the jury, there is no error for the reason that one of the instructions given did embody the principle of the cited section. The decisions of Chinnis v. Pomona Pump Co., 36 Cal.App.2d 633, 98 P.2d 560; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 506, 143 P. 714; Wiswell v. Shinners, 47 Cal. App.2d 156, 117 P.2d 677, 680, are not in point. In the Chinnis case the driver's negligence was not imputed to his guest. In the Crabbe case there was no evidence to rebut the presumption that deceased was taking ordinary care for his own safety, hence the presumption prevailed. In the Wiswell case there were two eyewitnesses to the collision. In reviewing that judgment which had been awarded on a directed verdict the court said: "Where facts are admitted or established by proof which is irreconcilable with the presumption, the latter loses its evidentiary value." Therefore appellant was entitled to the benefit of the presumption claimed until dispelled by evidence at variance with the presumption. It was for the jury to determine whether the presumption had been overcome by contrary evidence. That they were justified in so finding is shown by the physical facts. Wiswell v. Shinners, supra.

(3) The third assignment is that there was no evidence justifying defendants' proposed instructions 11, 12, and 14. Number 11 sets forth the provisions of section 564, and declares that if deceased violated such provisions he was negligent as a matter of law, and if such act was a proximate cause of the accident plaintiffs cannot recover. Number 12 recites (1) that the duty of a pedestrian to yield the right of way while crossing a highway at a point other than a cross-walk area may call for a higher degree of care than that applied when he crosses at a regular cross walk; (2) that if deceased failed to exercise the degree of care of a reasonably prudent person in crossing at a point where he does not have the right of way he was guilty of negligence as a matter of law; and (3) that if such negligence was a proximate cause of the accident plaintiffs cannot recover. Number 14 declares that the degree of care required of deceased was that of a reasonably prudent person under similar circumstances; that a reasonably prudent person would have known that, by virtue of the darkness and the color of his clothing, it would be difficult for the motorist to observe him there; that therefore a greater degree of care was imposed upon deceased under the circumstances if such were found to have existed.

Appellants do not say that the criticized instructions embody erroneous statements of the law. Their claims are that there is no evidence justifying 11, and that in attempting to apply the law by 14 the court effectually told the jury they might find deceased had violated section 564, although no witness had seen him before the impact.

[8-10] In making such claims, appellants are in error. Both 11 and 12 were given because of the proof that deceased, while in the open country and in the easterly lane of the highway, was struck by the left lamp of the Chevrolet, proceeding northerly. Number 12 is a fair attempt to apply section 564 to the very facts in evidence. Instruction 10 quoted and correctly applied section 562.

Such instructions were properly given to aid the jury in the event they should determine from the evidence that the deceased in violation of the two code sections was either crossing the highway or walking in defendants' lane of travel. The fact that there was no living witness to the impact was no reason for rejecting the instructions. The physical facts were sufficient to prove that deceased was about two feet east of the center stripe. If he stepped east just after the south-bound car passed, Clemente's vision was at that instant dimmed. The circumstances warranted the instructions.

[11] There is no authority to support the contention that appellants were entitled to an instruction that the deceased was presumed to have complied with the provisions of the Vehicle Code requiring him to yield the right of way to approaching vehicles. The extent to which the court might go was to advise the jury that they should weigh the presumption, sec. 1963,

Code Civ.Proc., and any evidence supporting it against the evidence offered by defendants and determine whether deceased had been negligent. Wiswell v. Shinners, supra. Such was the effect of plaintiffs' instruction number 4.

[12] Plaintiffs make the point that they were prejudiced by instructions upon topics concerning which no evidence was received. Citing Jones v. Goldtree Bros. Co., 142 Cal. 383, 386, 77 P. 939. It is asserted that there was no evidence to contradict the presumption, sec. 1963, that decedent had complied with the law and that instructions as to his duty in that regard became needless and confusing. We have cited the proof which justified the inference that the negligence of deceased contributed to his death. The instruction on his duty was therefore timely.

Upon an examination of the entire cause including the evidence we are of the opinion that no miscarriage of justice has resulted in the giving of any instruction. Art. VI, Sec. 4½, Constitution.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.



63 Cal.App.2d 405

DILLMAN v. McCOLGAN, Bank and Corporation Franchise Tax Com'r, et al.

Civ. 6999.

District Court of Appeal, Third District, California.

March 22, 1944.

Hearing Denied May 19, 1944.

1. Statutes ⇐219

Although interpretation of statute by an administrative agency will be accorded great respect by courts and will be followed if not clearly erroneous, it will be overthrown by courts, if erroneous, where such question of law is properly presented.

2. Statutes ⇐190

In order to justify construction of a statute by either an administrative agency or a court, it must first appear that construction is necessary.

3. Constitutional law ⇐77

A ministerial officer may not, under guise of a rule or regulation, vary or enlarge terms of a legislative enactment.

4. Constitutional law ⇐77

Regulation adopted by tax commissioner purporting to except income accrued and liabilities incurred prior to January 1, 1935, in computing net income under Personal Income Tax Act, which was enacted in 1935, even though taxpayer reported on cash receipts and disbursements basis, could not be justified as an administrative interpretation of the act. Gen. Laws 1937, Act 8494, §§ 5(a), 16(a, d, e).

5. Statutes ⇐220

Fact, if established, that Personal Income Tax Act was amended in 1937, 1939, 1941 and 1943, without any indication by Legislature that regulation adopted by tax commissioner was not in accord with legislative will, could not give force of law to the regulation, where regulation was in effect a supplement to the act and the act itself was unambiguous. Gen.Laws 1937, Act 8494.

6. Taxation ⇐363½

Where taxpayer in good faith contested his liability for assessment on bank stock levied against him in 1933, and it was not until during year 1935 that taxpayer's liability was adjusted and paid, taxpayer who kept his books on a cash receipts and disbursements basis was entitled to deduction for amount paid on account of assessment in computing income tax for 1935. Gen.Laws 1937, Act 8494, §§ 5(a), 16(a, d, e).

7. Constitutional law ⇐77

Fact that discriminatory results would have followed if tax commissioner had not adopted rule which purported to except income accrued and liabilities incurred prior to January 1, 1935, in computing net income under Personal Income Tax Act, did not justify commissioner's adoption of the rule, which amounted to legislative action by commissioner. Gen.Laws 1937, Act 8494, §§ 5(a), 16(a, d, e).

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Dean Dillman, executor of the last will and testament of Charles Francis Dillman, deceased, against Charles J. McColgan, Bank and Corporation Franchise

Tax Commissioner of the State of California, and others, to recover income tax deficiency assessment levied against plaintiff's deceased for the year 1935 and paid under protest. From a judgment for plaintiff, the named defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondent.

ADAMS, Presiding Justice.

Plaintiff, as executor of the last will and testament of Charles Francis Dillman, deceased, brought this action in September, 1939, to recover from defendants the sum of $1,466.64 which had been paid by decedent as personal income taxes. The case was tried upon a stipulation of facts which recites that Dillman owned 710 shares of the capital stock of the California National Bank of Sacramento, which bank was declared insolvent by the Comptroller of the Currency on January 21, 1933. On April 17, 1933, an assessment of 100% of the par value of the stock of said bank was levied against the stockholders, Dillman's share thereof being $71,000. He denied liability and suit was filed against him. On August 3, 1935, the action was settled, and Dillman paid the assessment in full, with accrued interest.

Dillman at all times kept his books on a cash receipts and disbursements basis, and in his income tax return for the year 1935 claimed deduction of the amount paid on account of said assessment. The Bank and Corporation Franchise Tax Commissioner disallowed the deduction, and levied a deficiency assessment against Dillman. Dillman died, and plaintiff, as executor, paid the deficiency assessment under protest and thereafter filed a claim for refund, which was denied by the commissioner on the ground that the loss sustained "was not deductible in the year in which paid for the reason that liability therefor was incurred prior to the taxable year of 1935, although not actually paid until that year."

It was further stipulated "that in every particular, except as regards the deduction claimed," the income tax return of Dillman for the calendar year 1935 "was duly made and was correct, and is not and has not been disputed"; and that the only issue arising out of said tax return, and the only issue involved in the action, is the propriety of the deduction claimed as aforesaid; also that the purchase and ownership of the stock by Dillman was a transaction entered into by him for profit.

The case was tried by the court without a jury, findings were waived and judgment was rendered in favor of plaintiff. The Franchise Tax Commissioner has appealed.

Section 5(a) of the Personal Income Tax Act of 1935, as enacted June 13, 1935 (Stats.1935, p. 1090; Deering, Act No. 8494), imposed a tax upon "net income."

Section 16(a) provided: "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) *in accordance with the method of accounting regularly employed in keeping the books of such taxpayer;* but if no such *method of accounting* has been so employed, or if the *method employed* does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income." (Italics ours.)

Section 16(d) provided: "The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted under subsection (a) of this section, any such amounts are to be properly accounted for as of a different period."

Section 16(e) provided: "The deductions and credits provided for in this act shall be taken for the taxable year in which 'paid or accrued' or paid or incurred, *dependent upon the method of accounting* upon the basis of which the net income is computed, unless in order clearly to reflect the income the deductions or credits should be taken as of a different period." (Italics ours.)

In his brief herein appellant says that "while ordinarily a taxpayer on the cash basis should report income received during the taxable year and take deductions for payments made during the taxable year, this is not true as to income earned prior to the applicable date of the Personal Income Tax Act (January 1, 1935) or as to obligations incurred prior to the applicable date of the Act." In support of this contention appellant refers to a purported regulation (which does not appear in the record) which, it is stated in the brief, was

made by the commissioner on February 26, 1936, designated Art. 36–1, reading as follows: "Ordinarily, a taxpayer reporting on the cash receipts and disbursements basis must report all income received during his taxable year even though accrued in a prior year and may deduct all amounts paid during such year, even though incurred in a prior year. However, income accrued prior to January 1, 1935 is not taxable and need not be reported, even though the income is received on or after that date and even though the taxpayer reports on the cash receipts and disbursements basis. Thus, salaries and other compensation for personal services earned in 1934 or prior years, for example, is not taxable even though received in 1935 or subsequently. Furthermore, obligations incurred prior to January 1, 1935 may not be deducted, even though paid on or after that date by a taxpayer reporting on the cash receipts and disbursements basis. Thus, delinquent taxes for years prior to 1935, rentals, salaries or other business expenses incurred in 1934 or prior years are not deductible, even though paid in 1935 or subsequently."

It is then argued that the foregoing is an "interpretation" of the Personal Income Tax Act made by the commissioner, that it has been followed by him for more than seven years, and that under the rule that administrative construction of a statute long and consistently adhered to should be given great weight by the courts in construing the language of such statute, it should be followed by this court.

Preliminarily, we note that the stipulation of facts upon which this case was presented contains no reference to the foregoing Art. 36–1, nor does it appear from the record that, if such a regulation was issued by the commissioner, it has been consistently adhered to.

[1] But assuming its existence and that it has been followed by the commissioner, it is by no means conclusive upon the courts. It was said in the recent case of Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935, that while the interpretation of a statute by an administrative agency will be accorded great respect by the courts and will be followed if not clearly erroneous, it will be overthrown by the courts, if erroneous, where such a question of law is properly presented.

[2] The first point to be determined is whether the statute which the commissioner purports to have interpreted by Art. 36–1, supra, required interpretation; for in order to justify construction by either an administrative agency or a court, it must first appear that construction is necessary. In United States v. Missouri Pac. R. Co., 278 U.S. 269, 277, 278, 49 S.Ct. 133, 136, 73 L. Ed. 322, 376, the court said: "It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience or hardships, if any, that result from following the statute as written, must be relieved by legislation. * * * Construction may not be substituted for legislation." Also see note, 73 L.Ed. pp. 322–375. The same principle is enunciated in California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 294, 140 P.2d 657, 661, 147 A.L.R. 1028, where it is said: "But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. Los Angeles County v. Superior Court, supra [17 Cal.2d 707, 112 P.2d 10]; 23 Cal.Jur. 776." Also see Hodge v. McCall, 185 Cal. 330, 334, 197 P. 86; Commissioner of Internal Revenue v. Van Vorst, 9 Cir., 59 F.2d 677, 679; Morrill v. Jones, 106 U.S. 466, 467, 1 S.Ct. 423, 27 L.Ed. 267.

[3] It is equally well established that a ministerial officer may not, under the guise of a rule or regulation, vary or enlarge the terms or conditions of a legislative enactment. Boone v. Kingsbury, 206 Cal. 148, 161–163, 273 P. 797; Bank of Italy v. Johnson, 200 Cal. 1, 21, 251 P. 784; Montgomery v. Board of Administration, etc., 34 Cal.App.2d 514, 521, 522, 93 P.2d 1046, 94 P.2d 610; 25 R.C.L. 1043, § 273; and cases cited in 73 L.Ed. 349–350.

[4] We find nothing in the applicable portions of the statute before us that calls for the construction placed upon it by Art. 36–1. Section 16, supra, states definitely that net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed by him in keeping his books; that the amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, and that the deductions and credits provided for shall be taken for the year in which "paid or accrued," or paid or incurred, dependent upon the method of accounting upon the

basis of which net income is computed. This is admitted by the rule itself which recites that "ordinarily" a taxpayer reporting on the cash receipts and disbursements basis must report all income received during his taxable year even though accrued in a prior year, and may deduct all amounts paid during such year, even though incurred in a prior year. Our attention is not directed to any language in the statute that authorized the commissioner to make the exception set forth in Art. 36–1, that income accrued prior to January 1, 1935, was not taxable and need not be reported though received after that date and even though the taxpayer reported on the cash receipts and disbursements basis, and that such taxpayer could not deduct amounts paid after January 1, 1935, for obligations previously incurred. As a rule of convenience this provision may have had its advantages in the administration of the act; but it is plain that in promulgating it the commissioner was not construing any language of the statute, for it makes no distinction between the years prior to and those subsequent to its enactment, but was supplementing it. And if the commissioner could modify the provisions of the act as to income accrued or liability incurred prior to 1935, he could as well be said to have been given authority to so provide for subsequent years, and thus to nullify the provision of the act that a taxpayer who keeps his books on a cash basis must report as income for a given year all cash income received during said year, and credit himself with disbursements for the year when disbursed.

[5] Appellant presents the further argument that the Personal Income Tax Act was amended in 1937, 1939, 1941 and 1943, "without any indication on the part of the Legislature that the administrative practice of the commissioner was not in accord with the legislative will." But such fact, if it be a fact, cannot give the force of law to a rule which is in effect a supplement to a statute, and where the act itself is unambiguous. Iselin v. United States, 270 U.S. 245, 46 S.Ct. 248, 70 L.Ed. 566. It was said in United States v. Missouri Pac. R. Co., supra, that the rule that re-enactment of a statute after it has been construed by officers charged with its enforcement impliedly adopts the construction, applies only when the construction is not plainly erroneous, and to cases presenting the precise conditions passed on prior to the re-enactment.

Finally, in order to defeat plaintiff's recovery, appellant falls back upon the provision in the act that if the method of accounting regularly employed by the taxpayer does not clearly reflect the income, computation thereof shall be made in accordance with such method as in the opinion of the commissioner does clearly reflect the income; and he argues that to require the inclusion of items of income earned prior to the applicable date of the act or to permit the deduction of obligations incurred prior to such date would not result in a clear reflection of income. But according to the stipulation of facts in this case the only ground upon which the deduction was disallowed in this case was that the liability was incurred prior to 1935 though not actually paid until that year. There is no showing that "the method employed" by Dillman did not "clearly reflect the income," or how or why his income would be more clearly reflected by disallowing the deduction; and it must be conceded that he followed the provision of the statute which declared that deductions and credits should be taken for the taxable year in which paid when such taxpayer regularly kept his books upon a cash receipts and disbursements basis, which, it is agreed, Dillman did.

In Insurance Finance Corp. v. Commissioner of Internal Revenue, 84 F.2d 382, in affirming a decision of the Board of Tax Appeals, the court said: "The two most common accounting methods for tax purposes are the accrual method and the cash receipts and disbursements method, sometimes designated the cash receipts method. Under the former method, entries are made of credits and debits when the liability arises, whether or not then received or disbursed, whereas, under the latter, credits yet to become due or obligations yet to be paid are ignored." And it is said that in the case before it, where the taxpayer kept his books on the cash receipts and disbursements basis and gross income was reported for the year when actually received, the same method should be followed on the other side of the account, and deductions taken for the year in which they were in fact paid; that the petitioner's income was "most clearly reflected" by restricting the deduction for a judgment rendered and affirmed on appeal in 1932, to the year 1933

in which it was actually paid. Also see Hart v. Commissioner of Internal Revenue, 1 Cir., 54 F.2d 848; United States v. Mitchell, 271 U.S. 9, 46 S.Ct. 418, 70 L.Ed. 799.

Appellant places great reliance upon Reeves v. Turner, 289 Ky. 426, 158 S.W.2d 978; but that case is distinguishable. There appellees in their income tax return for 1936 deducted an amount paid for federal income taxes during 1936 on income earned prior to 1935, and which should have been paid prior to 1936. The item was disallowed. The court said that under section 4182b-3 of the statute of their state, income taxes paid to the United States were allowed as a deduction, but that the statute was not specific as to whether it meant federal taxes paid in the usual course of business, that is, in March following the calendar year for which the federal return was made; but that as the legislature was not specific as to what year's federal income taxes constituted a legal deduction, it was presumed that it did not intend to permit deduction of federal income taxes which should have been, according to the ordinary and usual course of business, paid in a year prior to the date of the state taxing act as was the case there; and that the true income of appellees for the year 1936 was not clearly reflected where such deduction was made. In so deciding it relied upon Bigelow v. Reeves, 285 Ky. 831, 149 S.W.2d 499, which had held that a taxpayer was not entitled to deduct back taxes paid during the year in which it was sought to deduct them, since the taxpayer's prior failure to assess the property was wrongful and constituted a constructive fraud, even if not done corruptly, and that he could not be permitted to take advantage of his own wrong.

[6] In the present case there is nothing uncertain about the loss claimed as a deduction. It was determined and adjusted and paid, all during the year 1935; and for all that appears, Dillman, in contesting the assessment on his bank stock, was acting in good faith and in the belief that he had a legal and justifiable defense to the suit for collection of same. Certainly there is nothing in the Reeves case to support Art. 36–1, supra, as that case was not determined on the ground that the federal tax liability was incurred prior to the effective date of the act, but on the ground that, as the legislature had not been specific as to what year's federal taxes should be allowed as a deduction, its language should be construed as meaning that such federal taxes should be allowed as a deduction only for the year when they were due and should have been paid.

[7] Appellant also argues that, had the commissioner not adopted the rule set forth in Art. 36–1, discriminatory results would have ensued. We find it a little difficult to follow the reasoning from which he draws this conclusion; but regardless of its logic, if it be a fact that discriminatory results would have followed, such fact is insufficient justification for what amounted to legislative action by the commissioner. It was matter to be corrected by the law-making power alone.

The judgment is affirmed.

SCHOTTKY, Justice pro tem., and THOMPSON, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.



YBARRA v. SPANGARD et al.*

Civ. No. 14179.

District Court of Appeal, Second District, Division 3, California.

March 24, 1944.

Hearing Granted May 23, 1944.

1. Physicians and surgeons ⇨18(9)

Evidence warranted nonsuit in favor of each of several physicians and nurses because of failure to show which one was responsible for injuries allegedly caused while patient was under anesthetic.

2. Physicians and surgeons ⇨18(6)

Where patient failed to show which of several physicians and nurses was responsible for injuries allegedly caused while patient was under anesthetic, or that all persons who could have inflicted injury were employees of some one defendant, "res ipsa loquitur" doctrine did not warrant recovery against any defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

* Subsequent opinion 154 P.2d 687.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Joseph Roman Ybarra against Lawrence C. Spangard and others for injuries resulting from allegedly improper treatment by physicians and nurses. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Marion P. Betty and Wycoff Westover, both of Los Angeles, for appellant.

Parker & Stanbury, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

[1] A judgment of nonsuit was entered in favor of each defendant, and rightly, we have concluded. We are inclined to agree with the plaintiff that he proved facts from which it could be said that someone caused an injury to plaintiff, but we agree with each defendant that the evidence was quite insufficient to enable the trial court to point the finger of blame at him.

Plaintiff's case may be fairly sketched in a few words, for other than that touching upon the extent of plaintiff's injury there was little evidence. Suffering from an abdominal ache, the plaintiff consulted the defendant Dr. Tilley, who advised him that he should have his appendix removed, and entered him in the hospital owned and managed by the defendant, Dr. Swift. Here a nurse, unidentified, gave him a hypodermic injection and readied him for the operation. He was wheeled into the operating room by the defendant Gisler, one of Dr. Swift's nurses. Dr. Reser, a defendant and employee of Dr. Swift, helped adjust the plaintiff on the operating table and administered the anesthetic. The defendant Dr. Spangard performed the operation at the request of Dr. Tilley. When the plaintiff awakened some few hours after the operation he was in bed in his hospital room, attended by the special nurse, defendant Thomson, and another nurse, not a defendant. Up to the time that the plaintiff entered the hospital he had suffered no injury to his upper arm. When he regained consciousness after the operation, he had a pain in his shoulder, due to the fact, according to some expert testimony, that a nerve had been injured by the application of some external pressure or strain.

[2] Plaintiff relies upon the doctrine of res ipsa loquitur to make out his case. But if the circumstances do tell their own tale, the most that they relate is that someone did something negligently to the plaintiff. If all those who could have pressed upon him during the period of his unawareness were the employees of any one defendant, that defendant might be held responsible for plaintiff's injuries, but even that was not established. Dr. Swift does not appear in the role of a superior responsible for the acts of Dr. Spangard, nor do Dr. Tilley or Dr. Spangard appear to be responsible for the possible negligence of any of the other actors. Who, if anyone, stood as an employer, responsible for the possible negligence of nurse Thomson, is not made to appear. Granting that something happened to the plaintiff between the sunset and the sunrise of his consciousness, who caused it, is veiled in the darkness of an utter lack of evidence. None of the defendants were called to testify; no one revealed whose hands moved the plaintiff from the operating table to his bed. In the premises, a judgment against any one defendant would have lacked evidentiary support. As to each defendant a nonsuit was required.

The judgment of nonsuit is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.



63 Cal.App.2d 349

O'ROURKE et al. v. TEETERS et al.

Civ. 14328.

District Court of Appeal, Second District, Division 2, California.

March 20, 1944.

1. Counties ⇐21½

A county zoning ordinance restricting certain Negroes' property to residential use was not invalid, although heavy traffic passed by property, there were unzoned areas nearby, other property nearby was not required to conform to such restriction, Negroes could not purchase business property nearby due to private race restriction agreements, and Negroes purchased property for electrical shop before ordinance went into effect.

2. Municipal corporations ⇐601

Heavy vehicular traffic over a street does not destroy restricted residential uses of adjacent property so as to abrogate residential restrictions.

3. Municipal corporations ⇐601

Unzoned or business districts adjacent to property restricted to residential purposes do not destroy character of restricted property for residential uses.

4. Municipal corporations ⇐601

That party makes large investment in city lot, which at time of purchase is free of restrictions, with intent to use it for business purposes, does not invalidate zoning ordinance subsequently adopted restricting use of property to residential purposes.

5. Municipal corporations ⇐601

Private agreements imposing restrictions on ownership or use of property are not to be considered when determining validity of zoning ordinance.

6. Municipal corporations ⇐122(2)

A zoning ordinance will be deemed to be within purview of police power in absence of showing that it is arbitrary or unreasonable.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Suit by Effie L. O'Rourke and others against Roy Teeters and others to enjoin the enforcement of a county zoning ordinance. From a judgment for plaintiffs, defendants appeal.

Reversed.

J. H. O'Connor, Beach Vasey, and Edward H. Gaylord, all of Los Angeles, for appellants.

Walter L. Gordon and Loren Miller, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment enjoining the enforcement of a county zoning ordinance[1] in so far as the ordinance prohibits plaintiffs from using a portion of their residence as a display room and office in which to display sundry electrical fixtures, and in which they keep certain office supplies, defendants appeal.

The essential facts are these:

On June 15, 1939, plaintiffs purchased a parcel of real property known as 9200 Hooper Avenue, County of Los Angeles. They erected a single family residence to which is attached a storeroom approximately fifteen by twenty feet. The reasonable value of the property is $2400. Plaintiffs occupied the residence. Every since the erection thereof they have used the display room and office located on the property for the purpose of displaying sundry electrical fixtures, and also for the purpose of keeping office supplies. Attached to the front of the storeroom is a sign approximately six by twenty-four inches which bears the following words: "O'Rourke, Electric Shop."

It is likewise conceded that:

a) A great deal of traffic passes plaintiffs' property on Hooper Avenue.

b) Hooper Avenue north of plaintiffs' property from 92nd Street to Manchester Street is unzoned. Hooper Avenue merges with Central Avenue at 94th Street which is two blocks south of plaintiffs' property and that south of 94th Street to Century Boulevard, Central Avenue is zoned for commercial purposes.

c) Across the street from plaintiffs' property are vacant lots.

d) [2] On the same side of the street as plaintiffs' property and in the same block are two single family residences in one of which a beauty shop is conducted and in the other a cabinet shop is operated.

e) [2] A planing mill is located on Hooper Avenue approximately 500 feet south of plaintiffs' property, and

f) Plaintiffs are Negroes and are unable, because of race restrictions, to obtain a suitable place for their business in the vicinity of their residence.

This is the sole question necessary for us to determine:

[1] The ordinance referred to in the opinion is Los Angeles County Ordinance No. 3474 (New Series), adopted November 14, 1939, which adds section 19-1/29 to the Los Angeles County zoning ordinance No. 1494 (New Series). The effect of the ordinance is to restrict the properties involved in the present action to single family residences, flats, apartment houses and bungalow courts.

[2] All of these uses were established prior to the effective date of Ordinance No. 3474 (New Series), and therefore legally existing under section 15 of the zoning ordinance.

Since (1) heavy traffic passes in front of plaintiffs' property, (2) there are unzoned areas near such property, (3) in the vicinity of plaintiffs' property other property is being used which does not conform to the restrictions imposed upon plaintiffs' property, (4) plaintiffs being of the Negro race, due to private race restriction agreements, cannot purchase business property near their residence, and (5) plaintiffs purchased the property at 9200 Hooper Avenue before the zoning ordinance went into effect planning to use it for an electrical shop, was the ordinance subsequently adopted restricting the use of the property to residential purposes invalid as to plaintiffs?

[1] This question must be answered in the negative and is governed by the following principles of law:

[2] 1) Heavy vehicular traffic over a street does not destroy restricted residential uses of adjacent property so as to abrogate residential restrictions. (Strong v. Hancock, 201 Cal. 530, 548, 258 P. 60; Zahn v. Board of Public Works, 195 Cal. 497, 510, 234 P. 388.)

[3] 2) Unzoned or business districts adjacent to property restricted to residential purposes do not destroy the character of the restricted property for residential uses. (Acker v. Baldwin, 18 Cal.2d 341, 345, 115 P.2d 455; Kort v. City of Los Angeles, 52 Cal.App.2d 804, 810, 127 P.2d 66; Smith v. Collison, 119 Cal.App. 180, 186, 6 P.2d 277.)

[4] 3) The fact that a party makes a large investment in a city lot, which at the time it is purchased is free of restrictions, with intent to use it for business purposes does not invalidate a zoning ordinance subsequently adopted restricting the use of the property to residential purposes. (Marblehead Land Co. v. City of Los Angeles, D. C., 36 F.2d 242, 244; Marblehead Land Co. v. City of Los Angeles, 9 Cir., 47 F.2d 528, 534.)

[5] 4) Private agreements imposing restrictions are not to be considered when determining the validity of a zoning ordinance for the reason that such private agreements are immaterial. (Oklahoma City v. Harris, 191 Okl. 125, 126 P.2d 988, 993.)

[6] Applying the foregoing rules to the facts in the instant case, it is apparent that none of the facts found by the court justified the conclusion that the questioned ordinance was clearly arbitrary or unreasonable and had no substantial relation to the public's health, safety, morals or general welfare. Hence the general rule is applicable that a zoning ordinance will be deemed to be within the purview of the police power in the absence of a showing that it is arbitrary or unreasonable. (Acker v. Baldwin, supra, 18 Cal.2d 344, 115 P.2d 455.)

Any other conclusion would result in a situation where only those who have been so fortunate as to obtain enough worldly goods to enable them to erect their homes in districts beyond the possible approach of commercial enterprises could be protected in their residences from the encroachment of business, commercial, and manufacturing enterprises. It needs no argument to support the thesis that all classes of our citizens, rich and poor, of whatever race or creed, are entitled to the equal protection of our laws and the privilege of living in areas which have been properly zoned for residential purposes pursuant to the recommendation of a duly created planning commission.

If the present judgment were to be sustained, such protection, instead of being extended to the Caucasian and Negro population, rich and poor alike, would be confined and reserved to the few wealthy inhabitants of Los Angeles.

Reynolds v. Barrett, 12 Cal.2d 244, 83 P. 2d 29, relied on by plaintiffs is factually distinguishable from the instant case. In the Reynolds case, a single lot was zoned for residential purposes which was completely surrounded by property used for nonresidential purposes. Clearly such ordinance was arbitrary and discriminatory, and therefore invalid.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.

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